Federal Court  Cour fédérale

Date: 20211130

Docket: IMM-1946-20

Citation: 2021 FC 1329

Ottawa, Ontario, November 30, 2021

PRESENT: The Hon. Mr. Justice Henry S. Brown

BETWEEN:

HAI LIN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision by the Refugee Protection Division [RPD] of the Immigration and Refugee Board dated February 24, 2020 [Decision]. The RPD found the Applicant excluded from refugee protection by virtue of Article 1F(b) (serious criminality) of the of United Nations Convention Relating to the Status of Refugees, 1951, CTS

1969/6; 189 UNTS 150 [*Convention*] and section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [*IRPA*].

II. Facts

[2] Background to the exclusion Order: The background to the exclusion order is not relevant to this decision and is therefore set out with minimal detail. The Applicant is a 41-year-old citizen of China who married a former partner when they were underage. His says his former partner became pregnant, she was forced to undergo an abortion, that he was detained for 3 days, beaten while in detention, and had to pay a monetary fine.

[3] He left China for the US in 2002. He claimed asylum, but his claim was dismissed in 2005, as was a subsequent appeal. Notwithstanding, the Applicant continued to live in the US illegally. After the crime at issue took place, he eventually left the US and unlawfully entered Canada and eventually made a refugee claim. The Minister intervened submitting he should be excluded for serious criminality because he caused a fatal collision in the US.

[4] The crime at issue - the fatal collision: In August 2007, the Applicant was the sole cause of a fatal vehicle collision causing the death of a 23-year-old woman, and injuries to 11 others at toll booths in Delaware. He was charged and arraigned in the State of Delaware, failed to show for his hearing, and a warrant was issued for his arrest. The Applicant says he did not know he had been charged. He says he did not know about the hearing at which he failed to show. He speaks little English and relied on translation. He lived in Tennessee and was transiting Delaware on his way to New York State when he was the sole cause of the fatal collision.

[5] Events after the fatal collision: After continuing to live illegally in the US another 9 years or so, in October 2015, the Applicant was introduced to his current partner, a Canadian citizen. They maintained a relationship online. Wanting to be with his current partner, he unlawfully crossed into Canada in July 2016. He remained in Canada but was eventually arrested and detained by Canadian police in 2017. He claimed refugee protection at which time the exclusion issue was raised and determined, leading to this judicial review.

III. Decision under review

[6] The Minister intervened before the RPD asking the Applicant be excluded from refugee protection pursuant to Article 1F(b) (serious non-political crime). In February 2020, the RPD agreed with the Minister and determined the Applicant is a person referred to in Article 1F(b) of the *Convention* by virtue of section 98 of *IRPA*, and is thereby excluded from refugee status. The crime identified by the Minister was a fatal motor vehicle collision in the US caused solely by the Applicant.

[7] The RPD noted the factors for assessing whether the crime committed was serious, as outlined by the Federal Court of Appeal in *Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404 [*Jayasekara*] and as generally approved by the Supreme Court of Canada in *Febles v Canada (Minister of Citizenship and Immigration)*, 2014 SCC 68 [McLachlin CJ] [*Febles*]:

- the nature and elements of the crime
- the mode of prosecution (summary or indictment)
- the penalty prescribed

- the facts surrounding commission of the crime, and
- mitigating and aggravating circumstances underlying the conviction.

[8] The RPD acknowledged and also applied *Febles*, the leading Supreme Court of Canada decision on Article 1F(b), which among other things also states:

> [60] Article 1F(b) excludes anyone who has ever committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee. Its application is not limited to fugitives, and neither is the seriousness of the crime to be balanced against factors extraneous to the crime such as present or future danger to the host society or post-crime rehabilitation or expiation.
>
> [Emphasis added]

[9] The RPD noted per *Febles*, "where a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada, the crime will generally be considered serious."

[10] The Applicant was charged in Delaware with "operation of a vehicle causing death", Title 21, Section 4176A of the Delaware Code of 1974, as amended. I note the crime to be assessed by the RPD for the purposes of exclusion is not that charged outside of Canada per paragraph 101(2)(b) of *IRPA* but the comparable crime in Canada identified by the Minister:

Ineligibility	**Irrecevabilité**
Serious criminality	**Grande criminalité**
101(2) A claim is not ineligible by reason of serious	**101(2)** L'interdiction de territoire pour grande criminalité visée à l'alinéa (1)f) n'emporte irrecevabilité

criminality under paragraph (1)(f) unless	de la demande que si elle a pour objet :
…	…
(b) in the case of inadmissibility by reason of a conviction outside Canada, the conviction is for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.	**b)** une déclaration de culpabilité à l'extérieur du Canada pour une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans

[11] The Minister submitted, and the RPD agreed that the comparable Canadian crime is operation of a conveyance causing death contrary to subsection 320.13(3) of the *Criminal Code,* RSC, 1985, c C-46 [*Criminal Code*]:

Operation causing death	**Conduite causant la mort**
320.13(3) Everyone commits an offence who operates a conveyance in a manner that, having regard to all of the circumstances, is dangerous to the public and, as a result, causes the death of another person.	**320.13(3)** Commet une infraction quiconque conduit un moyen de transport d'une façon dangereuse pour le public, eu égard aux circonstances, et cause ainsi la mort d'une autre personne.
[Emphasis added]	[Je souligne]

[12] In this respect, section 320.21 of the *Criminal Code* provides:

Punishment in case of death	**Peine en cas de mor**
320.21 Everyone who commits an offence under subsection 320.13(3),	**320.21** Quiconque commet une infraction prévue aux paragraphes 320.13(3),

