Federal Court  Cour fédérale

Date: 20130829

Docket: IMM-11894-12

Citation: 2013 FC 913

Ottawa, Ontario, August 29, 2013

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

NOE GAMA SANCHEZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [Act] for judicial review of the decision of the Refugee Protection Division [RPD] of the Immigration and Refugee Board, dated 30 October 2012 [Decision], which found that the Applicant was excluded from refugee protection pursuant to Article 1F(b) of the United Nations Convention Relating to the Status of Refugees and section 98 of the Act.

BACKGROUND

[2] The Applicant is a 38-year-old citizen of Mexico. He arrived in Canada on 1 June 2008 and claimed refugee protection on 9 December 2008.

[3] Before coming to Canada, the Applicant lived in the United States. On 13 November 1996, the Applicant sold approximately 200 grams of drugs containing methamphetamine to an undercover police officer in Nebraska. The Applicant was charged with two criminal offences: (I) conspiracy to possess with intent to distribute and to distribute a substance containing methamphetamine; and (II) possession with intent to distribute a substance containing methamphetamine.

[4] On the advice of a confidential informant, the Nebraskan police also searched the basement of the house next door to the Applicant's. The informant said that the Applicant had been seen coming in and out of the basement of that house with drugs, and the police attributed the drugs found in the basement to the Applicant and his brother. The police also recovered a weapon.

[5] The Applicant cooperated with the Nebraskan authorities and entered into a plea bargain. He pled guilty to the first charge, and the second charge was dropped. As part of the plea bargain the Applicant agreed to deportation and the United States Attorney's Office agreed to recommend that the Applicant not be considered a leader, organizer or manager of the crime, and that increases in the level of offence would not be sought. The Applicant was sentenced to 60 months imprisonment, which was the statutory minimum out of a potential sentence of 40 years. On 25 June 1998 the Applicant was transferred to a Mexican prison, and he was released in 2001 after completing his sentence.

[6] Part of the Applicant's plea agreement also provided that he would be held responsible for at least 100 grams and not more than 700 grams of a substance or mixture containing methamphetamine. Prior to the Applicant's sentencing, his lawyer objected to the amount of drugs it was alleged was involved in the offence, as well as the alleged extent of the Applicant's criminal history. The Applicant denied having any involvement with drugs found in the basement of the house next door to his home, or having any involvement in drug-related activities other than the attempt to sell methamphetamines on one occasion (13 November 1996).

[7] According to the Applicant, the only time he attempted to sell methamphetamines was on 13 November 1996. Earlier that day, the Applicant says he learned that his grandmother had passed away and he desperately wanted to return to Mexico for the funeral. The Applicant was 22 years-old at that time, and he says that the only way he thought he would be able to get the money he needed to return to Mexico was by selling drugs. Regardless, the Nebraska Court found in sentencing that the offence involved at least 400 grams, but less than 700 grams, of a substance containing methamphetamines, and that the Applicant's criminal history was not limited to the attempted sale on 13 November 1996.

[8] By decision dated 30 October 2012, the RPD found that the Applicant's criminal history involved a serious non-political crime and, accordingly, that the Applicant was excluded from refugee protection.

DECISION UNDER REVIEW

[9] The RPD found that the Applicant was excluded from refugee protection by virtue of Section F of Article 1 of the United Nations Convention Relating to the Status of Refugees, which reads as follows:

> F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

[10] As there was little dispute as to the facts surrounding the Applicant's criminal background, the main issue in contention was whether or not the subject crime was "serious" for the purposes of Article 1F(b). The Minister had to demonstrate that the crime was "serious" on a standard that was less than a balance of probabilities, but more than a mere suspicion (*Sumaida v Canada (Minister of Citizenship and Immigration)*, [2000] 3 FC 66 (CA)).

[11] The RPD noted that the determination of facts in exclusion cases requires the same approach as in inadmissibility cases, which is different from the approach taken in determining the facts pertaining to refugee claims under sections 96 or 97 of the Act. The standard that the RPD used in this case was "reasonable grounds to believe," which is a threshold rather than a standard of proof (*Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 39).

