Federal Court  Cour fédérale

Date: 20120926

Docket: IMM-7113-11

Citation: 2012 FC 1130

Ottawa, Ontario, September 26, 2012

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

DOMINGO ANTONIO CABREJA SANCHEZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision of the Immigration and Refugee Board, Refugee Protection Division (the Board), dated September 23, 2011, wherein the applicant was determined to be neither a Convention refugee within the meaning of section 96 of the Act, nor a person in need of protection as defined in subsection 97(1) of the Act. This conclusion was based on the Board's finding that the applicant was excluded from refugee protection pursuant

to section 98 of the Act and Article 1F(b) of the *United Nations Convention Relating to the Status of Refugees* (the Refugee Convention).

[2] The applicant requests that the Board's decision be quashed and the matter be referred back for redetermination by a differently constituted panel with the applicant having the right to make further updated submissions.

Background

[3] The applicant, Domingo Antonio Cabreja Sanchez, is a citizen of the Dominican Republic.

[4] In April 1992, the applicant moved to the United States where he met Anna Reyes. The couple moved in together in 1997 and have two sons and one daughter together. The applicant also has two daughters from a previous relationship and one son from a later relationship.

[5] In 1998, the applicant was convicted of assault with a weapon. He pled guilty to the charge of assault with intent to cause physical harm and received three years probation. In 2004, the applicant was convicted of possession with intent to traffic and received five years probation. As a result of this sentence, the applicant was ordered deported to the Dominican Republic in May 2008.

[6] After his return to the Dominican Republic, the applicant entered into a relationship with a woman who, unbeknownst to him, was the mistress of an army general in his home town. On March

15, 2009, the general walked in on the applicant and the mistress in her bed. The applicant escaped out the window and went into hiding at a friend's house.

[7] The day after the incident, three masked men visited the applicant's father's house searching for the applicant. After the men left, the applicant's father called him and warned him not to come home. The same day, the applicant's home was broken into and damaged. Neighbours later told the applicant's father that a car drove by slowly and looked into the house three or four times a day. The applicant was therefore unable to go home to get his passport.

[8] On March 18, 2009, with the help of a friend, the applicant boarded a flight to Toronto using his Dominican ID card. When he arrived in Canada without a passport, the applicant was detained and interrogated. The applicant was then sent to the Metro West Detention Center.

[9] On March 24, 2009, the applicant was given a detention review. His detention was ordered continued to ensure that he would appear at an admissibility hearing. The applicant's ex-wife helped him find a lawyer. His lawyer visited him on March 25, 2009.

[10] On April 13, 2009, the applicant was issued an exclusion order. On April 27, 2009, the applicant was issued a direction to report for removal on May 2, 2009. On April 28, 2009, the applicant filed an application for leave and judicial review of the Minister's delegate's decision to issue an exclusion order.

[11] On April 29, 2009, the applicant filed a pre-removal risk assessment (PRRA) application. On April 30, 2009, the applicant filed a motion to stay his removal. On May 1, 2009, I issued an order staying the applicant's removal.

[12] On June 29, 2009, the applicant was informed that the respondent would not be opposing leave. The applicant was released from detention on July 2, 2009.

[13] On August 17, 2009, the applicant filed a notice of discontinuance for the leave application, having arrived at an agreement with the respondent. In exchange, the exclusion order was cancelled and the applicant was allowed to make a refugee claim.

[14] The hearing of the applicant's refugee claim was held on July 14, 2011.

Board's Decision

[15] The Board issued its decision on September 23, 2011. It determined that the applicant was neither a Convention refugee nor a person in need of protection. This determination was based on the Board's finding that the applicant is a person referred to in Article 1F(b) of the Refugee Convention and is therefore excluded from the refugee determination process.

[16] The Board first noted the applicant's prior convictions in the United States. On the first conviction, the Board found that the applicant's evidence was fraught with inconsistencies and discrepancies. For example, the applicant's testimony was inconsistent on when he threw the plastic

tube at the victim and whether the victim kicked a window or a door. The Board concluded that it was not established on a balance of probabilities that the incident occurred in the way alleged or was precipitated by the victim's conduct.

