Federal Court Cour fédérale

Date: 20160212

Docket: IMM-3085-15

Citation: 2016 FC 190

Ottawa, Ontario, February 12, 2016

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

ABDI ELMY HERSY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada [Board] dated June 22, 2015 [Decision], which vacated the Applicant's convention refugee protection, pursuant to s 109(1) of the Act.

II. BACKGROUND

[2] The Applicant is a citizen of Somalia. Beginning in August 1999, he resided in the United States where he was unsuccessful in an attempt at claiming political asylum. On December 23, 2006, he entered Canada at Windsor, Ontario. On January 5, 2007, he made his refugee claim at the Citizenship and Immigration Canada office in Toronto, Ontario.

[3] On May 6, 2008, the Applicant's refugee claim was accepted by the Board.

[4] On December 11, 2009, the Applicant was interviewed by a Canada Border Services Agency [CBSA] officer with regards to allegations of sexual assault offences committed in the United States in 2006, prior to his arrival in Canada. On October 10, 2012, the Minister of Citizenship and Immigration [Respondent] filed an application to vacate the decision that allowed the Applicant's refugee protection claim. The Respondent claimed that the Applicant had been charged with sexual assault offences, had a warrant issued for his arrest on March 14, 2007, and had misrepresented and withheld this information from the Board during his refugee claim hearing.

[5] The matter was initially heard on April 30, 2013 before the Board and the Respondent was successful in the application to vacate the Applicant's refugee status. However, the Federal Court permitted the judicial review of the decision and the matter was returned to a newly constituted Board panel.

[6] The Respondent alleged that had the Board been aware of the Applicant's charges in the United States, the Applicant would have been excluded from refugee protection pursuant to Article 1F(b) of the *United Nations Convention Relating to the Status of Refugees* [Convention], and that this would have been determinative of the claim.

[7] The Applicant conceded that he had been charged with crimes in the United States that predated his refugee hearing on May 6, 2008, but maintained that he was unaware of the charges at the time of his hearing, and therefore would have been unable to provide such information to the Board.

III. DECISION UNDER REVIEW

[8] As referenced above, this is the second time the Applicant has sought judicial review of a Refugee Protection Division [RPD] decision to vacate his refugee claim. The application was initially allowed by a decision of the Board on May 24, 2013. The Applicant sought judicial review and on December 22, 2014, Justice Gagné ordered that the decision be set aside and the application was remitted back to the Board for re-determination by a different member. The current Decision, is the result of that re-determination.

[9] In its Decision, the Board reviewed three specific issues, ultimately answering all three in the affirmative:

> 1) Did the [Applicant] misrepresent or withhold material facts relating to a relevant matter?
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> 2) Are there serious reasons to consider the [Applicant] committed the alleged crimes in the United States? and

> 3) Are these alleged crimes serious for the purposes of determining whether the [Applicant] should be excluded under Article 1F(b)?

Question 1: Did the Applicant misrepresent or withhold material facts relating to a relevant matter?

[10] The Board noted that in his Personal Information Form [PIF], signed on February 1, 2007, when asked about any past arrests, detainments, charges or convictions in any country, the Applicant failed to disclose any information pertaining to his offences and charges in the United States. While the PIF was signed prior to the charges in the United States being brought against the Applicant, he swore at the hearing of his refugee claim that the information contained in the PIF was true, complete and accurate. Furthermore, prior to this affirmation, he had made other, unrelated amendments to the PIF. The Board found that it was clear that had he been aware of the criminal charges brought against him, he would have had every opportunity to present this information, and would have had a responsibility to do so.

[11] As to whether the Applicant knew he had been charged with an offence and that a warrant had been issued for his arrest prior to May 6, 2008, the Board did not find his testimony – that he was first informed of the existence of the charges and warrant from a CBSA officer during a December 11, 2009 interview – to be credible. Not only did the Applicant have trouble remembering dates and details of a number of key events since his arrival in Canada, but a number of inconsistencies emerged between his testimony and other credible evidence that was before the panel. The CBSA officer who had interviewed the Applicant had indicated that the Applicant stated that he had been contacted by the police five months after arriving in Canada. Further, he had admitted to a conversation with the FBI in 2007 in which he was informed that

he was a fugitive. The Applicant was unable to explain to the satisfaction of the Board the inconsistencies between his testimony at the hearing and that which he provided in the CBSA interview. His attempts to do so only led to further problematic contradictions and denials. The Board found that the officer's testimony, on the other hand, was delivered in a straightforward manner and without exaggeration; there was no reason to question his character, integrity or professionalism and the Board was satisfied that the Applicant made the statements that the officer had solemnly declared he had made.