320.14(3), 320.15(3) or 320.16(3) is liable on conviction on indictment to imprisonment for life and to a minimum punishment of,	320.14(3), 320.15(3) ou 320.16(3) est passible, sur déclaration de culpabilité par mise en accusation, de l'emprisonnement à perpétuité, les peines minimales étant les suivantes:
(a) for a first offence, a fine of $1,000;	**a)** pour la première infraction, une amende de mille dollars;
(b) for a second offence, imprisonment for a term of 30 days; and	**b)** pour la deuxième infraction, un emprisonnement de trente jours;
(c) for each subsequent offence, imprisonment for a term of 120 days.	**c)** pour chaque infraction subséquente, un emprisonnement de cent vingt jours.
[Emphasis added]	[Je souligne]

[13] Based upon the evidence and given the maximum sentence in Canada was life imprisonment under section 320.21 of the *Criminal Code*, the RPD found there were serious reasons for considering that the offence committed by the Applicant was a serious non-political crime pursuant to Article 1F(b). Therefore, the RPD found the Applicant excluded from refugee protection.

[14] As such, the RPD did not, and did not need to consider the facts alleged in support of the refugee claim. Neither will the Court in this case.

IV. Issues

[15] The issues are:

1. Is the Decision reasonable?
2. Did the RPD breach procedural fairness?

V. Standard of Review

A. *Principle of Procedural Fairness*

[16] With regard to the first issue, questions of procedural fairness are reviewed on the correctness standard: *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, per Binnie J at para 43. That said, I note in *Bergeron v Canada (Attorney General)*, 2015 FCA 160, per Stratas JA at para 69, the Federal Court of Appeal says a correctness review may need to take place in "a manner 'respectful of the [decision-maker's] choices' with 'a degree of deference': Re: *Sound v Fitness Industry Council of Canada*, 2014 FCA 48, 455 N.R. 87 at paragraph 42." But see *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [per Rennie JA]. In this connection I also note the Federal Court of Appeal's recent decision holding judicial review of procedural fairness issues is conducted on the correctness standard: see *Canadian Association of Refugee Lawyers v. Canada (Immigration, Refugees and Citizenship*), 2020 FCA 196 per de Montigny JA [Near and LeBlanc JJA concurring]:

> [35] Neither *Vavilov* nor, for that matter, *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, have addressed the standard for determining whether the decision-maker complied with the duty of procedural fairness. In those circumstances, I prefer to rely on the long line of jurisprudence, both from the Supreme Court and from this Court, according to which the

> standard of review with respect to procedural fairness remains correctness.

[17] I also understand from the Supreme Court of Canada's teaching in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 23 that the standard of review for procedural fairness is correctness:

> [23] Where a court reviews the merits of an administrative decision (i.e., judicial review of an administrative decisions other than a review related to a breach of natural justice and/or the duty of procedural fairness), the standard of review it applies must reflect the legislature's intent with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the rule of law. The starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness.
>
> [Emphasis added]

[18] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50, the Supreme Court of Canada explains what is required of a court reviewing on the correctness standard of review:

> [50] When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

B. *Reasonableness*

[19] With regard to reasonableness, in *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, issued at the same time as the Supreme Court of Canada's decision in

Vavilov, the majority per Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

> [31] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
>
> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
>
> [Emphasis added]

[20] Moreover, *Vavilov* requires the reviewing court to assess whether the decision subject to judicial review meaningfully grapples with the key issues:

> [128] Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" (*Newfoundland Nurses*, at para. 25), or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (para 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question

> whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39.
>
> [Emphasis added]

VI. Analysis

A. *Relevant legislation and jurisprudence*

[21] Article 1F(b) of the *Convention* provides:

Article 1F(b)	**Article 1F(b)**
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;
[Emphasis added]	[Je souligne]

[22] Section 98 of the *IRPA* provides:

Exclusion-Refugee Convention	**Exclusion par application de la Convention sur les réfugiés**
98 A person referred to in section E or F of Article 1 of the Refugee Convention is not	**98** La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la

a Convention refugee or a person in need of protection.	qualité de réfugié ni de personne à protéger.

[23] *Abbas v Canada (Citizenship and Immigration)*, 2019 FC 12 is a recent decision summarizing judicial review jurisprudence regarding exclusion under section 98 of the *IRPA* and Article 1F(b) of the *Convention*:

> [18] The Federal Court of Appeal confirms that the Minister merely has to show, on a burden less than the civil standard of balance of probabilities, that there are serious reasons to consider the applicant committed the alleged acts. In *Zrig v Canada (Minister of Citizenship and Immigration)*, 2003 FCA 178 [*Zrig*] Nadon JA confirms the following principle at para 56:
>
> > [56] The Minister does not have to prove the respondent's guilt. He merely has to show - and the burden of proof resting on him is "less than the balance of probabilities"-that there are serious reasons for considering that the respondent is guilty.
>
> [19] As to what constitutes a “serious” crime, the Supreme Court of Canada in *Febles v Canada (Minister of Citizenship and Immigration)*, 2014 SCC 68, per McLachlin CJ [*Febles*], instructs at para 62:
>
> > [62] The Federal Court of Appeal in *Chan v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 17150 (FCA), [2000] 4 F.C. 390 (C.A.), and *Jayasekara* has taken the view that where a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada, the crime will generally be considered serious. I agree. However, this generalization should not be understood as a rigid presumption that is impossible to rebut. Where a provision of the *Canadian Criminal Code*, R.S.C. 1985, c. C-46, 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 Canada should not be presumptively excluded Article 1F(b) is designed to exclude only those whose crimes are serious. The UNHCR has suggested that a

> presumption of serious crime might be raised by evidence of commission of any of the following offences: homicide, rape, child molesting, wounding, arson, drugs trafficking, and armed robbery (Goodwin-Gill, at p. 179). These are good examples of crimes that are sufficiently serious to presumptively warrant exclusion from refugee protection. However, as indicated, the presumption may be rebutted in a particular case. While consideration of whether a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada is a useful guideline, and crimes attracting a maximum sentence of ten years or more in Canada will generally be sufficiently serious to warrant exclusion, the ten-year rule should not be applied in a mechanistic, decontextualized, or unjust manner.