[17] With regards to the 2004 arrest, the Board noted the applicant's testimony that he had only sold drugs during a temporary period of unemployment to help pay for medication for his sick mother. However, the Board noted that there was no independent corroboration provided by the date of the hearing on the applicant's employment situation or his family's health status at relevant times. The applicant explained that he did not think it was necessary to provide this information. The Board rejected this explanation and found it significantly inadequate in the highly important circumstances of a refugee claim.

[18] Although applicant's counsel applied for leave to submit corroborating documentation within one week, the Board ruled that it was not established that the applicant had adequately explained the reasons for his failure to submit that evidence in a timely manner in advance of the hearing. In coming to this finding, the Board noted that the applicant had been represented at material times by counsel experienced in immigration and refugee claims. In addition, extensive corroboration had been filed in connection with the refugee allegations themselves. The Board found that this indicated that the applicant had turned his mind to the importance of filing documentation in advance. Finally, the Board also noted that there were several discrepancies between the applicant's testimony and the work history section of his Personal Information Form (PIF). The Board observed that it had not been established that the applicant's ability to recall these important timeframes and events was impaired or compromised for any reason.

[19] The Board found that even though the sentences had been served, the applicant was excluded from refugee protection under Article 1F(b) of the Refugee Convention. The Board also found that it was not established that there were sufficient mitigating factors on which to determine the applicant's criminal conduct in the U.S. had not been tantamount to serious non-political crimes in all the circumstances. The Board found that the crimes committed by the applicant are serious crimes under Canadian law and the question of whether he served one or more sentences did not absolve him from the assessment of exclusion from the refugee determination process.

Issues

[20] The applicant submits the following points at issue:

1. Did the Board err in failing to assess the Canadian equivalent of the applicant's U.S. criminal convictions?

2. Did the Board err in failing to assess the *Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404, [2008] FCJ No 1740 factors?

3. Did the Board err in refusing to accept post-hearing disclosures?

[21] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the Board err in not conducting a Canadian equivalency analysis of the applicant's U.S. convictions?

3. Did the Board err in assessing the seriousness of the applicant's convictions under Canadian law?

Applicant's Written Submissions

[22] The applicant submits that the Board erred in: failing to assess the Canadian equivalent of his U.S. criminal convictions; failing to assess relevant factors; and refusing to accept post-hearing disclosures. The applicant submits that all these issues are procedural fairness questions that are reviewable on a correctness standard. The applicant submits that when natural justice or procedural fairness are breached in the process of issuing an exclusion order to a foreign national, the exclusion order is invalid and should be rescinded.

[23] On the first issue, the applicant submits that the Board did not correctly state his convictions. The Minister's disclosures, on which the Board relied on, do not clearly indicate whether the applicant was convicted of assault with a weapon, assault causing bodily harm or assault with reckless physical injury. Thus, the Board's finding that the applicant was convicted of assault with a weapon is inaccurate. To determine whether the applicant's convictions were serious non-political crimes, it was imperative that the Board base its decision on accurate facts. As the Board failed to do so here and also failed to conduct an analysis of the Canadian criminal law equivalencies of his U.S. convictions, the decision is flawed.

[24] The applicant notes that at the hearing, his counsel spent considerable time comparing the U.S. and Canadian convictions. These submissions rendered it doubtful that the U.S. convictions equated to serious non-political crimes in Canada. The applicant also submits that the Board erred by not considering the evidence he submitted to determine if there were serious reasons for his prior convictions.

[25] On the second issue, the applicant submits that the Board failed to conduct a proper analysis in accordance with the guidance provided in *Jayasekara* above. In that case, the Federal Court of Appeal instructed decision makers to consider five factors that could rebut the presumption of a serious non-political crime: evaluation of the elements of the crime; mode of prosecution; penalty prescribed; facts; and mitigating and aggravating circumstances underlying the conviction.