[12] The Applicant's registration to practice as a respiratory care practitioner was revoked by the Minnesota Board of Medical Practice on March 12, 2009. The Board's negative assessment of the credibility of the Applicant on the issue of when he became aware of the charges against him was compounded by the Applicant's inability to explain why, despite his failure to contest allegations made against him in Minnesota that effectively disqualified him from practicing respiratory care in Alberta, he nonetheless applied to practice in Alberta.

[13] The Board found on a balance of probabilities that the Applicant was aware that he had been charged with crimes in the United States prior to his refugee hearing. Therefore, he knowingly withheld or misrepresented information to the original panel of the Board that granted him refugee status. This was a misrepresentation or withholding of clearly material and relevant facts that relate to the issue of his exclusion from refugee status.

Question 2: Are there serious reasons to consider the Applicant committed the alleged crimes in the United States?

[14] The Board concluded it could reasonably rely on the complaint and warrant for the Applicant's arrest in Minnesota when making a determination of possible Article 1F(b) exclusion: *Gamboa Micolta v Canada (Citizenship and Immigration),* 2013 FC 367 at para 49 [*Micolta*]. In assessing "serious reasons to consider," the Board placed significant weight on the documents and details from the United States provided by the Respondent, which described the charges against the Applicant. He was accused by the State of Minnesota of committing two counts of criminal sexual conduct in the fourth degree, two counts in the fifth degree and two counts of criminal abuse. These arose from two incidents, both of which consisted of the Applicant fondling the breasts and pubic area of female patients under the guise of medical treatment while working as a medical care provider. The first instance described in the complaint occurred on July 13, 2006 and the second between November 21, 2006 and November 25, 2006.

[15] The Board did not find the Applicant's denial of committing the crimes convincing. His credibility was further negatively affected by his baseless accusation that the complainants had contrived the allegations against him. In addition, the Board noted a lack of corroborative evidence that would allow it to assign greater weight to his denials.

[16] The Applicant was criminally charged in a jurisdiction that respects the rule of law and had been stripped of his medical license because of these charges. The Board placed significant weight on the similarity in details between the July 2006 and November 2006 incidents, despite there being no connection between the complaints. The Board ultimately found that serious

reasons existed to hold that the Applicant had indeed committed the sexual crimes he was charged with.

Question 3: Are these alleged crimes serious for the purposes of determining whether the Applicant should be excluded under Article 1F(b)?

[17] The Board found that the Applicant's crimes were "serious" for the purposes of determining whether he should be excluded under Article 1F(b). Using the decision of the Federal Court of Appeal in *Jayasekara v Canada (Citizenship and Immigration)*, 2008 FCA 404 [*Jayasekara*] and the factors it identifies as relevant considerations as guidance, the Board found that had the Applicant committed the crimes in Canada for which he was charged in the United States, they would constitute crimes under s 271 of the *Criminal Code*, RSC, 1985, c C-46 [Criminal Code], a hybrid offence, punishable by way of indictment for a term of imprisonment not exceeding ten years, or by way of summary conviction for a term of imprisonment not exceeding eighteen months. The Board said that the maximum sentence faced by the Applicant upon conviction in the United States is consistent with the maximum noted in s 271, slightly strengthening a relatively weak and rebuttable presumption of seriousness. The Board went on to weigh the mitigating and aggravating factors of the case, finding that the Applicant had failed to rebut even the low threshold applicable in this case.

[18] The Board found that the Applicant did not attempt to address the charges in question when he first learned of them, only dealing with them once he learned that they would have negative consequences on his ability to obtain permanent residence in Canada. The Applicant left the United States two weeks after being fired from his employment due to the circumstances that

led to the charges being brought against him. The timing of this departure, when considered in conjunction with the Applicant's lack of evidence corroborating his purported rationale for leaving the United States (to avoid potential arrest for immigration reasons), led the Board to find it more likely that he left the country because of the criminal charges he was facing.

[19] Furthermore, the Board found that any reluctance on the part of American authorities to refuse the Applicant entry to the United States, or to seek the Applicant's extradition, did not support that his crimes should not be considered serious.