[12] The RPD noted that, according to the *Criminal Code of Canada*, RSC 1985 (*Criminal Code*) and the *Controlled Drugs and Substances Act*, SC 1996, c 19 (CDSA), the Applicant was convicted of an indictable, not hybrid, offence. Crimes for which one might serve over ten years should be considered serious (*Canada v Canada (Minister of Citizenship and Immigration)*,

[2000] 4 FC 300 (CA)), though the RPD considered this a "guideline" and not a hard rule. Further, the Federal Court of Appeal has provided guidance on this issue at paragraphs 44-46 of *Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404 [*Jayasekara*]:

> 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; S. & Ors v. Secretary of State for the Home Department*, [2006] EWCA Civ 1157; *Miguel-Miguel v. Gonzales*, 500 F.3d 941 (9th Cir. 2007), August 29, 2007, at pages 945 and 946-947. 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. There is no balancing, however, with factors extraneous to the facts and circumstances underlying the conviction such as, for example, the risk of persecution in the state of origin: see *Xie v. Canada (Minister of Citizenship and Immigration)*, [2005] 1 F.C.R. 304 (F.C.A.), at paragraph 38; *Immigration and Naturalization Service v. Aguirre-Aguirre*, at page 427; *T. v. Secretary of State for the Home Department*, [1995] 1 W.L.R. 545 (C.A.), at pages 554-555; *Dhayakpa v. Minister of Immigration and Ethnic Affairs*, at paragraph 24.
>
> For instance, a constraint short of the criminal law defence of duress may be a relevant mitigating factor in assessing the seriousness of the crime committed. The harm caused to the victim or society, the use of a weapon, the fact that the crime is committed by an organized criminal group, etc. would also be relevant factors to be considered.
>
> I should add for the sake of clarity that Canada, like Great Britain and the United States, has a fair number of hybrid offences, that is to say offences which, depending on the mitigating or aggravating circumstances surrounding their commission, can be prosecuted either summarily or more severely as an indictable offence. In countries where such a choice is possible, the choice of the mode of prosecution is relevant to the assessment of the seriousness of a crime if there is a substantial difference between the penalty prescribed for a summary conviction offence and that provided for an indictable offence.

[13] The RPD noted that whether the Canadian law applicable should be at the time of the offence (1996) or the time of the exclusion (2011) could be an important issue, because in 1996 trafficking methamphetamine was covered by the then *Food and Drug Act*, RSC 1985, c F-27, and was a hybrid offence and not strictly indictable. The RPD reviewed submissions from both parties on this point, and looked to the decision in *Zrig v Canada (Minister of Citizenship and Immigration)*, 2003 FCA 178 for its conclusion that the purpose of Article 1F(b) is to "ensure that the country of refuge can protect its own people by closing its borders to a criminal who it regards as undesirable because of the seriousness of the ordinary crimes which is suspects such criminal having committed," and as such it made sense that the law as it existed at the time of the exclusion hearing should be applied.

[14] The RPD then reviewed the facts surrounding the Applicant's drug arrest. The main point of contention between the parties was that the information from U.S. authorities submitted by the Minister indicated that the Applicant and his brother had been involved in narcotics distributed in the Omaha area for approximately two years, whereas the Applicant contended that he and his brother sold drugs once in an attempt to get money to go back to Mexico for their grandmother's funeral. The Applicant disclosed a death certificate purported to be his grandmother's, which said she died on 13 November 1996.

[15] The Applicant also testified that his next-door neighbour was a drug dealer and told him he could earn money by delivering the drugs. The Applicant recounted selling the drugs to an undercover officer, which aligned with the U.S. authorities' version of the facts, but denied knowing anything about the drugs that were found in the basement of the house next door. He also denied

allegations of a confidential informant telling the police that the Applicant was seen selling drugs in the area and keeping drugs in the basement.