[26] In this case, the applicant submits that the Board did not evaluate the mode of prosecution or the elements of the crime and erred in its assessment of the mitigating factors. With regards to the seriousness of the offence, the applicant submits that he explained the alleged inconsistencies in his story on his first conviction at the hearing when he corrected the interpreter. The Board erred by ignoring the fact that the weapon was a plastic tube and that the applicant received a low sentence and no jail time.

[27] Finally, on the third issue, the Board asked the applicant at the hearing if he had any evidence corroborating the reason he provided for his 2004 drug trafficking conviction. Applicant's counsel requested a week adjournment to obtain such evidence. Although the Board refused, applicant's counsel submitted the documents one week after the hearing.

[28] The applicant submits that the Board's refusal to accept the post-hearing evidence was unreasonable in light of the significant delays already incurred on this file and the length of time that it took the Board to issue its decision (75 days). In addition, the Board failed to consider the probative value of the documents before rejecting them. The applicant submits that the Board erred in so doing.

Respondent's Written Submissions

[29] The respondent submits that the interpretation of section 98 of the Act and Article 1F(b) of the Refugee Convention is an issue of law that is reviewable on a correctness standard. Conversely, the Board's decision that the applicant is a person described under Article 1F(b) involves questions of mixed fact and law that are reviewable on a reasonableness standard.

[30] The respondent submits that it is established jurisprudence that an exclusion hearing under Article 1F(b) has a different burden of proof than the standard of beyond a reasonable doubt in a criminal trial. In an Article 1F(b) hearing, the Board must only be satisfied that there are serious reasons for considering that the person committed a serious non-political crime. This standard is higher than a mere suspicion but lower than a balance of probabilities.

[31] The respondent submits that unlike cases on admissibility under the Act, it is not necessary to conduct an equivalency analysis with respect to exclusion at the RPD. An applicant may attempt to rebut the presumption that a crime is serious by addressing the factors listed by the Federal Court of Appeal in *Jayasekara* above. However, this jurisprudence does not require the Board to re-examine the evidence that was presented to the court of competent jurisdiction to determine whether the conviction was properly rendered.

[32] The respondent submits that the applicant failed to rebut the presumption of the seriousness of his crimes because his story was not credible and he did not provide corroborative evidence.

[33] In summary, the respondent submits that the Board's decision was reasonable. The Board assessed and weighed the applicant's evidence and found it not credible or trustworthy. As such, the Board found that there were serious reasons for considering that the applicant had committed a serious non-political crime.

Analysis and Decision

[34] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[35] It is well established that the appropriate standard of review for issues of procedural fairness is correctness (see *Wang v Canada (Minister of Citizenship and Immigration)*, 2008 FC 798, [2008] FCJ No 995 at paragraph 13; and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at paragraph 43). It is also well established that the interpretation of section 98 of the Act and Article 1F(b) of the Refugee Convention is a question of law, reviewable on a correctness standard (see *Pineda v Canada (Minister of Citizenship and Immigration)*, 2010 FC 454, [2010] FCJ No 538 at paragraph 18). No deference is owed to decision makers on these issues (see *Dunsmuir* above, at paragraph 50).

[36] Conversely, the application of section 98 and Article 1F(b) to the facts of a particular case is a question of mixed fact and law, reviewable on a reasonableness standard (see *Pineda* above, at paragraph 18; and *Jawad v Canada (Minister of Citizenship and Immigration)*, 2012 FC 232, [2012] FCJ No 232 at paragraph 21).

[37] In reviewing the Board's decision on a standard of reasonableness, the Court should not intervene unless the Board came to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47; and *Khosa* above, at paragraph 59). It is not up to a reviewing Court to substitute its own view of a preferable outcome, nor is it the function of the reviewing Court to reweigh the evidence (see *Khosa* above, at paragraphs 59 and 61).

[38] **Issue 2**

Did the Board err in not conducting a Canadian equivalency analysis of the applicant's U.S. convictions?