[20] The Federal Court of Appeal's decision of *Jayasekara* identifies factors to evaluate whether a crime is "serious" for the purposes of Article 1F(b), at para 44:

> [44] I believe there is a consensus among the courts that the interpretation of the exclusion clause in Article 1F(b) of the Convention, as regards the seriousness of a crime, requires an evaluation of the elements of the crime, the mode of prosecution, the penalty prescribed, the facts and the mitigating and aggravating circumstances underlying the conviction: see *S v. Refugee Status Appeals Authority, (N.Z. C.A.), supra*; *S and Others v. Secretary of State for the Home Department*, [2006] EWCA Civ 1157 (Royal Courts of Justice, England); Miguel-Miguel v. Gonzales, no. 05-15900, (U.S. Ct of Appeal, 9th circuit), August 29, 2007, at pages 10856 and 10858. In other words, whatever presumption of seriousness may attach to a crime internationally or under the legislation of the receiving state, that presumption may be rebutted by reference to the above factors.
>
> [Emphasis added]

[24] Moreover, *Febles* states the following regarding balancing the seriousness of a crime against conduct post-crime:

> [60] Article 1F(b) excludes anyone who has ever committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee. Its application is not limited to fugitives, and neither is the seriousness of the crime to be balanced against factors extraneous to the crime such as present or future danger to the host society or post-crime rehabilitation or expiation.
>
> [Emphasis added]

B. *Reasonableness*

[25] The Applicant submits the RPD erred in determining he was excluded from seeking refugee protection by virtue of Article 1F(b) of the *Convention* section and section 98 of *IRPA*. Both parties dealt with the factors identified in *Jayasekara*. I will go through each as did the RPD.

[26] The nature and elements of the crime: The Applicant submits he had "merely been involved in a motor vehicle accident" and that "traffic accidents would not normally be considered a serious crime" such that it would warrant exclusion. The Applicant relies on *Febles* at para 62 to argue "Operation of a vehicle causing death" is not as serious in nature as the examples of serious crimes listed by the Supreme Court of Canada which relied on the UNHCR's suggestion "that a presumption of serious crime might be raised by evidence of commission of any of the following offences: homicide, rape, child molesting, wounding, arson, drugs trafficking, and armed robbery." The Supreme Court of Canada held these are examples of

crimes “that are sufficiently serious to presumptively warrant exclusion from refugee protection.”

[27] I agree, but of course this is not an exhaustive list; other crimes may be included subject to the comments noted in paragraph 62 of *Febles* set out above.

[28] The Applicant cites to *Brzezinski v Canada (Minister of Citizenship and Immigration),* [1998] 4 FC 525 [*Brzezinski*], where Justice Lufty (as he then was) found the crime of shoplifting did not come within the scope of Article 1F(b). The Applicant submits his crime committed is “similar to shoplifting in the sense that it is out of place in the context of the other Exclusion clauses from Article 1F.” I note *Brzezinski* predates much of the jurisprudence on judicial review regarding exclusion, including *Febles* (2014) and *Jayasekara* (2008). Moreover, in *Brzezinski,* the applicants were charged with summary convictions in Canada with sentences ranging between fines and one fourteen-day period of detention. The facts are not at all like those in the case at bar, and I find it of little assistance to the Applicant.

[29] In terms of the facts of this case, the following uncontested evidence was before the RPD outlining the facts of the fatal collision caused by the Applicant. This information is contained in a Fatal Motor Vehicle Report entitled: Fatal Motor Vehicle Collision Delaware State Police troop #6 Victim: Meghan Kieffer Complaint #06-07-76718 [Collision Report], outlining the circumstances in which 23-year-old Meghan Kieffer was killed:

FATAL MOTOR VEHICLE COLLISION
DELAWARE STATE POLICE TROOP #6
VICTIM: Meghan Kieffer
COMPLAINT #06-07-76718

[…]

II. Description of the collision

A. Synopsis

1. Victims and Injured

[…] Ms. Kieffer suffered blunt force head injuries as a result of the collision. Ms. Kieffer was wearing a seatbelt at the time of the collision. Her side airbag did not deploy as a result of the collision. Ms. Kieffer was a rear seat passenger in vehicle #3. […]

[…]

2. Vehicles/Operators Involved

[…]

Vehicle #3 [the car in which the victim was killed, ed.] is a gray, 2006 Acura TSX four-door sedan. […] It is owned and was operated by operator #3 Christopher Perry. Mr. Perry possesses a valid, Virginia driver's license […] with no endorsements. […] Vehicle #3 was occupied by operator #3/injured #2 Christopher Perry, injured #3, Brian Meenaghan and victim Meghan Kieffer.