[16] The RPD also noted that the Nebraska Court did not accept that the Applicant was only responsible for the amount of drugs sold to the undercover officer, and found that the offence involved at least 400 grams, i.e. he was also responsible for the 369 grams found in the basement next door. The Nebraska Court also referenced a "Presentence Investigation Report," which stated that the Applicant's criminal history prohibited "safety valve provisions" from coming into play, and that the statutory minimum of 60 months imprisonment had to be imposed. Although the Presentence Investigation Report was not before the RPD, the RPD found on a balance of probabilities that this reference meant that the Applicant had a criminal history relevant to the drug charge, and that the Nebraska Court was not prepared to downgrade on the basis that the Applicant's criminal history had been overstated. Further, the Court went on to say that because the Applicant agreed to deportation, a decrease to 60 months of imprisonment was appropriate. The RPD found, on a balance of probabilities, that this meant that if the Applicant had not agreed to deportation then his sentence would have been higher than 60 months.

[17] The Applicant testified that he only entered into the plea bargain because, if he did not and his case went to trial, he faced 50 years in jail. He also alleged that he only pled guilty to selling the drugs to the undercover officer, for which he would only get 18-36 months in jail, but he did agree that his lawyer explained the contents of the plea agreement to him. The Applicant also claimed that he filed an appeal (and later abandoned it) on the basis that he was not responsible for the drugs in the basement next door, but he provided the RPD with no evidence about this appeal.

[18] The RPD noted that it was not required to "retry" the foreign proceedings, and found that the Minister had provided serious reasons to consider that the Applicant committed the crime of which he was convicted in Nebraska. The RPD also accepted the evidence outside of the Applicant's guilty plea that indicated he was involved in drug trafficking outside of the one sale to the undercover officer. The Applicant had provided no credible evidence to the contrary, and while the Applicant may have wanted to return to Mexico because his grandmother had just died, the RPD found this to be insufficient to justify committing such a serious offence. This motivation was confirmed in the Applicant's guilty plea, but was not accepted by the Nebraska Court and had no impact on his conviction or sentence. The Applicant had also provided U.S. authorities with false identification on another occasion, which gave reason to doubt his credibility.

[19] As for mitigating factors, the Applicant pointed out that the drugs were not actually found at his house and there was no evidence of violence. The Applicant also claimed that he was not part of an organized operation, but the RPD pointed out that the charge that he pled guilty to involved "conspiracy." The District Attorney also noted that he would not seek "enhancement" based upon possession of a dangerous weapon. The RPD found that this did not mean the Applicant did not commit the offence; it simply meant that the DA did not want to pursue it. Furthermore, although the Applicant completed his sentence, this was not reason enough not to apply Article 1F(b) (*Jayasekara*). There was also ample case law stating that the rehabilitation of an individual is not a relevant factor when addressing the "seriousness" of the crime in the context of exclusion.

[20] The RPD also pointed to some aggravating factors. Firstly, considering the amount of drugs involved, it found there was serious reason to consider that the Applicant's involvement could not simply have begun on 13 November 1996, the same day his grandmother died. The Applicant's

attempt to present himself under a false name and the provision of documentation in support of that false allegation was also considered an aggravating factor.

[21] The RPD noted that drug trafficking is an offence which is presumed to be serious (*Jayasekara* at paragraph 48), though that presumption is rebuttable. The Federal Court of Appeal discussed the seriousness of drug trafficking in *Jayasekara*, and noted that it is recognized as such by many international bodies and countries. This "seriousness" is manifested in the severe punishment that is rendered in many countries for engaging in such activities.

[22] Taking all the above into account, the RPD found that the Minister had established that the crime committed by the Applicant in Nebraska was "serious" for the purposes of Article 1F(b). As such, the Applicant was excluded from refugee protection.

STATUTORY PROVISIONS

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

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 a Convention refugee or a person in need of protection.	**98.** La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.

[24] Article 1F(b) of the Convention is also applicable in this proceeding:

> F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> > (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

ISSUES

[25] The Applicant raises the following issues in this application:

a. Whether the RPD erred in its assessment of the seriousness of the offence by referring to the equivalent law in Canada at the time of the hearing rather than at the time the offence was committed;

b. Whether the RPD further erred in its assessment of the seriousness of the offence by ignoring mitigating circumstances underlying the Applicant's conviction.