This issue arises from the wording of Article 1F(b) of the Refugee Convention, which states:

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:	F. Les dispositions de cette Convention ne seront pas 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;

[39] The applicant submits that the Board failed to conduct an analysis of the Canadian criminal law equivalencies of his U.S. convictions in determining whether the crimes he committed were serious as required under Article 1F(b). The applicant submits that this failure is an error of law. In support, the applicant refers to two cases. In *Raina v Canada (Minister of Citizenship and Immigration)*, 2011 FC 19, [2011] FCJ No 247, Madam Justice Elizabeth Heneghan found that "[t]he failure to properly apply the test for determining equivalency of criminal offences for the purpose of Article 1F(b) of the Convention can constitute a reviewable error" (at paragraph 7). At paragraph 8, Madam Justice Heneghan referred to the earlier decision of *Hill v Canada (Minister of Employment and Immigration)* (1987), 73 NR 315, [1987] FCJ No 47 (CA) that sets out the tests for determining the equivalency of offences as follows:

> It seems to me that because of the presence of the words "would constitute an offence ... in Canada", the equivalency can be determined in three ways: - first, by a comparison of the precise wording in each statute both through documents and, if available, through the evidence of an expert or experts in the foreign law and determining therefrom the essential ingredients of the respective offences. Two, by examining the evidence adduced before the adjudicator, both oral and documentary, to ascertain whether or not that evidence was sufficient to establish that the essential ingredients of the offence in Canada had been proven in the foreign proceedings, whether precisely described in the initiating documents or in the statutory provisions in the same words or not. Third, by a combination of one and two.

[40] Thus, contrary to the applicant's submissions, *Raina* above, does not indicate that the failure to conduct the analysis is a reviewable error; rather, it is the incorrect application of that test, if it is applied, that is a reviewable error. It is also notable that in *Canada (Minister of Citizenship and Immigration) v Pulido Diaz*, 2011 FC 738, [2011] FCJ No 926 at paragraph 13, Mr. Justice Michael Phelan observed that in *Hill* above, the Federal Court of Appeal did not deal with Article 1F(b).

This seems to suggest that an equivalency analysis is not required in an Article 1F(b) determination (as will be discussed further below).

[41] The other case relied on by the applicant is *Iliev v Canada (Minister of Citizenship and Immigration)*, 2005 FC 395, [2005] FCJ No 493. Again, contrary to the applicant's submissions, the reviewable error in *Iliev* above, was not a failure to conduct an equivalency analysis. Rather, Madam Justice Heneghan found that "[t]he problem with the Board's conclusion in this regard is that it was made in the absence of any evidence about the equivalency between the Bulgarian criminal law and the criminal law of Canada" (at paragraph 6). Thus, the reviewable error identified in *Iliev* above, was that the decision was rendered without an evidentiary basis.

[42] Turning to the case at bar, the Board clearly stated the basis on which it relied on in finding that the applicant's convictions were serious crimes (at paragraph 18):

> In coming to this conclusion, I have relied heavily on the submissions and reply of counsel for the Minister. In particular, I have been assisted by and agree with her treatment of what constitutes a serious crime in Canada. I find that the crimes committed by the claimant are serious crimes under Canadian law […] [emphasis added]

[43] Thus, although it did not conduct an equivalency analysis itself, the Board relied on the respondent's submissions in finding that the applicant's U.S. convictions were for serious crimes. The submissions of the Minister referred to the applicant's U.S. criminal history as documented in a Criminal Justice Information Services Division print-out. This print-out was included in the Minister's notice of intent to intervene dated May 19, 2011. On the print-out, the applicant's 1998

arrest charge was listed as "PL 120.05 SUB 02", while his 2004 arrest charge was listed as "PL 220.39 SUB 01".

[44] In the submissions of the Minister, it was explained that, if committed in Canada, PL 120.05 SUB 02 of the New York Statutes would equate to section 267 of the *Criminal Code*; namely, assault with a weapon or causing bodily harm. This is an indictable offence in Canada, with offenders liable to imprisonment for a term not exceeding ten years. In addition, if committed in Canada, PL 220.39 SUB 01 of the New York Statutes would equate to section 5(1) of the *Controlled Drugs and Substances Act*; namely, trafficking in a Schedule 1 substance (cocaine). This is an indictable offence in Canada, with offenders liable to imprisonment for life.