[20] That the Applicant's crimes did not involve any weapons or threats does not provide a mitigating effect. The crimes may have been less serious than other crimes, but this does not, in and of itself, mean that the crimes were not serious. Conversely, aggravating factors were noted in the vulnerability of the victims involved, the Applicant's position of authority and the evidence showing that he may have fled to escape charges. These matters suggest that the Applicant's crimes would be punished at the higher end of s 271's scale. Furthermore, the fact that the Applicant attempted to put himself into the same environment in Canada was also considered to be an aggravating factor.

[21] The Board considered the opinion letter by the law firm of Wolch DeWit Watts & Wilson [Opinion Letter] regarding the seriousness of the Applicant's crimes, noting that it failed to outline the facts upon which the opinion was based and applied case law with facts different from those of the matter of hand.

[22] The Board concluded that the Applicant withheld the fact that he had been charged in Minnesota of criminal sexual conduct from the original panel that conferred on him refugee protection. Had the Applicant been forthcoming with the original panel of the Board, it would have considered him excluded from refugee protection under Article 1F(b) and this would have been determinative of the claim.

IV. ISSUES

[23] The Applicant raises the following issues in this judicial review:

1. Did the Board make a reviewable error in finding that there are serious reasons to consider the Applicant committed the alleged crimes in question?
2. Did the Board further commit a reviewable error by shifting the onus from the Respondent to the Applicant?
3. Can a finding of exclusion based on Article 1F(b) ever be made out assuming, without conceding same, that the offences occurred as alleged and the receiving state would have proceeded summarily had those offences occurred here?

V. STANDARD OF REVIEW

[24] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review

analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[25] The first issue presents a question of mixed fact and law and the reasonableness standard of review is triggered as a result: *Ching v Canada (Citizenship and Immigration)*, 2015 FC 860 at para 31 [*Ching*]; *Jung v Canada (Citizenship and Immigration)*, 2015 FC 464 at para 28.

[26] The second issue regarding onus involves a question of law. However, as this is a question of law clearly within the specialized expertise of the tribunal, the reasonable standard will apply: *Smith v Alliance Pipeline Ltd*, 2011 SCC 7 at para 26; *Cabdi v Canada (Citizenship and Immigration)*, 2015 FC 26 at para 18; *Demiri v Canada (Citizenship and Immigration)*, 2014 FC 1104 at para 12.

[27] As regards the third issue, the Applicant is arguing that it was unreasonable in this case for the Board to find that the crimes he committed were serious enough to exclude him under Article 1F(b). Hence, a standard of reasonableness will apply to this issue.

[28] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": see *Dunsmuir*, above, at para 47; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls

outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

VI. STATUTUTORY PROVISIONS

[29] The following provisions of the Act are applicable in this proceeding:

Convention Refugee	**Définition de « réfugie »**
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.
Person in need of protection	**Personne à protéger**
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,	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

their country of former habitual residence, would subject them personally

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.

Vacation of refugee protection

Demande d'annulation

109. (1) The Refugee Protection Division may, on application by the Minister, vacate a decision to allow a claim for refugee protection, if

109. (1) La Section de la protection des réfugiés peut, sur demande du ministre, annuler la décision ayant accueilli la demande d'asile

it finds that the decision was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter.

résultant, directement ou indirectement, de présentations erronées sur un fait important quant à un objet pertinent, ou de réticence sur ce fait.

Rejection of application

(2) The Refugee Protection Division may reject the application if it is satisfied that other sufficient evidence was considered at the time of the first determination to justify refugee protection.

Rejet de la demande

(2) Elle peut rejeter la demande si elle estime qu'il reste suffisamment d'éléments de preuve, parmi ceux pris en compte lors de la décision initiale, pour justifier l'asile

Allowance of application

(3) If the application is allowed, the claim of the person is deemed to be rejected and the decision that led to the conferral of refugee protection is nullified.

Effet de la décision

(3) La décision portant annulation est assimilée au rejet de la demande d'asile, la décision initiale étant dès lors nulle.