STANDARD OF REVIEW

[26] The Supreme Court of Canada in *Dunsmuir v New Brunswick* 2008 SCC 9 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 well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[27] The Applicant points out that the Federal Court of Appeal stated at paragraphs 24-25 of *Febles v Canada (Minister of Citizenship and Immigration)*, 2012 FCA 324 [*Febles*] that the standard of review applicable to the RPD's interpretation of Article 1F(b) is correctness. The issue of whether the law at the time of conviction or the time of the hearing was considered in a similar context in *Canada (Minister of Citizenship and Immigration) v Velasco*, 2011 FC 627 [*Velasco*], where Justice Leonard Mandamin found at paragraph 34 that a correctness standard applied. Thus, the first issue will be evaluated on the basis of correctness.

[28] Whether or not a person should be considered as falling within Article 1F(b) is a question of mixed fact and law that is reviewable on a reasonableness standard (*Jayasekara*, above; *Feimi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 262 at paragraph 6). The Applicant agrees with this; the second issue will be reviewed on a reasonableness standard.

[29] 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 paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa* 2009 SCC 12 at paragraph 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."

ARGUMENTS

The Applicant

The Date of the Equivalent Offence in Canada

[30] The potential sentence for a crime committed in a foreign jurisdiction as provided in the domestic law of the country of refuge is a relevant factor for consideration in determining the "seriousness" of a non-political crime within the meaning of Article 1F(b) (*Jayasekara*, above). The RPD found that the law at the time of the hearing applied. However, the Federal Court of Appeal recently reached the opposite conclusion in *Febles*, above:

> 52 In my view, the ordinary meaning of the text of Article 1F (b) is that whether a crime is serious for exclusion purposes is to be determined on the basis of the facts listed by this Court in *Jayasekara*. The seriousness of a crime is to be assessed as of the time of its commission; its seriousness does not change over time, depending on whether the claimant is subsequently rehabilitated and ceases to pose a danger to the public.

[31] Further, in *Feimi v Canada (Minister of Citizenship and Immigration)*, 2012 FCA 325 [*Feimi*], the Federal Court of Appeal reiterated that the seriousness of a crime is to be assessed as of the time of its commission, and pointed out that someone's "current dangerousness" or rehabilitation are not relevant to an exclusion determination under 1F(b).

[32] The reasoning in *Febles* was recently applied by the Federal Court in *Valdespino v Canada (Minister of Citizenship and Immigration)*, 2013 FC 359 [*Valdespino*]. Justice Douglas Campbell found at paragraphs 6 and 11 that the seriousness of the crime is to be assessed on the basis of

factors that existed at the time of the crime's commission, and to consider post-offence mitigating and aggravating factors was contrary to law.

[33] The Applicant submits that, based on the above case law, it is the law in Canada as it was at the time of the offence outside Canada that the RPD should have applied.

Mitigating Factors

[34] In *Jayasekara* at paragraph 44, the Federal Court of Appeal stipulated that mitigating factors should be considered when analysing the seriousness of a crime. The Applicant submits that the following mitigating factors were relevant to his case:

- He was only 22 years old at the time of the offence;
- His grandmother had just passed away and he wanted to return to Mexico for the funeral;
- There was no violence related to the offence;
- He cooperated with U.S. authorities in their investigation;
- He had no previous convictions;
- There were no drugs or related paraphernalia in the Applicant's residence;
- There was no solid evidence tying the Applicant to the drugs in the basement and his fingerprints were not found on the lock to the basement;
- The amount of drugs was relatively limited;
- He agreed to deportation and the plea agreement;

- The District Attorney decided not to seek enhancements for weapon or obstruction of justice and recommended that the Applicant was not a leader, organizer or manager;
- The mandatory statutory minimum sentence of 5 years was imposed when a sentence of up to 40 years was possible;
- The charge involved a substance containing methamphetamine as opposed to pure methamphetamine, which would have carried a statutory minimum sentence of 10 years as opposed to 5 years.

[35] The Applicant submits that all of these factors needed to be considered in their totality by the RPD, and the fact that they were not is an error (*Toro v Canada (Minister of Employment and Immigration)*, [1981] 1 FC 652 (FCA)).

The Respondent

The Date of the Equivalent Offence in Canada

[36] The Respondent points out that in *Jayasekara* the Federal Court of Appeal held that there is a presumption that certain offences, including drug trafficking, are considered serious crimes. There is also a presumption that a crime punishable by a term of imprisonment of at least ten years is a serious crime.

[37] In addition to this, the Court of Appeal laid out the following factors (*Jayasekara* factors) that ought to be considered when assessing the seriousness of a crime for the purposes of Article 1F(b):

- The elements of the crime;
- The mode of prosecution;
- The penalty prescribed;
- The facts of the conviction;
- Any mitigating and aggravating circumstances underlying the conviction.

[38] The RPD noted that possession of methamphetamine for the purpose of trafficking is currently an indictable offence under the CDSA and punishable by life imprisonment. The Applicant argues that the RPD should have considered the possible sentence in Canada for possession of methamphetamine for the purpose of trafficking in 1996 when he committed the offence in the United States, and when it was a hybrid offence under the *Food and Drug Act*. The Respondent submits that accepting this argument would be contrary to the purposes of Article 1F(b), which allows a country to close its borders to those that it considers to be undeserving of refugee protection because of crimes such persons have committed (*Jayasekara* at paragraphs 28-29).

[39] The Respondent submits that in *Febles*, cited and relied upon by the Applicant, the Federal Court of Appeal was not considering whether the seriousness of a refugee claimant's crime should be assessed based on the law of the receiving state at the time of the offence or the time of the refugee hearing. The Court was dealing with whether rehabilitation was a relevant factor when the RPD was assessing the seriousness of a crime. The Court of Appeal concluded that it was not relevant for a number of reasons, including the fact that the application of Article 1F(b) is not limited to claimants who pose a current danger to the Canadian public. The Court's comment that the seriousness of a crime has to be assessed at the time of its commission has to be read in the

context of the rest of the paragraph of the Court's reasons which indicates that the seriousness of an offence does not change over time depending on whether the claimant is subsequently rehabilitated. Accordingly, the comment relied up on by the Applicant provides little, if any, support for his argument.

[40] Furthermore, even if one considers the Applicant's possible sentence in 1996, his offence was still a serious crime in Canada. A hybrid offence is treated as an indictable offence unless the Crown elects to proceed by way of summary conviction. Thus, even under the criminal law in Canada in 1996, the Applicant still faced a possible sentence of 10 years for drug trafficking, which raises the presumption of a serious crime.

[41] In *Canada (Minister of Citizenship and Immigration) v Raina*, 2012 FC 618 [*Raina*], the Federal Court found it was an error for the RPD to find that the offence of sexual interference could be considered not serious because it was a hybrid offence. Also, in *Jayasekara* the Federal Court of Appeal specifically referred to the fact that drug trafficking in Canada carries a maximum time of 18 months for a summary conviction, and up to a maximum of life imprisonment for an indictable offence, depending on the substance trafficked, as evidence of the seriousness with which Canada views drug trafficking.

Mitigating Factors

[42] The Respondent points out that the RPD carefully and extensively reviewed the *Jayasekara* factors in its Reasons for the Decision. The RPD is not necessarily required to discuss all of a claimant's circumstances in its reasons at the level of detail argued by the Applicant. Furthermore, the RPD did, in fact, consider the things listed by the Applicant in detail and at length. For example,

the RPD considered the Applicant's age, his alleged rationale for committing the crime because of his grandmother's death, his lack of criminal record, his allegation that he had nothing to do with the drugs in the basement, the statutory minimum sentence imposed, the charges sought by the D.A., the fact that no drugs were found in his apartment, and that there was no evidence of violence.

[43] A plain reading of the Decision indicates that the RPD fully analyzed the *Jayasekara* factors, and the Respondent submits that the Decision was reasonable.

The Applicant's Reply

[44] The Applicant submits that the presumptions that drug trafficking and offences punishable by a term of imprisonment of at least ten years are considered serious crimes are rebuttable ones (*Jayasekara*; *Feimi* at paragraph 22). This is not the end of the assessment. Whether the offence can be prosecuted summarily and/or as an indictable offence is a relevant consideration if there is a substantial difference between the penalties prescribed.

[45] Although the Court of Appeal in *Febles* determined that the length and completion of a sentence, rehabilitation, and "present dangerousness" were not relevant to a consideration of the seriousness of a crime for the purposes of exclusion under Article 1F(b), the Court clearly stated that "the seriousness of a crime is to be assessed as of the time of its commission; its seriousness does not change over time."

[46] The Applicant submits that if a person cannot be given any consideration for the passage of time, namely his or her rehabilitation and completion of the sentence since the offence was committed, it would be inequitable for the Minister to benefit when legislative changes make a

particular offence more serious. If the question of whether a claimant poses a present danger to the Canadian public is not relevant for the purpose of determining "seriousness," then the present penalty imposed should not be either. This interpretation would not undermine Canada's ability to refuse protection to persons, as the hybrid nature of the offence is only one factor among many that are assessed when exclusion on the basis of Article 1F(b) is being determined.

[47] The Applicant also submits that not all of the mitigating factors mentioned by the RPD were analysed. The mere recitation of facts does not mean that they were analysed (*Zhong v Canada (Minister of Citizenship and Immigration)*, 2011 FC 980). The decision in *Valdespino*, above, emphasized the importance of engaging all mitigating factors in an analysis of the seriousness of an offence.

The Respondent's Further Memorandum of Argument

[48] The Respondent submits that the law does not support the Applicant's contention that the RPD had to consider the criminal law in Canada as it stood at the time the crime was committed. In *Febles*, the Court of Appeal was dealing with the issue of whether rehabilitation was a relevant factor when assessing the seriousness of a crime, and did not consider whether the law at the time of the offence or the time of the refugee hearing ought to be applied. The Court's comment that the seriousness of a crime has to be assessed at the time of its commission has to be read in the context of the rest of the Court's words which indicate that the seriousness of an offence does not change over time "depending on whether the claimant is subsequently rehabilitated and ceases to pose a danger to the public" (*Febles*, paragraph 52). Furthermore, in light of the purposes of Article 1F(b), the receiving state's present view of the seriousness of the crime is a relevant consideration.

[49] Furthermore, even if one considers the law as it stood in 1996 for possession of methamphetamine for the purpose of trafficking, the offence was still a serious crime in Canada. It was a hybrid offence, which is treated as an indictable offence unless the Crown elects to proceed by way of summary conviction (*Raina*, above).

[50] In response to the Applicant's arguments that the *Jayasekara* factors were not properly considered, the Respondent notes that the RPD carefully identified and considered the factors in its Reasons. The RPD is not required to discuss each mitigating factor in detail or explain why it weighed the factors the way that it did (*Velasquez v Canada (Minister of Citizenship and Immigration)*, 2013 FC 273 at paragraph 16; *Shire v Canada (Minister of Citizenship and Immigration)*, 2012 FC 97 at paragraphs 62-64; *Ganem v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1147 at paragraphs 44-47). Furthermore, contrary to the Applicant's allegations, many of the factors which the Applicant says the RPD ignored are discussed at length in its Reasons.

ANALYSIS

[51] The Applicant does not dispute that he was convicted in 1997 in the United States for conspiracy and possession with intent to distribute methamphetamine. There is also no issue that this crime had any political aspect. The only issue before the Court is whether the RPD committed a reviewable error when it found that the Applicant had committed a serious crime for the purposes of Article 1F(b) of the *Refugee Convention*.