[45] The submissions of the Minister also stated that the Federal Court of Appeal has indicated, without explicitly deciding, that a serious non-political crime should be equated with one in which a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada (see *Chan v Canada (Minister of Citizenship and Immigration)*, [2000] 4 FC 390, [2000] FCJ No 1180 (CA) at paragraph 9; and *Xie v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1023, [2003] FCJ No 1372, aff'd 2004 FCA 250, [2004] FCJ No 1142 at paragraph 27).

[46] Similarly, in *Jayasekara* above, the Federal Court of Appeal noted:

> 40 For the purpose of determining whether a person is ineligible to have his or her refugee claim referred to the Refugee Protection Division on the basis of "serious criminality", paragraph 101(2)(b) of the IRPA requires a conviction outside Canada for an offence which, if committed in Canada would be an offence in Canada punishable by a maximum term of at least 10 years. This is a strong indication from Parliament that Canada, as a receiving state, considers crimes for which this kind of penalty is prescribed as serious crimes. In the case of a crime committed outside Canada, paragraph 101(2)(b)

> makes the length of the sentence actually imposed irrelevant. […]
> [emphasis added]

[47] Thus, based on existing jurisprudence, an offence for which a maximum term of ten years imprisonment is imposed under Canadian law, would likely constitute a serious offence under Article 1F(b). Both of the applicant's convictions, if committed in Canada, would appear to meet this standard.

[48] In summary, the Board explicitly stated that it relied on the respondent's submissions, which included the submissions of the Minister, in finding that the applicant's U.S. convictions were serious non-political crimes in Canada. The submissions of the Minister were based on the applicant's U.S. criminal record and descriptions of the applicable New York State statutory provisions compared to Canadian law. This satisfied the first option of the equivalency analysis describe in *Hill* above; albeit that when the test was described in *Hill* above, it did not pertain to an Article 1F(b) determination (although it was referred to in *Raina* above, which did concern Article 1F(b)). Further, the applicant's criminal record and New York State statutory provisions were attached to the Minister's notice of intent to intervene. Thus, unlike *Iliev* above, the Board in this case did have evidence before it when it accepted the equivalency analysis presented in the submissions of the Minister.

[49] Nevertheless, as noted in the submissions of the Minister, no equivalency analysis is required with respect to an exclusion determination under section 98 of the Act. The respondent relies in support on the explicit requirement for an equivalency analysis under section 36 of the Act and the lack of such a requirement under section 98 of the Act. Further support is provided in *Vlad v*

Canada (Minister of Citizenship and Immigration), 2007 FC 172, [2007] FCJ No 241, where Madam Justice Judith Snider noted on this issue:

> 21 […] While the Board discussed the elements of the Canadian offence, it did not carry out an express equivalency analysis of the Romanian law and s. 120(a) of the Criminal Code as the Applicant submits it is required to do so.
>
> 22 This argument misses the purpose of the Board's analysis. There is no need for the foreign law to be absolutely equivalent to the relevant Canadian offence. Foreign legislation is not determinative of whether a serious non-political crime has been committed for Canadian immigration purposes, although it may be helpful in assessing the crime. The focus must be on whether the acts of the claimant could be considered crimes under Canadian law. The words of a relevant foreign law may be helpful but need not be identical. In this case, I am satisfied that the Board carried out the necessary analysis.
>
> 23 The Board did not err in its approach to assessing exclusion. [emphasis added]

[50] Thus, I do not find that the Board erred by not conducting its own exclusionary analysis or by relying on the submissions of the Minister on what the applicant's U.S. convictions would be considered under Canadian law. Notably, these latter submissions were based on uncontested evidence of the applicant's criminal record and New York State statutory provisions.

[51] **Issue 3**

Did the Board err in assessing the seriousness of the applicant's convictions under Canadian law?