Vehicle #4 [the vehicle driven by the Applicant, ed.] is a maroon, 2006 Ford E350 Econoline XLT Superduty 15-passenger van. […]

[…]

3. Description of the Scene

[…]

1-95 in the area south of the toll plaza is a six-lane divided highway with three lanes of travel in each direction. […] The collision occurred exclusively on the northbound side of the highway so that is the area that will be further described. I-95 northbound has three asphalt lanes of travel that are relatively straight and level. The lanes are divided by broken white lines and passing is permitted within the northbound lanes. There is a full improved asphalt shoulder on the right (east) side of the highway and a steel guardrail adjacent to the shoulder that separates the highway from a grass area. […]

It was dark at the time of the collision and there were no adverse weather conditions. Overhead streetlights are posted along the east

side of die highway adjacent to the shoulder to illuminate the area. Traffic was backed up and slowly moving due to volume at the toll plaza. There were lanes closed for construction north of the toll plaza. South of the toll plaza there was no active construction at that time. All orange construction barrels were on the shoulder and none of the lanes were shut down in this area. The roadway widens to four lanes approximately .1 miles after the collision scene. The speed limit on 1-95 is 55 miles per hour. Approximately .3 miles south of the collision scene there are signs posted on both sides of the highway that state "Reduce Speed." Approximately 20 feet prior to the collision area there is a 40 mph posted speed limit sign on both sides of the highway.

[…]

… [The car in which the victim was killed, ed.] had damage to its front end and more severe damage to its rear end. A maroon Ford van [the van driven by the Applicant, ed.] was still wedged on the rear of the Acura partially covering the rear passenger and trunk areas. The Ford van overrode the Acura when it collided with its rear end.

[…]

4. How and Why the Collision Occurred

Vehicle #1, vehicle #2 and vehicle #3 [the car in which the victim was killed, ed.] were stopped consecutively in the center lane of 1-95 northbound approximately 1/4 mile south of the toll plaza. Vehicle #4 [the Applicant's car, ed.] was traveling northbound in the center lane and operator [the Applicant, ed.] #4 failed to stop behind the stationary traffic. The front of vehicle #4 struck the rear of vehicle #3 [the car in which the victim was killed, ed.] and rode up on top of its rear for a point of impact (POI-1) approximately l.9' north of the RP, 5.l' west of the RP. Vehicle #3 was pushed forward as a result of the impact and its front struck the rear of vehicle #2 for POI-2 20.25' north of the RP, 5.43' west of the RP. […] Vehicle #3 [the car in which the victim was killed, ed.] came to a final resting place in the center lane 53.9' north of the RP, 634' west of the RP. Vehicle #4 remained wedged on top of the rear of vehicle #3 [the car in which the victim was killed, ed.] at its final resting place 42.2' north of the RP, 5.61 ' west of the RP.

[…]

B. Investigative Action

1. Cause of Death

a. Pronounced by, Time, Date

On Thursday, August 16, 2007 at 2207 hours the victim, Meghan Kieffer, was pronounced dead by telemetry by Dr. Mike Bryer of the Christiana Hospital Staff Paramedics at the scene attached leads to the victim that sent an electronic signal to a base station at Christiana Hospital Emergency Room. At the base station, Dr. Buyer could determine that Meghan Kieffer had no vital signs, and therefore, could pronounce her dead. Her body was transported from the scene of the collision to Christiana Hospital Emergency Room.

b. Medical Examiner Investigator

Staff members at Christiana Hospital notified Mr. Rick Pretzler, an investigator with the Medical Examiner's Office, at approximately 2300 hours. Mr. Pretzler responded to the hospital and took charge of Meghan Kieffer's body.

c. Autopsy

Dr. Adrienne Sekula-Perlman, Deputy Medical Examiner, performed an autopsy on the body of Meghan Kieffer on Saturday, August 18, 2007 at approximately 1100 hours. Dr. Sekula-Perlman determined that Ms. Kieffer died as a result of blunt force injuries to the head including a subarachnoid hemorrhage.

[…]

2. Next of Kin Notified

Staff members at Christiana Hospital notified […] mother of the victim by phone at approximately 0030 hours on August 17, 2007. I also contacted [the victim’s mother, ed.] from the hospital's phone and provided her with details of the collision as they were known at diet time. […]

3. Examination / Disposition of Vehicles

[…]

Vehicle #3 – gray, 2006 Acura TSX four-door sedan.

DAMAGE

Vehicle #3 [the car in which the victim was killed, ed.] had two distinct areas of contact damage due to it being struck in the rear and pushed into the vehicle in front of it. The rear end of vehicle #3 was completely demolished in the initial impact. The damage included the rear bumper, trunk lid, windshield and quarter panels. The entire rear end was pushed forward to the area of the rear seat. The rear seat was pushed forward from the impact as well.

The second area of contact damage included the left front corner, bumper, hood, left fender and headlight assembly. Induced damage was evident throughout the vehicle. The A-pillars and front windshield were also damaged by rescue personnel attempting to remove the occupants.

TIRES

Vehicle #3 [the car in which the victim was killed, ed.] had four Michelin IDCMXM4 P215/50Rl7 tires. The right side tires were flat and unseated as a result of the impact. The left side tires remained undamaged in the collision and were properly inflated. All of the tires appeared to be in good shape with sufficient tread depth. The left front tire was partially impeded from rolling due to the frame of the vehicle resting against the tire.

LIGHTS

The left front headlights of the vehicle [the car in which the victim was killed, ed.] as well as the rear lights of the vehicle were destroyed in the impact. I examined the right headlight filament and observed hot shock to the low beam filament indicating the lights were on at the time of the impact. No witnesses reported that vehicle #3's headlights were not activated.