[30] The following provisions of the Criminal Code are applicable in this proceeding:

Sexual assault

271. Everyone who commits a sexual assault is guilty of

(a) an indictable offence and is liable to imprisonment for a term of not more than 10 years or, if the complainant is under the age of 16 years, to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year; or

(b) an offence punishable on summary conviction and is

Agression sexuelle

271. Quiconque commet une agression sexuelle est coupable:

(a) soit d'un acte criminel passible d'un emprisonnement maximal de dix ans ou, si le plaignant est âgé de moins de seize ans, d'un emprisonnement maximal de quatorze ans, la peine minimale étant de un an;

(b) soit d'une infraction punissable sur déclaration de

liable to imprisonment for a term of not more than 18 months or, if the complainant is under the age of 16 years, to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of six months.	culpabilité par procédure sommaire et passible d'un emprisonnement maximal de dix-huit mois ou, si le plaignant est âgé de moins de seize ans, d'un emprisonnement maximal de deux ans moins un jour, la peine minimale étant de six mois.

VII. ARGUMENT

A. *Applicant*

[31] The Applicant submits that the Board made numerous reviewable errors in the Decision. The Board found that the Applicant committed the alleged offences on the basis of mere statements, found that the offences would result in a greater sentence than that advised by uncontested expert opinion, shifted onus to the Applicant; and did not consider that the prosecuting authorities both chose to deport the Applicant and failed to extradite him, undermining the finding that the alleged offence is a "serious" one.

[32] The Applicant says that the Board can only be said, at most, to suspect that the Applicant has committed a serious crime outside of Canada. This does not meet the required standard that is greater than mere suspicion, but not as high as proof on a balance of probabilities: *Ching*, above, at para 34.

[33] The Board appears to have made its decision that the Applicant is factually guilty of serious non-political crimes on the issuance of felony warrant/criminal complaints from the State

of Minnesota which are based on hearsay in the form of the unsworn statements of unidentified individuals made to an investigator, who then advised the complainant officer who signed the complaint. "Serious reasons" cannot come solely from the findings of another court or investigating authority without the Board having a clear understanding of what the evidence against the Applicant was. Unlike the circumstances in *Micolta*, above, the Board did not have the benefit of an indictment or access to any objective, credible evidence that underpinned the warrant. The Applicant says that the credibility, or apparent lack thereof, of the Applicant cannot corroborate deficient evidence.

[34] The Applicant submits that the Respondent's reliance on hearsay undermines the determination that there are reasonable grounds to consider that a serious crime occurred. There is no objective evidence to corroborate the complaints of sexual assault; there is no testimony from the complaint investigator, no victim statements or hospital reports and no third party witnesses to the alleged acts of fondling.

[35] It would stand to reason that the United States authorities would prosecute someone in their custody if there was a reasonable prospect of a crime having been committed. However, this did not occur. Nonetheless, the Board transferred its decision-making power to a foreign authority, blankly accepting its assertions.

[36] The Applicant submits that, in the alternative, should the Court find that the Board conducted an examination of the evidence in line with the guidance in *Ching*, above, the allegations against him do not amount to a serious crime. *Jayasekara*, above, is the leading case

on a determination of serious non-political crime and established the following factors which must be assessed: (a) the elements of the crime; (b) the mode of prosecution; (c) the penalty prescribed; and (d) the facts and the mitigating and aggravating circumstances underlying the conviction.

[37] The Applicant alleges that the Board failed to consider the decision of the United States to not prosecute him as a foreign national when he returned and voluntarily surrendered himself to the authorities. This is in itself a reviewable error. In opting not to prosecute, it would appear that the American authorities either did not consider his offences serious, or did not believe they had sufficient grounds to find him legally guilty. Either scenario would suggest that the offence is not a serious crime.

[38] The Applicant argues that it was an error for the Board to definitively conclude that, in 2008, he would have been excluded from refugee protection when there is no presumption of the seriousness of the alleged offence in this case. While the alleged offence may be reprehensible, given the expert opinion and range of sentence before the Board, it was not of the nature required to elevate it to the level of "non-political serious crime" under Article 1F(b).

[39] As made clear by the order of Justice Gagné of December 22, 2014, the Board was required to consider the hybrid nature of sexual assault as an offence, as per s 271 of the Criminal Code, as one of the factors under *Jayasekara*, above. Highlighting the decision of Justice Gleason in *Tabagua v Canada (Citizenship and Immigration)*, 2015 FC 709, the Applicant claims that it is clear now that where a provision has a large sentencing range, such as

sexual assault, and a claimant's crime falls at the less serious end of the range (as established by the criminal law Opinion Letter), the claimant should not be presumptively excluded. The Board finding otherwise is reason enough for the Decision to be quashed and returned for reconsideration.

[40] The Applicant says that while the Board was not required to conduct an equivalency analysis, it was required to consider that, in Canada, the charges against the Applicant could, and likely would (as stated in the Opinion Letter), proceed by way of summary conviction, which may have led the original panel to find that the charges were not indicative of a serious crime.

[41] The Applicant argues that the Board erred by finding that the Applicant failed to provide the evidence that would allow greater weight to be placed on his denials of his alleged crimes, as it is clear that the onus rests on the Minister to establish that serious reasons exist for considering that he indeed committed them: *Ching,* above, at para 44.

[42] In *Canada (Citizenship and Immigration) v Lopez Velasco*, 2011 FC 627 [*Velasco*], Justice Mandamin upheld the decision of the RPD to not vacate Mr. Velasco's refugee protection, finding him not to be excluded under Article 1F(b), despite his conviction in the United States for sexual interference with children. In *Canada (Citizenship and Immigration) v Anmar*, 2011 FC 1094 [*Anmar*], the Court held that the respondent's crime of sexual assault was not serious enough to justify excluding him from protection against persecution and torture. The Applicant submits that the Board had a duty to consider the case law, including the results in

Anmar and *Velasco,* particularly given that these cases dealt with sexual offences more egregious than his own.

B. *Respondent*

[43] The Respondent notes that the Applicant's submissions do not challenge the finding of the Board that he knowingly misrepresented or withheld relevant facts at his refugee hearing relating to the charges and warrant that were issued for his arrest in the United States.

[44] Article 1F(b)'s "serious reasons for considering" has been defined in *Lai v Canada (Citizenship and Immigration)*, 2005 FCA 125 at paras 25 and 70 [*Lai*]. As submitted by the Applicant, the standard is less than a balance of probabilities, but more than a mere suspicion, based on credible evidence. The evidence considered may be hearsay or otherwise not admissible in court proceedings, and the tribunal need not consider the inclusion of aspects of a case once an exclusionary finding has been made.

[45] The Federal Court has held that in cases that involve the equivalent inadmissibility threshold, found in s 33 of the Act, a warrant or indictment issued in a democratic country may be relied on by the tribunal in determining if reasonable grounds exist to believe that a person has committed a serious crime outside of Canada: *Thanaratnam v Canada (Citizenship and Immigration)*, 2004 FC 349 at para 15 [*Thanaratnam*]. The Respondent submits that the Board's finding that "there are serious reasons to consider the [Applicant] committed the sexual assault crimes he has been charged with" was more than a mere suspicion.

[46] The arrest warrant was not the only evidence or finding of fact relied on by the Board in the Decision. The Board's conclusions were based on the following factual findings that the Applicant has ignored in his submissions: an investigation was conducted by a competent police department; the two complainants had very similar accounts of the alleged crimes; a public attorney was involved and had to sign off on the charges being laid; the warrant was issued by a judge in a democratic country with a justice system that closely parallels that of Canada; the Applicant fled the United States while the investigation into the alleged crimes was about to culminate in his arrest; the state authorities had investigated the alleged crimes and a determination had been made by a judicial authority that there was sufficient evidence that the Applicant committed the crimes and to seek his arrest; the Applicant referred to himself as a "fugitive;" the Applicant's motion to have the charges dismissed was not granted; a contemporaneous investigation was launched in Minnesota that ultimately led to the Applicant losing his licence to practice and terminated his employment, which corroborates the criminal charges; and the Board did not find the Applicant credible.

[47] The Respondent claims that the information submitted by the Applicant with respect to indictments is unsupported. An indictment is not a pre-requisite for a finding of serious reasons for considering that the Applicant committed the crimes he is charged with: *Thanaratnam*, above.

[48] As regards the Applicant's submission that the evidence cannot be relied on as it is based on unsworn statements made to the police, the Respondent notes that bringing the matter to trial and acquiring sworn statements from the complainants were delayed by the Applicant fleeing the

jurisdiction where charges were about to be laid. Therefore, to allow the Applicant to benefit from these actions would be a miscarriage of justice. In addition, the allegation of hearsay represents a misunderstanding of the criminal justice system, as the complaint or information is not always laid by the investigating officer.

[49] The Respondent says that the Board relied on the proper standard and test in its Article 1F(b) analysis as per *Lai*, above: the standard of “serious reasons to consider.” The Board examined everything before it and made a fact-based determination.