In its decision, the Board stated the applicant's convictions as follows (at paragraph 4):

> In 1998, the claimant was convicted in the United States of America (USA) of assault with a weapon and received three years probation. He pleaded guilty to the charge of assault with intent to cause

> physical harm. In the year 2004, again in the USA, he was convicted of possession with intent to traffic and served five years probation. He appears to have negotiated the guilty pleas on both of these offences.

[52] As mentioned above, the Board relied on the Minister's characterization of the applicant's convictions as: PL 120.05 SUB 02 and PL 220.39 SUB 01 of the New York Statutes. These were the assault charges listed on the U.S. Criminal Justice Information Services Division print-out. Conversely, the actual convictions were listed as PL 120.00 NO SUB and PL 220.06 NO SUB. The Board acknowledged the differences between the arrest charges and convictions in part by stating (at paragraph 4): "[The applicant] appears to have negotiated the guilty pleas on both of these offences". This finding reflects the applicant's testimony at the hearing that his U.S. lawyer was able to negotiate lower sentences for both of his offences.

[53] The applicant submits that the Board erred by not considering the actual sentences as opposed to the arrest charges.

[54] Differences between charges and actual sentences have been discussed extensively in the jurisprudence. In *Jayasekara* above, the Federal Court of Appeal noted that:

> 41 I agree with counsel for the respondent that, if under Article 1F(b) of the Convention the length or completion of a sentence imposed is to be considered, it should not be considered in isolation. There are many reasons why a lenient sentence may actually be imposed even for a serious crime. That sentence, however, would not diminish the seriousness of the crime committed.
>
> […]

> 42 […]a look at the lenient sentence in isolation by a reviewing authority would provide a distorted picture of the seriousness of the crime of which the offender was convicted. [emphasis added]

[55] More recently in *Pineda* above, Madam Justice Johanne Gauthier noted:

> 24 Finally, it is worth citing the following passage of Justice Décary's reasons in *Zrig* at paragraph 1295:[...]
>
> 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 in *Pineda*]
>
> 25 This makes good sense given that charges can be dismissed for a variety of reasons including procedural issues, rejection of crucial evidence for technical reasons, or simply because the accused raised a reasonable doubt. The Convention does not adopt the stringent standard applicable in criminal proceedings and the RPD may indeed be satisfied that evidence produced by the Minister, which may not be admissible in a court of law, is sufficient to raise a serious possibility that the applicant has indeed committed a serious crime.

[56] It is also well established that there is a low evidentiary threshold to determine if there are serious reasons for considering that a refugee claimant has committed a serious non-political crime before seeking protection in Canada (see *Pineda* above, at paragraph 27). As Mr. Justice Richard Mosley explained in *Jawad* above, at paragraph 27:

> The test of serious reasons for considering that a refugee claimant has committed a serious non-political offence within the scope of Article 1 F (b) is similar to the evidentiary standard of reasonable grounds to believe. It is more than mere suspicion but less than the civil standard of a balance of probabilities: *Ramirez v Canada (Minister of Employment and Immigration)*, [1992] 2 FC 306 (CA) at

> para 4-6. The test requires compelling and credible information: *Mugeresa v Canada (Minister of Employment and Immigration)*, 2005 SCC 40 at para 114. [emphasis added]

[57] Thus, based on the low standard applicable to exclusion hearings and the deference owed to the Board on this issue, I find that the Board came to a reasonable conclusion on the seriousness of the applicant's U.S. crimes based on the evidence before it.

[58] Once a crime is found to be serious under Article 1F(b), an applicant may seek to rebut that finding by addressing the factors listed by the Federal Court of Appeal in *Jayasekara* above, at paragraph 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. […] [emphasis added]

[59] In this case, the applicant submits that the Board erred in this analysis by not evaluating the mode of prosecution or the elements of the crime and in its assessment of the mitigating factors. The applicant notes that he explained the alleged inconsistencies in his story on his 1998 conviction. The applicant also submits that the Board failed to consider that the weapon he used in his 1998 conviction was a plastic tube and that he received a low sentence and no jail time for that conviction. Conversely, the respondent submits that the applicant failed to rebut the presumption of the seriousness of his crimes because his story was not credible and he did not provide corroborative evidence.