Hot shock is the deformation of the light filament, which occurs when a force is applied to the bulb when it is hot, or activated. […]

[…]

MISCELLANEOUS

The seatbelt in the left rear passenger position [in the car in which the victim was killed, ed.] was cut by rescue personnel to remove the victim from the vehicle. I also noted blood stains on the extended belt. The latch was still in the buckle. Both front seatbelt were found locked in an extended position confirming they were being worn at the time of the impact. Both operator #3,

Christopher Perry and passenger Brian Meenaghan stated they were wearing their seatbelts.

I pressed the brake pedal and it held firm. It was not free to the floor and rebounded when released. The steering wheel turned normally and the wheels followed the correct path. The front airbags as well as the right side curtain airbags deployed as a result of this collision.

Vehicle #4 – [the Applicant's van, ed.] **maroon, 2006 Ford E350 Econoline XLT 15-passenger van**

DAMAGE

Vehicle #4 [the Applicant's van, ed.] sustained contact damage to its front end. The damage included the front bumper, grill, left headlight assembly, hood and radiator. There was no significant induced damage observed to any other areas of the vehicle.

TIRES

Vehicle #4 [the Applicant's van, ed.] had four Michelin LTX M/S LT 225/75Rl6 tires. The right front tire and both rear tires had sufficient tread depth and air pressure and were not damaged in the collision. The left front tire was flat and unseated as a result of the impact with vehicle #3. The tire appeared to be in good shape otherwise. The flange was not bent in the impact and the wheel was free to rotate.

LIGHTS

The lens of the left front headlight [of the Applicant's van, ed.] was broken and I was able to observe hot shock damage in the low beam filament of this headlight bulb. The hot shock damage is an indicator that the bulb was incandescent when the impact occurred. No witnesses report that vehicle #4's headlights were not activated.

MISCELLANEOUS

The front airbags of vehicle #4 [the Applicant's van, ed.] deployed as a result of the collision. I pressed the brake pedal and it held firm. It did not travel to the floor and rebounded when released. The odometer of vehicle #4 read 27,619.7 miles. […]

4. Impairment Investigation

None of the operators, including operator #4 Hai Lin, displayed any signed of intoxication while being interviewed reference this

collision. As such, no probable cause was developed for alcohol or drug testing.

[…]

C. Interviews

1. Principles

[…]

Interview Operator #3 Christopher Perry:

[…]

Mr. Perry [the driver of the victim's car, ed.] stated he, passenger [deleted, ed] victim Meghan Kieffer were traveling from Virginia to New Jersey to spend the weekend with friends. They left at approximately 1900 hours this evening and bad just stopped the Maryland House rest stop. They had just stopped due to backed up traffic at the toll for a few seconds when they were struck from behind. Mr. Perry stated he saw vehicle #4 "barreling down" on them a split second before the impact. Mr. Perry did not hear any skidding prior to .the impact. […]

Interview Operator #4 Hai Lin [the Applicant, ed.]**:**

[…] Mr. Lin speaks Mandarin Chinese and Cpl/I Tsai served as translator. […]

Mr. Lin confirmed that he was the drive of vehicle #4. He stated he and the other occupants left Tennessee at approximately 0600 hours this morning and were hearing to New York. He stated they rotated driving all day and he had been driving for approximately a half hour on this stretch prior to the collision. Mr. Lin stated they had stopped in Maryland and he got coffee. He was looking at road signs for New York and when he looked back at the road it was too late. He was too close to the other vehicle to stop.

Mr. Lin denied that he fell and asleep and confirmed that he was not looking ahead. He denied consuming any drugs or alcohol prior to driving. […]

2. Witness / Persons Contacted

Interview Witness #1 Billy McBride, WMN-45, DOB 071262:

[…]

Mr. McBride slated he was in the left lane of 1-95 northbound and was positioned next to vehicle #3 (Acura) [the car in which the victim was killed, ed.] where his passenger window was in line with the rear bumper of the vehicle. He stated he was traveling approximately 2 to 5 miles per hour due to backed up traffic. The vehicles next to him were stopped in the center' lane and he saw the van (vehicle #4) plow into the rear of the Acura.

Mr. McBride called 9-1-1 and tried to get the door of the Acura [the car in which the victim was killed, ed.] open for the victim. Other people were also trying to help. The driver of the van did not get out. Mr. McBride stated he did not think the van driver was paying attention because he hit the car at approximately 40 to 50 miles per hour. Mr. McBride stated he heard no screeching or skidding on the part of the van prior to the collision and added that his windows were down at that time. […]

Interview Witness #2 Nicholas Cole, WMN-26, DOB 041881:

[…]

Mr. Cole stated he was in the left lane of 1-95 northbound and had just moved there from the center lane. He was moving very slowly in the backed up traffic and stated that the cars in the center lane were completely stopped. He saw the van strike the gray car out of the comer of his eye. He could not say what the van was doing prior to the collision and did not know why it did not stop.

After the collision, Mr. Cole drove along side the involved vehicles and asked if everyone was okay. He attempted to extricate the victim with the help of others at the collision scene but was unsuccessful. He tried to call 9-1-1 but was unsure of his location or even what toll plaza he was near. […]

D. Reconstruction

No technical reconstruction was performed for this collision. Speed is not the primary cause. The extensive damage to the rear of vehicle #3 [the car in which the victim was killed, ed.] and the lack of braking evidence on the roadway supports the witness accounts that vehicle #4 was travelling full speed when the collision occurred. The normal speed limit on I-95 is 55 miles per hour and drops to 40 miles per hour approximately 20 feet prior to the point of impact. […]

E. Prosecutive Action

[…]

> I typed a warrant charging Mr. Lin [the Applicant, ed.]with operating a vehicle causing the death of another person. I transported Mr. Lin from Troop 6 to JPII. The warrant was approved and Mr. Lin was arraigned by Judge Kenney with the assistance of a Mandarin Chinese interpreter on the Language Line. Judge Kenney set bail at $1,150 secured. I transported Mr. Lin to Howard Young Correctional Institution where he was committed in lieu of this bond. He later posted bond with the assistance of a friend and was released pending arraignment in Superior Court.
>
> **F. Investigator's Opinion / Comments**
>
> The primary cause of this fatal collision is the failure of operator #4, Hai Lin [the Applicant, ed.], to give full time and attention to the roadway and traffic conditions. He stated he was looking at signs for New York, which was his ultimate destination, and by the time he looked back at the road he was too close to the vehicle ahead of him. Traffic at that time on I-95 northbound was backed up approximately 1/4 mile from the toll plaza, where it is common for there to be slow moving or stopped traffic. Numerous brake lights of the stopped vehicles should have alerted Mr. Lin to the stopped traffic ahead. By failing to stop behind vehicle #3 [the car in which the victim was killed, ed.], Mr. Lin caused die death of victim Meghan Kieffer. The impact into the rear of vehicle #3 [the car in which the victim was killed, ed.] was so severe that the entire rear end was crushed and the rear seat was pushed forward. There was no evidence of pre-impact braking on the part of Mr. Lin.

[30] The mode of prosecution and the penalty prescribed: In *Febles* at para 62, the Supreme Court of Canada held that a maximum sentence of 10 years or more raises the presumption that the crime is serious enough to warrant exclusion. However, the Court also cautioned the presumption is not rigid and is rebuttable. The Applicant submits and I agree section 320.13(3) of the *Criminal Code* is a crime that carries a large sentencing range as envisioned in *Febles.* Pursuant to section 320.21, the maximum sentence is life imprisonment while the minimum sentence is a $1,000 fine for a first offence.

[31] In my respectful view, the RPD failed to meaningfully grapple with what penalty the Applicant might have received if he was charged in Canada. This failure offends the reasoning in *Tabagua v Canada (Citizenship and Immigration),* 2015 FC 709 [Gleason J as she then was] at paras 19-21 [*Tabagua*]:

> [19] As for the use of a forged passport, the maximum sentence prescribed by section 57 of the *Criminal Code* is 14 years' imprisonment (in respect of a forgery committed in respect of a Canadian passport). However, as my colleague, Justice Mosley, noted in *Almrei v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1002, 247 ACWS (3d) 650 (at para 48), "[t]he actual penalty that would be imposed for such an offence is, of course, likely to be much less, particularly for an offender without any prior criminal history in this country." The same might also be said of the offence of identity theft, even if prosecuted by way of indictment.
>
> [20] Here, the RPD failed to discuss what penalty the applicant might have received, had she been charged in Canada, and failed to note that the only evidence of the actual use by the applicant of the forged passport (as opposed to the use of the fraudulent Khachirova identity) was the fact that the applicant used the forged passport to gain access to the U.S. However, she claims she was required to do so to escape her persecutor. If believed, this would constitute a mitigating factor that the Board did not assess and that would also possibly have mitigated a sentence had the crime been committed in Canada and had the applicant been charged with it.
>
> [21] As the RPD failed to undertake the type of analysis that the Supreme Court mandated is required in *Febles* and failed to assess the seriousness of the applicant's conduct in light of the range of sentences available, the Board's decision must be set aside and the matter remitted for reconsideration as occurred in *Jung*. Contrary to what the respondent argues, the need for the type of analysis mandated by *Febles* is not lessened by the fact that the applicant was not charged and therefore was not sentenced. If anything, these facts would tend to show that the applicant's actions fall at the less serious end of the spectrum and therefore that a sentence well below the maximum would likely have been imposed had the applicant committed the offences and been charged in Canada.
>
> [Emphasis added]

[32] Put another way, the RPD acted unreasonably in failing to meaningfully grapple with whether the Applicant's sentence would "fall at the less serious end of the range" (or, conversely, at the more serious end of that range) as set out in *Jung v Canada (Minister of Citizenship and Immigration)*, 2015 FC 464 [de Montigny J as he then was] at paras 48-49 [*Jung*]:

> [48] At the end of the day, however, the most egregious error of the Board member was her failure to take into account what the Supreme Court considered a critical factor in *Febles*, namely 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. This consideration was quite relevant in the case at bar: the Canadian sentence for fraud over $5,000 has a large sentencing range (0 to 14 years), and the Applicant's crime – fraud of $50,000 with a 10 month sentence – *prima facie* falls at the low end of this range. The wide sentencing range and the Applicant's low actual sentence (not only was the actual sentence only two years but it was suspended and the only jail time was 165 days pre-trial custody) were clearly a most relevant factor in determining whether the crime was serious.
>
> [49] On that basis alone, the decision of the Board ought to be quashed and the matter returned for reconsideration by a different panel of the Board.
>
> [Emphasis added]

[33] Given these authorities, I conclude the RPD's failure to meaningfully grapple with the large sentencing range and the associated failure to consider whether the Applicant would "fall at the less serious end of the range" or, conversely, at the more serious end of that range is a reviewable error.

[34] I wish to add there is no need for the RPD to determine with precision where in a sentencing range the Canadian comparable crime falls. The RPD is not a criminal court for the

purpose of finding guilt or innocence: *Deng v Canada (Citizenship and Immigration)*, 2007 FC 943 [Hughes J] at para 11 citing to *Lai v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 125 at para 23 [per Pelletier JA]. For the same reason, the RPD is not a criminal court for the purpose of determining the appropriate sentence.

[35] However, in my respectful opinion and to comply with *Febles*, *Tabagua* and *Jung*, the RPD must meaningfully grapple with whether the crime falls within the less serious, or the more serious range of the Canadian criminal provision. I am not persuaded the RPD should be asked to do more. Because the RPD did not make this required determination, I am unable to agree the RPD complied with constraining law.

[36] Mitigating and aggravating circumstances underlying the conviction: The Applicant submits the RPD erred by considering his post-offence conduct in assessing aggravating circumstances. Indeed, the RPD found the Applicant's flight from prosecution was a "significant aggravating factor". The Applicant points to *Febles* for the proposition that post-offence conduct is not relevant to assessing the seriousness of a crime pursuant to Article 1F(b). I agree with the Applicant.

[37] The Respondent submits *Febles* does not forbid consideration of post-offence actions referring the Court to *Tabagua* at paragraph 12. I disagree because that reference in *Tabagua* formed no part of the ratio of Justice Gleason's reasons. Instead, I am bound by what the Supreme Court of Canada in *Febles* (2014), subsequent to *Jayasekara* (2008), held at paragraph 60:

> [60] Article 1F(b) excludes anyone who has ever committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee. Its application is not limited to fugitives, and neither is the seriousness of the crime to be balanced against factors extraneous to the crime such as present or future danger to the host society or post-crime rehabilitation or expiation.
>
> [Emphasis added]

[38] Therefore, in my respectful view, it was unreasonable for the RPD to consider post-offence conduct.

[39] The Applicant also submits the RPD erred by ignoring the absence of a number of relevant aggravating factors set out in section 320.22 of the *Criminal Code*. In particular, the Applicant submits he was not: (1) racing, (2) having a passenger under 16 years old, (3) making money and, (4) driving without a licence or (5) speeding at the time of the accident. He also says the Applicant in this case could have been assessed on the basis of a breach of subsection 130(3) of the Ontario *Highway Traffic Act*, RSO 1990, c H.8.

[40] Because I am ordering a reconsideration in this case, I will not consider these submissions further except to say I disagree with the assertion that the Applicant was not speeding. The Collision Report concluded: “The primary cause of this fatal collision is the failure of operator #4, Hai Lin, to give full time and attention to the roadway and traffic conditions.” The officer’s opinion was that “Speed is not the primary cause” of this collision, see Collision Report, section D. Reconstruction.

[41] However, the Collision Report concluded the Applicant struck the victim's car at "full speed", which would appear to have been 40 miles per hour (64 kilometres per hour). While 40 miles per hour was the posted speed limit, that of course could not justify the Applicant travelling at that speed in the circumstances i.e., where the other vehicles were stopped or almost stopped.

[42] In my view it is indisputable the Applicant's speeding was the cause of Ms. Keiffer's death, if not also the collision itself. Had the Applicant been slowing down to stop at approximately 2 to 5 miles per hour (approximately 3.3 to 8 kilometers per hour) due to backed up traffic, as was the case with the other cars approaching the toll booths, such as Witness McBride in the next lane, Ms. Keiffer would not have been killed. Instead, the evidence is that the Applicant "plow[ed] into the rear of the [victim's car]" and "hit the car at approximately 40 to 50 miles per hour" (as per Witness McBride) after being seen "barreling down on [the victim's car] a split second before the impact" (as per Witness Perry) at "full speed". As stated in the Collision Report, "the normal speed limit on 1-95 is 55 miles per hour (approximately 89 kilometers per hour) and drops to 40 miles per hour (approximately 64 kilometers per hour) approximately 20 feet prior to the point of impact." The Collision Report found the Applicant hit the victim's car at "full speed".

[43] There were no mechanical extenuating factors: the Applicant's tires were good, his brakes worked, his lights were on, and his steering worked when he plowed into Ms. Kieffer's car causing her death. The argument he was not intoxicated, pressed by the Applicant as an extenuating circumstance, is of small consequence in these circumstances.

[44] As the uncontested Collision Report concludes:

> **D. Reconstruction**
>
> No technical reconstruction was performed for this collision. Speed is not the primary cause. The extensive damage to the rear of vehicle #3 and the lack of braking evidence on the roadway supports the witness accounts that vehicle #4 was travelling full speed when the collision occurred. The normal speed limit on I-95 is 55 miles per hour and drops to 40 miles per hour approximately 20 feet prior to the point of impact. […]
>
> **F. Investigator's Opinion / Comments**
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> The primary cause of this fatal collision is the failure of operator #4, Hai Lin, to give full time and attention to the roadway and traffic conditions. He stated he was looking at signs for New York, which was his ultimate destination, and by the time he looked back at the road he was too close to the vehicle ahead of him. Traffic at that time on I-95 northbound was backed up approximately 1/4 mile from the toll plaza, where it is common for there to be slow moving or stopped traffic. Numerous brake lights of the stopped vehicles should have alerted Mr. Lin to the stopped traffic ahead. By failing to stop behind vehicle #3, Mr. Lin caused die death of victim Meghan Kieffer. The impact into the rear of vehicle #3 was so severe that the entire rear end was crushed and the rear seat was pushed forward. There was no evidence of pre-impact braking on the part of Mr. Lin.

[45] In addition to these factors, I agree with the Applicant that an analysis of the factors in section 320.22 of the *Criminal Code* should also be carried out where such sentencing provisions apply. I note the list in section 320.22 is not exhaustive; other aggravating circumstances must be considered in the redetermination:

Aggravating circumstances for sentencing purposes	**Détermination de la peine: circonstances aggravantes**
320.22 A court imposing a sentence for an offence under any of sections 320.13 to 320.18 shall consider, in addition to any <u>other</u>	**320.22** Le tribunal qui détermine la peine à infliger à l'égard d'une infraction prévue à l'un des articles 320.13 à 320.18 tient compte,

aggravating circumstances, the following:

(a) the commission of the offence resulted in bodily harm to, or the death of, more than one person;

(b) the offender was operating a motor vehicle in a race with at least one other motor vehicle or in a contest of speed, on a street, road or highway or in another public place;

(c) a person under the age of 16 years was a passenger in the conveyance operated by the offender;

(d) the offender was being remunerated for operating the conveyance;

(e) the offender's blood alcohol concentration at the time of committing the offence was equal to or exceeded 120 mg of alcohol in 100 mL of blood;

(f) the offender was operating a large motor vehicle; and

(g) the offender was not permitted, under a federal or provincial Act, to operate the conveyance.

en plus de toute autre circonstance aggravante, de celles qui suivent:

a) la perpétration de l'infraction a entraîné des lésions corporelles à plus d'une personne ou la mort de plus d'une personne;

b) le contrevenant était engagé soit dans une course avec au moins un autre véhicule à moteur, soit dans une épreuve de vitesse, dans une rue, sur un chemin ou une grande route ou dans tout autre lieu public;

c) le contrevenant avait comme passager dans le moyen de transport qu'il conduisait une personne âgée de moins de seize ans;

d) le contrevenant conduisait le moyen de transport contre rémunération;

e) l'alcoolémie du contrevenant au moment de l'infraction était égale ou supérieure à cent vingt milligrammes d'alcool par cent millilitres de sang;

f) le contrevenant conduisait un gros véhicule à moteur;

g) le contrevenant n'était pas autorisé, au titre d'une loi fédérale ou provinciale,

à conduire le moyen de transport.

[Emphasis added] [Je souligne]

C. *Procedural Fairness*

[46] At the hearing, counsel for the Applicant requested one week extra time to provide submissions on exclusion, which was granted such that written submission were due on Friday February 21, 2020. However, on Thursday February 20, 2020, counsel briefly wrote to request an additional one week, that is, to February 28, 2020. The RPD denied the request because it had not been perfected per Rule 50(3)(b) of the *Refugee Protection Division Rules*, SOR/2012-256, and because no reasons for the extension were given.

[47] Late in the day on February 21, 2020, after hours, counsel for the Applicant sent reasons for the extension: 1) she was overburdened with other cases, and 2) it would be a lot of work to respond to the case law adduced at the hearing by Minister's counsel.

[48] The RPD issued its reasons on Monday February 24, 2020. It is not known if the decision maker had the Applicant's filing before making its decision. It is not enough to ask this Court to speculate to that effect, which I certainly decline to do. The Court also finds the Decision is protected by the presumption of regularity, see *Varela v Canada (Citizenship and Immigration)*, 2017 FC 1157 [Barnes J]:

> [7] There is no merit to this argument. A strong presumption of regularity applies to decisions of this sort: see *Canada v Weimer*, (1998) 228 NR 341 at paras 12-13, [1999] WDFL 60. The presumption can be rebutted with convincing evidence that the decision-maker lacked the authority to decide, but here no such

> evidence was presented. This situation is, in practical terms, no different than one where the decision-maker's signature is illegible. If identity of the decision-maker is somehow a material issue on judicial review, the affected party has a duty to ask for it. Standing silent and complaining later is not an available option.

[49] And also *Canada (Minister of Human Resources Development) v Wiemer* (1998), 228 NR 341 (FCA) [Létourneau JA] at para 13:

> [13] The fact is that a person who signs, or purports to sign, for a senior officer in a department benefits from a presumption that he or she has the authority that he or she purports to exercise until such time as the presumption is rebutted.

[50] The Applicant received the RPD's decision dated February 24, 2020, containing the exclusion decision.

[51] On February 25, 2020, the RPD denied the second request because the exclusion decision had been finalized. On February 26, 2020, counsel faxed her post-hearing submissions.

[52] The Applicant submits the RPD breached the duty of procedural fairness by ignoring his request for an extension of time to provide post-hearing submissions. I disagree because when the submissions finally came in the RPD was *functus*. The Applicant waited too long to file proper submissions; in my view, counsel having missed one deadline should have acted with far more diligence in seeking a second. There is no merit to the procedural fairness submission.

VII. Conclusion

[53] In my respectful view, the Applicant has not shown procedural fairness was breached, but has established and I find the decision of the RPD was unreasonable. Therefore judicial review will be granted.

VIII. Certified Question

[54] The Applicant requested the certification of the following question which arose in the context of his submissions that the extension of time should have been granted:

> Does the jurisprudence suggesting that the RPD has a duty to consider all submissions prior to becoming *functus* also include non-evidentiary submissions related to procedural requests?

[55] I will not certify this question because it is not dispositive of this case.

JUDGMENT in IMM-1946-20

THIS COURT'S JUDGMENT is that:

1. Judicial review is granted.
2. The Decision is set aside.
3. The matter is remanded to a different decision maker to be re-determined in accordance with these reasons.
4. No question of general importance is certified.
5. There is no Order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1946-20
STYLE OF CAUSE:	HAI LIN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY WAY OF VIDEOCONFERENCE
DATE OF HEARING:	NOVEMBER 24, 2021
JUDGMENT AND REASONS:	BROWN J.
DATED:	NOVEMBER 30, 2021

APPEARANCES:

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