[50] The Board weighed all of the critical mitigating factors outlined in *Jayasekara*, above, against the relevant circumstances. The Respondent also notes that the procedure used to prosecute the crime included a series of steps, as well as an analysis of the warrant issued for the Applicant’s arrest and the denial of the motion to dismiss the charges.

[51] The facts that no trial ever occurred and that the Applicant was deported do not suggest that the offence is not considered serious in the United States. To conclude otherwise is speculative. Furthermore, it is an error of fact to state that the American authorities chose not to prosecute the Applicant as the matter is ongoing and the Applicant was released on bail.

[52] The three-page Opinion Letter was addressed in full by the Board. The letter was clearly a biased letter and should not be ascribed any expertise; the Board properly placed little weight on it. In addition, an equivalency test was not required. The Board found that the Applicant had been charged for criminal sexual conduct which corresponded to s 271 of the Criminal Code

which carries a maximum sentence of ten years imprisonment. The presumption that this was a serious crime satisfied the analysis required under *Henandez Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68 [*Febles*]. No mitigating factors were ignored by the Board, which specifically addressed all of the evidence, including the Opinion Letter and case law provided by the Applicant.

[53] The Applicant in *Velasco*, above, had been convicted of a misdemeanour. While the Applicant argues that the facts in *Velasco* were more egregious and the Board should have distinguished the case from the present circumstances, the evidence before the Board was that the Applicant was facing a felony complaint and no evidence had been submitted to indicate otherwise.

[54] The credibility finding and the weight given to the Applicant's evidence by the Board do not amount to a shifting of onus. Unlike *Ching*, above, the Respondent says that there is a plethora of evidence upon which to find that the crimes that were committed were serious.

[55] The Respondent submits that the Decision falls within a range of acceptable, possible outcomes that are defensible on the facts and the law and should therefore not be disturbed.

VIII. ANALYSIS

[56] The Applicant does not challenge the Board's finding that, on a balance of probabilities, the Applicant was aware he had been charged with crimes in the United States prior to his refugee hearing of May 2, 2008. This finding was supported by credibility concerns that were

also referred to by the Board when it considered whether there were serious reasons to consider that the Applicant had committed the alleged crimes in the United States, and that the crimes were "serious" for the purposes of determining whether the Applicant should be excluded under Article 1F(b).

[57] The Applicant does challenge the Board's finding that there were serious reasons to consider that he had committed the crimes in the United States. In my view, it is possible to disagree with this finding but it is not possible to say that it was unreasonable. There were many factors that the Board relied upon here in addition to the complaints, the investigation and the warrant. There was Officer Cobb's testimony and the actions of the Minnesota Medical Board. Both the prosecutor and the judge signed off on the warrant. The Applicant was arrested when he returned to the United States, and he himself brought a motion to have the charges dismissed, which was refused. Cumulatively, there were sufficient facts to support the Board's decision on this issue. However, I don't think I need to deal with this issue in any detail because I accept the Applicant's alternative ground that the Board committed a reviewable error when it found the crimes were "serious" for the purposes of Article 1F(b).

[58] The Board acknowledges and refers to the guidance on this issue provided by the Federal Court of Appeal in *Jayasekara*, above, and by the Supreme Court of Canada in *Febles*, above. However, the evidentiary basis for finding the crimes "serious" is somewhat circumstantial and speculative, and the Board further rejects expert opinion on point for no acceptable reason, effectively appointing itself as an expert on this issue.

[59] The telling points in the Board's analysis are as follows:

> [51] The panel notes no evidence has been entered that would indicate the complainants to the [Applicant's] crimes were physically injured in any way. No weapons were used during the commission of these crimes, and no threats were made against the complainants. However, the mitigating effect of these circumstances is reduced in the view of the panel, due to the fact that crimes involving these circumstances are treated even more severely in sections 272 (Sexual Assault with a Weapon, maximum penalty of 14 years imprisonment) and 273 (Aggravated Sexual Assault, maximum of life imprisonment) of the Criminal Code than section 271. The fact that the [Applicant's] crimes were less serious than other crimes does not, in and of itself, mean the [Applicant's] crimes were not serious. Section 271 provides an indication, if not a presumption, that the [Applicant's] crimes were serious.
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> [52] The physical acts perpetrated by the [Applicant] involved touching women's breasts and genitalia / pubic area without their consent. There is no evidence to suggest any penetration occurred, and when viewed purely on the basis of the actual physical acts involved, it is reasonable to infer that in many scenarios these crimes would be punished on the lower, as opposed to the higher, end of the scale provided for in section 271. However, when the panel considers the aggravating factors of the vulnerability of the victims, the position of authority held by the [Applicant], and the evidence showing the claimant may have fled to the United States to escape charges, the panel concludes the [Applicant's] crimes would be punished at the higher end of this scale.
>
> [53] The [Applicant] testified the complainant of the July 2006 incident had recently had surgery and was under the effects of narcotics that may have caused hallucinatory effects and feelings of intimacy. He testified the November 2006 complainant was low-income, homeless, and a drug addict. As reported in the complaint, the [Applicant] also told Officer Zerwas the November 2006 complainant was a drug addict. While noting the credibility issues with the [Applicant's] testimony overall, and the fact the [Applicant] provided this information about the complainants as his explanation as to why they may have made false allegations against him, the panel accepts the [Applicant's]description of the complainants as accurate, as it is plausible to the panel that the [Applicant]would have selected victims less likely to complain about his actions, or who would not be believed if they did complain, and the [Applicant's]description of the November 2006 victim has been repeated consistently. The panel finds the victims

of the [Applicant's] crimes were particularly vulnerable, in that they had a diminished capacity to resist the [Applicant's] advances, and to seek protection from the [Applicant's] actions towards them. This was a significant aggravating factor in the panel's view.

[54] The panel's [*sic*] position of authority and trust over the complainants was also a significant aggravating factor, particularly when assessed in conjunction with the complainant's vulnerability. When considering the situation of the November 2006 complainant, this is a homeless woman with drug addiction issues. She attended a medical clinic in the hopes of receiving medical care. She was lying prone in a bed wearing only a hospital gown. The [Applicant], under the pretense of giving her the medical treatment she was seeking, instead proceeds to sexually molest her. In the view of the panel, the implications of the [Applicant's]actions are potentially severe for the victim, in that the resulting loss of trust in the medical profession could inhibit the ability of an already vulnerable person from obtaining necessary medical care in the future. While no evidence has been presented to establish that any of the victims of the [Applicant's] crimes suffered any serious physical injury, the panel views the potential for psychological injury and a reluctance to avail oneself of medical care due to a fear of molestation apparent from these crimes as an aggravating factor.

[55] The UNHCR background note, as referred to in the *Jayasekara* decision, indicates that "evidence of serious habitual criminal conduct" is a factor when determining the seriousness of crimes. The [Applicant]began his employment at Woodwinds Hospital in February 2006. As per the Minnesota Board decision, the first incident involving the [Applicant]occurred in June 2006, only four months after commencing employment there. The second incident, for which the [Applicant]was charged, occurred the following month in July, and the third incident, for which he has also been charged, occurred four months later, in November of that year. The [Applicant]was fired from Woodwinds Hospital shortly after the November incident, and was in Canada two weeks later. The panel finds this frequency of events within this short period of time to be habitual. The panel further notes that approximately five or six months after his arrival in Canada, the [Applicant] received his license to perform the same type of medical work in Canada that he was performing in the United States; however, this license was revoked after it was discovered that he had his license revoked in Minnesota. The fact the [Applicant] attempted to put himself into the same environment in Canada in which his habitual conduct occurred previously was also considered by the panel to be an aggravating factor in this case.

> [56] The panel has reviewed the opinion letter provided by the law firm of Wolch DeWit Watts & Wilson regarding the seriousness of the [Applicant's] crimes. While noting that "cases with similar facts could currently attract a term of imprisonment between 6 months and 2 years", the opinion letter fails to outline specifically what those facts are that the opinion is based on. For example, the author of the letter, Hersh E. Wolch, may have accepted at face value that the [Applicant] did not flee the jurisdiction where the crimes were committed, whereas the panel has found the [Applicant's] testimony in this regard lacking in credibility. With respect to the criminal cases provided by Mr. Wolch, these cases are distinguished from that of the [Applicant] on their facts. None of these cases involve a medical practitioner sexually assaulting a vulnerable patient under the guise of providing her with medical care.
>
> [footnotes omitted]

[60] It would appear that the Board placed the Applicant's crimes at the higher end of the scale because of:

a) The vulnerability of the victims;

b) The position of authority held by the Applicant; and

c) The Applicant "may have fled to the United States to escape charges [*sic*]."

[61] The Board bases "vulnerability" on the fact that the Applicant chose victims who were less likely to complain or who would not be believed if they did complain. Yet these victims actually did complain and they were believed.

[62] The Board also finds (at para 54) that:

> …the implications of the [Applicant's] actions are potentially severe for the victim, in that the resulting loss of trust in the medical profession could inhibit the ability of an already vulnerable person from obtaining necessary medical care in the future. While no evidence has been presented to establish that any

> of the victims of the [Applicant's] crimes suffered any physical injury, the panel views the potential for psychological injury and a reluctance to avail oneself of medical care due to a fear of molestation apparent from these crimes is an aggravating factor.

[63] There was no evidence before the Board of "potential for psychological injury" or a "reluctance to avail oneself of medical care due to a fear of molestation," so that the Board is here casting itself as an expert on the likelihood of future conduct resulting from the Applicant's crimes. This amounts to little more than speculation.

[64] The Board earlier finds (at para 33) that:

> … the Minnesota Board decision provides insufficient evidence to establish serious reason to consider the [Applicant] committed a crime with respect to the June 2006 incident. However, as will be discussed below, this evidence was considered by the panel in assessing the severity of the [Applicant's] crimes.

[65] The Board never explains what the Minnesota Board decision does prove if it doesn't establish a serious reason to consider that a crime was committed, or why it constitutes evidence of "serious habitual criminal conduct."

[66] Also, the fact that the Applicant applied for a similar position in Canada is not evidence of "serious habitual criminal conduct."

[67] Perhaps of most importance in this context is the Board's rejection of expert, or at least convincing authoritative evidence, on point. The Board entirely rejects Mr. Wolch's view in the Opinion Letter that "cases with similar facts could currently attract a term of imprisonment

between 6 months and 2 years," on the grounds that "the opinion letter fails to outline specifically what those facts are that the opinion is based on" and that

> …the criminal cases provided by Mr. Wolch, these cases are distinguished from that of the [Applicant] on their facts. None of these cases involve a medical practitioner sexually assaulting a vulnerable patient under the guise of providing her with medical care.

[68] The Board clearly states here what the member believes is required to determine whether the crimes committed by the Applicant are serious enough to warrant exclusion under Article 1F(b). The Board rejects the Applicant's attempts to provide evidence on point from Mr. Wolch. But the Board does not refer to any cases it would regard as providing the relevant guidance. The Decision is simply based upon what the Board thinks is serious, not upon reliable evidence as to what Canadian law regards as serious. The Board has placed itself in the position of an expert on criminal law, an expert that does not feel the need to refer to any evidence on the issue of what such crimes would attract as a possible prison term, but who rejects the Applicant's evidence on the grounds that it is distinguishable. This is unreasonable. The Board is not an expert in criminal sentencing and cannot just designate crimes as "serious" under Canadian criminal law on the basis of its own opinion.

[69] The Board was also wrong to reject the evidence that the United States had decided not to prosecute the Applicant, or to seek his extradition, as being merely speculative as to the seriousness of the crimes. Many cases of this Court point out that the actions of the United States authorities (for instance, in issuing warrants and indictments) can be relied on because the United States observes the rule of law. This logic works both ways. A country that observes the rule of law does not fail to prosecute serious crimes when it has the opportunity to so do. This evidence

should have been weighed by the Board when it considered the seriousness of the Applicant's crimes. The fact that it was not is a reviewable error.

[70] It was also unreasonable of the Board to reject *Velasco* and *Ammar*, both above, as not providing any kind of guidance on the issue of "seriousness." The facts in those cases, although not similar to the Applicant's situation, involved extremely aggressive and repugnant conduct by persons in a position of trust, and yet the sentences imposed did not indicate that the crimes were treated as serious. The Board rejects this evidence, even though it refers to no decision that would suggest that the Applicant's crimes would be dealt with as serious crimes.

[71] In the end, instead of looking at similar cases as a guide to how the Applicant would be treated in Canada from the sentencing perspective, the Board simply falls back on its own subjective notion of what is serious in Canada without any objective evidence to support it.

[72] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed. The Decision is quashed and the matter is returned for reconsideration by a different Board Member in accordance with these reasons.
2. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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