[60] In its analysis, the Board reviewed the applicant's testimony on the two incidents and found inconsistencies in both. This review pertained predominantly to the *Jayasekara* above, factor of mitigating circumstances.

[61] With regards to the 1998 conviction, the applicant explained that the incident was precipitated by the victim's conduct. However, the Board rejected this explanation largely due to minor inconsistencies. The Board noted that at one point the applicant said the victim kicked the door, whereas at another he said she kicked the window. This was an extremely minor inconsistency; especially in light of the majority of the applicant's testimony which referred to a window (the applicant only mentioned a door once). The Board also found that the applicant's testimony was inconsistent on who was leaving when he threw the plastic tube. However, on review of the hearing transcript, this inconsistency also appears minor and it is more likely than not that both the applicant and the victim were leaving his room when he threw the plastic tube.

[62] Although these are minor inconsistencies, it is well established that significant deference is owed to decision makers on questions of credibility. Credibility findings should only be overturned in the clearest of cases (see *Khan v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1330, [2011] FCJ No 1633 at paragraph 30). Thus, although minor, the Board's decision is not unreasonable on this finding alone.

[63] With regards to the 2004 conviction, the applicant explained that as he had lost his job and was the sole provider for his family in the Dominican Republic which included paying medical expenses for his sick mother, he had no choice but to sell the drugs for money. The Board noted that

there was no corroborating evidence of the applicant's temporary loss of employment, his support of his family or his mother's illness. It rejected the applicant's explanation that he did not think that evidence was necessary.

[64] Here, I find that the Board came to a completely reasonable decision. The issue of the applicant's temporary unemployment clearly contradicted the information he included in the work section of his PIF. No period of unemployment at the relevant time was indicated there. In addition, the applicant testified that the David Auto Shop closed down in 2003, which led to his unemployment and subsequent need to sell drugs. However, in his PIF, the applicant stated that he worked at the David Auto Body Shop from 2001 to 2005. This is a clear and important contradiction.

[65] It is also notable that the applicant's hearing originally began on May 31, 2011. However, as the issue of exclusion was not included in the screening form, the hearing was postponed to allow the Minister to make submissions on that issue. Prior to the postponement, applicant's counsel acknowledged that "The claimant is aware of the exclusion issue and he's aware of the implications – or the potential implications on the claimant". Thus, I find that the Board came to a reasonable finding in rejecting the applicant's explanation of lack of knowledge. He clearly recognized the importance of this issue and therefore the importance of filing sufficient evidence on it well before the hearing.

[66] Thus, I find that the Board came to a reasonable finding on the factor of mitigating circumstances in evaluating the seriousness of the applicant's crimes. The lack of credibility also

applies to the Board's finding on the *Jayasekara* above, factors of the elements of the crime and the facts. Finally, with regards to the factors of the mode of prosecution and penalty prescribed, the Board noted the equivalent Canadian offences of the arrest charges had the crimes occurred in Canada. As mentioned above, the Board acknowledged the small sentences, but found these had been reduced due to negotiation on the part of the applicant. This was a finding reasonably open to the Board on the evidence before it. I therefore find that the Board adequately assessed the *Jayasekara* factors and came to a reasonable decision that in this case, these factors did not rebut its finding that the applicant's crimes were serious. For these collective reasons, I would dismiss this application for judicial review.

[67] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

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

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

***Immigration and Refugee Protection Act*, SC 2001, c 27**

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,	(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

***United Nations Convention relating to the Status of Refugees*, July 28, 1951, [1969] Can TS No 6, Article 1**

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:	F. Les dispositions de cette Convention ne seront pas 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;

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Richard Wazana	FOR THE APPLICANT
Khatidja Moloo-Alam	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Wazana Law Toronto, Ontario	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT