Federal Court of Appeal  Cour d'appel fédérale

Date: 20121207

Docket: A-379-11

Citation: 2012 FCA 324

CORAM: **EVANS J.A.**
SHARLOW J.A.
STRATAS J.A.

BETWEEN:

LUIS ALBERTO HERNANDEZ FEBLES

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard at Toronto, Ontario, on November 19, 2012.

Judgment delivered at Ottawa, Ontario, on December 7, 2012.

REASONS FOR JUDGMENT BY:	EVANS J.A.
CONCURRED IN BY:	SHARLOW J.A.
CONCURRING REASONS BY:	STRATAS J.A.

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REASONS FOR JUDGMENT

EVANS J.A.

A. *INTRODUCTION*

[1] Luis Alberto Hernandez Febles, a national of Cuba, was convicted in the United States in 1984 and 1993 of assault with a deadly weapon. He came to Canada in 2008 after completing his prison sentences and claimed refugee status.

[2] The Refugee Protection Division of the Immigration and Refugee Board (RPD) held that Article 1F (b) of the *United Nations Convention relating to the Status of Refugees*, July 28, 1951, [1969] Can. T.S. No 6 (Convention) excluded him from the definition of a refugee. This was because

his convictions in the United States provided serious reasons for considering that he had committed "a serious non-political crime" outside Canada.

[3] Mr Febles says that alcohol was a factor that led to his commission of these crimes, he has served his sentences, and is now rehabilitated. He argues that the purposes of Article 1F (b) are to prevent ordinary criminals from escaping local criminal justice by acquiring refugee status, and to protect the public of a receiving state from convicted criminals who are dangerous. Since Mr Febles had served his sentence, he was not a fugitive from justice. Consequently, he says, the RPD was obliged to consider whether, despite his criminal record, he represents a danger to the Canadian public.

[4] The question to be decided in this appeal is whether the RPD erred in law because, in determining if Mr Febles was excluded from refugee status on the ground that he had committed a "serious" crime within the meaning of Article 1F (b), it failed to consider whether he was rehabilitated and posed a present danger.

[5] In my view, the RPD correctly concluded that whether a refugee claimant who has served his sentence poses a present danger to the Canadian public is not relevant for determining the seriousness of a crime for the purpose of Article 1F (b). Accordingly, I would dismiss the appeal from the decision of the Federal Court (2011 FC 1103), in which Justice Scott (Application Judge) denied Mr Febles' application for judicial review to set aside the RPD's decision.

B. *FACTUAL BACKGROUND*

[6] Mr Febles left Cuba in 1980 and was accepted by the United States as a refugee by virtue of his fear of persecution as a political dissident. However, he subsequently lost his refugee status as a result of his criminal convictions, and is subject to an administrative warrant of removal from the United States.

[7] Mr Febles entered Canada illegally on October 12, 2008, and two days later applied for refugee protection on the ground of a well-founded fear of persecution in Cuba for his political beliefs. During his interview with an officer of the Canada Border Services Agency (CBSA) to determine whether the claim was eligible to be referred to the RPD, Mr Febles revealed his criminal convictions in the United States.

[8] On the basis of a report filed by a CBSA officer, Mr Febles was referred to the Immigration Division of the Immigration and Refugee Board for an inadmissibility hearing. Following that hearing, Mr Febles was found to be inadmissible and a deportation order was issued dated June 3, 2010. The basis of the inadmissibility finding was that he had been convicted of an offence outside Canada for which he could have been sentenced to a maximum of at least 10 years' imprisonment if it had been committed in Canada.

[9] Despite Mr Febles' criminal record, a CBSA officer decided not to request the Minister of Citizenship and Immigration (MCI) for an opinion as to whether his claim was ineligible to be referred to the RPD on the ground that he posed a danger to the public in Canada. Nonetheless, on August 10, 2010, the Minister of Public Safety and Emergency Preparedness (MPSEP) filed a notice

of intervention in Mr Febles' hearing before the RPD, alleging that Article 1F (b) excluded him from the definition of a refugee because there were serious reasons for considering that he had committed a serious non-political crime outside Canada.

C. *DECISION OF THE RPD*

[10] In its reasons for decision, dated October 27, 2010, the RPD described the circumstances surrounding the crimes of which Mr Febles had been convicted in 1984 and 1993, that is, assaults with a deadly weapon other than a firearm. He had been sentenced to two years in prison and three years on probation for each of these offences. He testified that he served just over a year of the first sentence, and then spent more time in prison for breaching the conditions of his probation. He served the entirety of the second sentence and observed his probation conditions. He said that since 1993 he has been sober and has not re-offended.

[11] Focussing on the second offence, the RPD noted that Mr Febles' conviction had been for an offence for which a maximum sentence of at least 10 years' imprisonment could be imposed if committed in Canada, and that this raised a presumption that the crime was "serious". However, it also stated that this presumption could be rebutted by other factors. Nonetheless, the RPD concluded that the gravity of Mr Febles' crime excluded him from refugee protection, even though he had committed the more recent of the crimes 17 years ago, was remorseful, had served his sentence, and has chosen "to follow a straighter path" since 1993 (RPD reasons at para. 24).

D. *DECISION OF THE FEDERAL COURT*

[12] The Application Judge relied on *Jayasekara v. Canada (Minister of Citizenship and Immigration),* 2008 FCA 404, [2009] 4 F.C.R 164 at para. 44 (*Jayasekara*) for the proposition that in determining whether a refugee claim is excluded by Article 1F (b) a court should not balance the seriousness of the crime as indicated by the maximum punishment that it carries if committed in Canada against "factors extraneous to the facts and circumstances underlying the conviction such as, for example, the risk of persecution in the state of origin".

[13] Accordingly, the Application Judge held (at para. 50) that Mr Febles' completion of his sentence was relevant only to the seriousness of the crime, not to "rehabilitation, expiation, recidivism and on-going danger." The RPD was precluded from taking rehabilitation into account in assessing the seriousness of the crimes committed by Mr Febles. It had therefore not unlawfully fettered the exercise of its discretion by failing to address whether he currently posed a danger to the Canadian public.

[14] The Application Judge certified the following question for appeal to this Court pursuant to paragraph 74*(d)* of the *Immigration and Refugee Protection Act*, 2001 S.C., c. 27 (IRPA):

> When applying Article 1F (b) of the *United Nations Convention relating to the Status of Refugees*, is it relevant for the Refugee Protection Division of the Immigration and Refugee Board to consider the fact that the refugee claimant has been rehabilitated since the commission of the crime at issue?

[15] For the reasons that follow I would answer the certified question in the negative and dismiss the appeal.

E. *LEGISLATIVE FRAMEWORK*

[16] An understanding of the issue raised in this appeal depends in part on locating it within the complex statutory scheme created by IRPA for the consideration of criminality in a variety of contexts.

[17] Paragraph 36(1)*(b)* of IRPA applies to all non-nationals and describes the circumstances in which they are inadmissible to Canada on the basis of criminal convictions outside Canada. However, paragraph 36(3)*(c)* provides that persons to whom paragraph 36(1)*(b)* applies are not inadmissible if, after the prescribed period, they satisfy the MCI that they have been rehabilitated.

36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	36. (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :
…	[…]
(b) having been convicted of an offence outside Canada 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; or	*b)* être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;
…	[…]
36. (3) The following provisions govern subsections (1) and (2):	36. (3) Les dispositions suivantes régissent l'application des paragraphes (1) et (2) :
…	[…]
(c) the matters referred to in paragraphs (1)*(b)* and *(c)* and (2)*(b)* and *(c)* do not constitute inadmissibility in respect of a permanent resident or foreign national who, after the prescribed period, satisfies the Minister that they have been rehabilitated or who is a member of a prescribed class that is deemed to have been rehabilitated;	*c)* les faits visés aux alinéas (1)*b)* ou *c)* et (2)*b)* ou *c)* n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui, à l'expiration du délai réglementaire, convainc le ministre de sa réadaptation ou qui appartient à une catégorie réglementaire de personnes présumées réadaptées;

[18] Section 101 of IRPA describes claims that are not eligible to be referred to the RPD. These include claims for refugee protection by claimants who are inadmissible to Canada for serious criminality under subsection 36(1) and whom the MCI believes are a danger to the public in Canada.

101. (1) A claim is ineligible to be referred to the Refugee Protection Division if	101. (1) La demande est irrecevable dans les cas suivants :
…	[…]
(f) the claimant has been determined to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality, except for persons who are inadmissible solely on the grounds of paragraph 35(1)*(c)*.	*f)* prononcé d'interdiction de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux — exception faite des personnes interdites de territoire au seul titre de l'alinéa 35(1)*c)* —, grande criminalité ou criminalité organisée.
(2) A claim is not ineligible by reason of serious criminality under paragraph (1)*(f)* unless	(2) L'interdiction de territoire pour grande criminalité visée à l'alinéa (1)*f)* n'emporte irrecevabilité de la demande que si elle a pour objet :
…	[…]
(b) in the case of inadmissibility by reason of a conviction outside Canada, the Minister is of the opinion that the person is a danger to the public in Canada and the conviction is for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament that is 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, le ministre estimant que le demandeur constitue un danger pour le public au Canada.

[19] Even when a claim is not ineligible to be referred to the RPD under section 101, in some situations the RPD must reject it. Article 1F (b) of the Convention, which section 98 of IRPA incorporates into IRPA by reference, sets out the situation relevant to the present appeal.

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.

[20] Article 1F (b) of the Refugee Convention provides as follows.

1F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:	1F. 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;
…	[…]

[21] Although excluded from refugee status by the above provisions and subject to a removal order on the ground of inadmissibility, a claimant may apply to the MCI for a pre-removal risk assessment (PRRA). However, paragraph 112(3)*(c)* provides that applicants for protection on a PRRA cannot be granted protection as refugees as defined by section 96 if their claim for refugee protection was rejected pursuant to Article 1F. Paragraph 113(*d*)(i) states that an immigration officer will consider the PRRA of these applicants for protection on the basis of the risk factors set out in section 97 (death, torture, or cruel and unusual treatment or punishment) and whether they are a danger to the public in Canada. Even if denied refugee status by subsection 112(3), successful applicants for a PRRA can obtain a stay of removal by virtue of subsection 114(1).

112.	112.
…	[…]
(3) Refugee protection may not result	(3) L'asile ne peut être conféré au

from an application for protection if the person	demandeur dans les cas suivants :
…	[…]
(b) is determined to be inadmissible on grounds of serious criminality with respect to a conviction in Canada punished by a term of imprisonment of at least two years or with respect to a conviction outside Canada 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)* il est interdit de territoire pour grande criminalité pour déclaration de culpabilité au Canada punie par un emprisonnement d'au moins deux ans ou pour toute 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;
…	[…]
(c) made a claim to refugee protection that was rejected on the basis of section F of Article 1 of the Refugee Convention;	*c)* il a été débouté de sa demande d'asile au titre de la section F de l'article premier de la Convention sur les réfugiés;
…	[…]
113. Consideration of an application for protection shall be as follows:	113. Il est disposé de la demande comme il suit :
…	[…]
(d) in the case of an applicant described in subsection 112(3), consideration shall be on the basis of the factors set out in section 97 and	*d)* s'agissant du demandeur visé au paragraphe 112(3), sur la base des éléments mentionnés à l'article 97 et, d'autre part :
(i) in the case of an applicant for protection who is inadmissible on grounds of serious criminality, whether they are a danger to the public in Canada, or	(i) soit du fait que le demandeur interdit de territoire pour grande criminalité constitue un danger pour le public au Canada,
…	[…]
114. (1) A decision to allow the application for protection has	114. (1) La décision accordant la demande de protection a pour effet de conférer l'asile au demandeur; toutefois, elle a pour effet, s'agissant de
(a) in the case of an applicant not	

described in subsection 112(3), the effect of conferring refugee protection; and	celui visé au paragraphe 112(3), de surseoir, pour le pays ou le lieu en cause, à la mesure de renvoi le visant.
(b) in the case of an applicant described in subsection 112(3), the effect of staying the removal order with respect to a country or place in respect of which the applicant was determined to be in need of protection.	

F. *ANALYSIS*

(i) Standard of review

[22] Mr Febles argues that correctness is the standard of review applicable to the RPD's interpretation of Article 1F (b) of the Convention, which is incorporated into IRPA by section 98, the RPD's enabling statute. Although reasonableness is now presumed to be the standard of review normally applied to a tribunal's interpretation of its enabling statute (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at para. 39), Mr Febles submits that the presumption of reasonableness is rebutted in this case.

[23] The Minister takes no position on this issue, arguing that the appeal must fail whichever standard of review applies, and that it is therefore unnecessary for the Court to decide the issue. Federal Court jurisprudence on the standard of review applicable to the RPD's interpretation of Article 1F (b) is not settled. For example, the Application Judge in the present case applied the reasonableness standard, while in *Feimi v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 262, the companion case before us, a different Application Judge applied correctness. The existence of this kind of uncertainty is sufficient reason for this Court to decide the standard of review applicable to the RPD's interpretation of Article 1F (b).

[24] I agree with Mr Febles that the normal presumption that reasonableness is the standard of review applicable to tribunals' interpretation of their enabling statute does not apply in this case. Article 1F (b) is a provision of an international Convention that should be interpreted as uniformly as possible: see, for example, *Jayasekara* at para. 4. Correctness review is more likely than reasonableness review to achieve this goal, and is therefore the standard to be applied for determining whether the RPD erred in law by interpreting Article 1F (b) as precluding consideration of Mr Febles' post-conviction rehabilitation and his present dangerousness. Further, the interpretation of Article 1F (b) does not give rise to any ambiguity.

[25] Accordingly, the prior jurisprudence of this Court applying the correctness standard of review to the RPD's interpretation of Article 1F (b) should be regarded as having satisfactorily resolved the issue: *Dunsmuir* para. 62.

(ii) Is rehabilitation or present dangerousness relevant to deciding if a non-political crime is "serious"?

[26] Mr Febles concedes that a crime punishable by a maximum of 10 years' imprisonment if committed in Canada is presumed by Canadian courts to be "serious" for the purpose of Article 1F (b), and that the crimes of which he was convicted in the United States fall into this category.

[27] However, he argues that the seriousness of a crime must be assessed as of the time when the exclusion issue comes to be decided. Mr Febles submits that the purpose of Article 1F (b) relevant to the present case is to protect receiving states from having to grant refugee status to dangerous criminals. Consequently, a crime should not normally be regarded as "serious" if the claimant has

served the sentence imposed and is no longer dangerous. Accordingly, the RPD erred in law when it failed to consider his rehabilitation after 1993 and whether he currently posed a danger to the Canadian public.

[28] The Application Judge regarded *Jayasekara* as precluding the RPD from considering whether Mr Febles was rehabilitated and currently dangerous. Mr Febles argues that *Jayasekara* does not resolve the issue because it is either distinguishable or wrong and should not be followed.

(a) What *Jayasekara* decided

[29] The certified question put to the Court in *Jayasekara* was whether the fact that a refugee claimant who had committed a serious crime outside Canada had served his sentence enabled him to avoid the application of Article 1F (b). After examining Canadian and international jurisprudence on the issue, the Court answered the question in the negative.

[30] In my view, the heart of the Court's reasoning in *Jayasekara* is contained in paragraph 44 of the reasons where, writing for the Court, Létourneau J.A. said:

> 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. … 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. …. [Emphasis added]

[31] An argument that a crime may be regarded as less serious years after its commission because the claimant is rehabilitated and is no longer a danger to the public would seem inconsistent with this

passage. Rehabilitation is indisputably a factor "extraneous to the facts and circumstances underlying the conviction". It is therefore not to be balanced against the presumed seriousness of the crime arising from the fact that, if committed in Canada, the crime is punishable by a maximum of at least 10 years' imprisonment.

[32] However, Mr Febles says that, while *Jayasekara* decides that completing a sentence does not in itself remove a claimant from the application of Article 1F (b), it is still a factor that the RPD may consider. If the RPD may consider sentence completion, he argues, it may also consider other post-conviction facts, including rehabilitation.

[33] In this regard, Mr Febles points to paragraph 41 of the reasons of Létourneau J.A., where he stated that if the length or completion of a sentence is to be considered under Article 1F (b), "it should not be considered in isolation." However, I cannot attach the same significance as Mr Febles to this single reference to the completion of a sentence.