[52] As the RPD makes clear in its Decision, the applicable date for assessing the seriousness of any offence is an important consideration for the purposes of Article 1F(b):

> [34] The impact of the answer could be meaningful. At the time of the offense, the criminality of the possession of methamphetamine for the purpose of trafficking in Canada was covered by the *Food and Drug Act* (FDA). Methamphetamine was a schedule G controlled drug. Pursuant to section 39 of the FDA, one who was convicted of possession of it for the purposes of trafficking was subject to, if indicted, a term not exceeding 10 years but, on summary conviction, a term not exceeding 18 months. It, unlike today under the CDSA as discussed above, was a hybrid offense and not strictly indictable.
>
> [35] If the FDA applied to the exclusion analysis in this case, it would open the door to a consideration of whether, as a hybrid offense, the circumstances could lead to a conclusion that the crime was less than serious as was the case in the Federal Court decision *MCI v. Lopez Velasco*. In that case, (which is primarily a vacation application based on a claimant having failed to disclose a 1992 conviction for "annoying or molesting children" in the US at his successful refugee hearing) it was determined, in effect, both the US and Canada in 1992, were hybrid offenses and, following the lead of the Court of Appeal in paragraphs 37 – 58 of *Jayasekara*, it could be determined to be less than serious. The Court in José Velasco noted (and did not otherwise dispute) that:
>
> > The RPD accepted that it was the Respondent's status or potential exclusion at the time of his application for refugee status (and not at the time of the 2010 vacation hearing) which was to be considered and, for the purpose of analysis of the crimes, reference should be made to the laws of California and Canada as at the time they committed in 1992.

[53] For the purposes of the Decision, the RPD applied the law as it existed in Canada at the time of the hearing and not at the time of the offence.

[54] The Applicant says that this was a reviewable error, and relies upon *Febles*, above, *Feimi*, above, and the recent case of Justice Campbell in *Valdespino*, for the proposition that the seriousness of a crime is to be assessed as of the time of its commission.

[55] In *Feimi*, the Federal Court of Appeal follows its own decision in *Febles* and the focus of disagreement in the present case requires consideration of what the Federal Court of Appeal intended by the following paragraph of *Febles*:

> 52 In my view, the ordinary meaning of the text of Article 1F (b) is that whether a crime is serious for exclusion purposes is to be determined on the basis of the facts listed by this Court in *Jayasekara*. The seriousness of a crime is to be assessed as of the time of its commission; its seriousness does not change over time, depending on whether the claimant is subsequently rehabilitated and ceases to pose a danger to the public.

[56] The Applicant argues that if the seriousness of the crime is to be assessed at the time of its commission, then a reviewable error occurred in the present case because the RPD assessed seriousness at the time of the hearing, and the difference between the two was highly material when the RPD came to assessing the *Jayasekara* factors.

[57] On the other hand, the Respondent argues that the Federal Court of Appeal was only focused on rehabilitation in *Febles* and *Feimi*. The seriousness of the crime does not change over time as a result of any rehabilitation that a claimant is able to achieve. But this does not prevent the Government of Canada from amending the law to make crimes more serious and, when this happens as in the present case, it is the more serious legislative embodiment of the crime in place at the time of the hearing that must be used to assess seriousness under Article 1F(b) of the Convention.

[58] The Court has heard able arguments from counsel on both sides. For the Applicant, counsel points out that it would be inconsistent and unfair to disregard rehabilitation and assess seriousness at the time of the commission in some cases, but then to allow a legislative change to move the

assessment time to the hearing in other cases. The Respondent argues that the Applicant's argument is inconsistent with the purposes of Article 1F(b), which include allowing the country to close its borders to persons it considers to be undeserving of refugee protection because of the crimes that such persons may have committed. These summaries do not do justice to the subtleties at counsel's presentations, but I think this is what it comes down to.

[59] In the end, I have to agree with the Respondent. This is because I do not think the relevant provisions of the Convention or the Act require a consideration of what is fair to claimants, or of whether there is any inconsistency.

[60] Article 1F(b) of the Convention allows signatories to refuse refugee protection to claimants who they consider to have committed a serious non-political crime outside of the country. This is a right granted to Canada and other signatories. The time when the serious non-political crime has been committed is any time prior to admission. It is clear from *Febles* that, if a serious non-political crime has been committed, subsequent rehabilitation will not change the seriousness of that crime. This is because it is not for the claimant to say whether he is deserving or not to be a refugee claimant. It is for Canada to decide who it regards as undeserving, and Canada's views on that may well change from time to time as Parliament alters its views on particular crimes. A crime previously regarded with more leniency may well be seen as much more threatening and repugnant as times and governments change. In my view, a claimant considered undeserving of protection at the time of the refugee hearing cannot be allowed to claim refugee status because he or she can say their criminal activity was regarded as less serious at the time of commission. If that were the case, refugee protection in Canada could be granted to people the country has come to regard as highly undesirable and undeserving. I don't think Canada's hands can be tied in its way.

[61] The focus is the seriousness of the nonpolitical crime and not whether rehabilitation has rendered a claimant less dangerous to the public. Often, there will be no difference in this regard between the time of commission and the time of the hearing. However, where legislative amendments have occurred and a crime has been made more serious or less serious, it seems to me that the RPD has to assess each claimant against Canada's prevailing view of the seriousness of the crime in question, and this will not necessarily mean the time of commission.

[62] I don't think there is anything in *Febles* or *Feimi* (concerned as they are with rehabilitation and, to use Justice Mosley in *Camacho v Canada (Minister of Citizenship and Immigration)*, 2011 FC 789 para 16, with considerations that are "extraneous to the facts and circumstances underlying the conviction") that forestalls my conclusions on this point. Indeed, I think there is much in decisions such as *Febles* and, for example *Zrig Canada (Minister of Citizenship and Immigration)*, 2003 FCA 178, that speaks to the overall purpose of Article 1F(b) and which supports my own conclusions.

[63] However, I have to admit that the matter is not entirely clear and that further guidance from the Federal Court of Appeal may well be necessary.

[64] When it comes to the RPD's application of *Jayasekara* and assessment of the relevant mitigating factors, the Applicant says that some of the factors were mentioned and appropriately addressed in the reasons. However, he says that others were not, and the RPD also failed to weigh and assess the mitigating factors in their totality. He also says that the mere recitation of facts does not imply that those facts were analyzed.

[65] When I review the Decision as a whole, I am convinced that the RPD did evaluate and weigh all of the *Jayasekara* factors in a reasonable way in assessing the seriousness of the Applicant's crimes. Even though they might not all have been reviewed and assessed in the way the Applicant says they should have been, I am satisfied that the substance is present in the reasons. See *Hawthorne v Canada (Minister of Citizenship and Immigration)*, [2002] FCJ No 1687 at para 3. The reasons for the RPD's conclusion are transparent, intelligible and justifiable given the factors at play and I cannot say that the Decision on this issue falls outside the range of possible, acceptable outcomes which are defensible on the facts and law.

[66] Both sides have suggested similar questions for certification. I think the essence of the point of concern is captured by the following question:

> When assessing the Canadian equivalent of a foreign offence in the context of exclusion under Article 1F(b) of the *Convention relating to the Status of Refugees* and the *Jayasekara* factors, should the Refugee Protection Division Member assess the seriousness of the crime at issue at the time of commission of the crime or, if a change to the Canadian equivalent has occurred in the interim, at the time when the exclusion is being determined by the Refugee Protection Division?

[67] I agree with the Applicant that this is a serious question of general importance under section 74*(d)* of the Act, that it transcends the interests of the immediate parties, contemplates a general issue of broad importance and would be determinative of the appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is dismissed; and

2. The following question is certified:

> When assessing the Canadian equivalent of a foreign offence in the context of exclusion under Article 1F(b) of the *Convention relating to the Status of Refugees* and the *Jayasekara* factors, should the Refugee Protection Division Member assess the seriousness of the crime at issue at the time of commission of the crime or, if a change to the Canadian equivalent has occurred in the interim, at the time when the exclusion is being determined by the Refugee Protection Division?

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	July 17, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	RUSSELL J.
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APPEARANCES:

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