[34] First, the discussion following paragraph 41 explains why the length of a sentence is an unreliable guide to the seriousness of a crime, and hence is often of little value on assessing the seriousness of the crime. The completion of a sentence is not even mentioned in this discussion. Second, neither the length nor completion of a sentence is included in the factors listed in paragraph 44 that may rebut the presumption of seriousness arising from the maximum sentence that could be imposed if the crime had been committed in Canada. Third, to interpret *Jayasekara* as allowing members of the RPD the discretion to consider completion of a sentence would likely lead to a lack of consistency in RPD decision-making bordering on arbitrariness.

[35] In short, I agree with Justice Mosley in *Camacho v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 789 at para. 16, that it follows from the reasoning in *Jayasekara* that the mitigating circumstances to be considered by the RPD when determining whether a crime is "serious" for the purpose of Article 1F (b) do not include whether the claimant is rehabilitated and a danger to the public in Canada. These considerations are "extraneous to the facts and circumstances underlying the conviction".

(b) Should *Jayasekara* be followed?

[36] In the alternative, Mr Febles says that the reasoning in *Jayasekara* is flawed and should not be followed. He identifies what he says are two errors in the Court's reasoning. First, the Court erred in distinguishing *Chan v. Canada (Minister of Citizenship and Immigration*), [2000] 4 F.C. 390 (C.A.) (*Chan*) on the ground that there had been a material amendment to the legislation after *Chan* was decided. Second, the authorities cited for the propositions contained in paragraph 44 do not in fact support them.

[37] In order to deal with the first point, it is necessary to briefly retrace the history of the interpretation of Article 1F (b) by this Court.

[38] *Chan* held that Article 1F (b) applied to refugee claimants who were seeking to avoid extradition from Canada, and not to those who had been convicted of a crime outside Canada and had served their sentence before arriving here. To interpret the exclusion clause as applicable to the latter category of claimants would, said the Court, conflict with the scheme of the legislation, and

> operate to automatically deny that person's right to a refugee hearing, regardless of [the person's] attempts at rehabilitation and whether or not [they] constitute a danger to the Canadian public.

In particular, the Court noted that criminality does not automatically render individuals inadmissible if the MCI is satisfied that they are rehabilitated. In the passage quoted above the Court may have left open the possibility that convicted criminals who have served their sentence could be excluded by Article 1F (b) if they were a danger to the public in Canada.

[39] This Court subsequently took a broader view of Article 1F (b) than that advanced in *Chan*. Thus, in *Zrig v. Canada (Minister of Citizenship and Immigration)*, 2003 FCA 178, [2003] 3 F.C. 761, the claimant relied on *Chan* to argue that Article 1F (b) did not apply to him because he could not be extradited for the crimes that there were serious reasons for considering that he had committed, namely, being complicit by association in serious non-political crimes committed by an organization in which he had a leadership role.

[40] The Court did not agree. Writing for the majority, Nadon J.A. said (at paras. 66 and 79 in particular) that a refugee claimant could be excluded under Article 1F (b) when there were serious reasons for considering that he had committed a serious non-political crime. It was not relevant for this purpose, he said, that the claimant could not be extradited because, for example, Canada had not concluded an extradition treaty with the state where the claimant's crime was allegedly committed, or a specific crime could not be attributed to the claimant.

[41] In concurring reasons, Décary J.A. (at paras. 118-129) reviewed the various purposes that Article 1F (b) was intended to serve, including (at para. 118)

> … ensuring that the country of refuge can protect its own people by closing its borders to criminals whom it regards as undesirable because of the seriousness of the ordinary crimes which it suspects such criminals of having committed.

He further explained this purpose by saying (at para. 119):

> … [It] indicates that while the signatories were prepared to sacrifice their sovereignty, even their security, in the case of the perpetrators of political crimes, they wished on the contrary to preserve them for reasons of security and social peace in the case of the perpetrators of serious ordinary crimes. This … purpose also indicates that the signatories wanted to ensure that the Convention would be accepted by the people of the country of refuge, who might be in danger of having to live with especially dangerous individuals under the cover of a right of asylum.

[42] I should point out that, unlike Mr Febles, Zrig had not been convicted of any crime, much less served a sentence. Hence, in formulating his understanding of the purposes of Article 1F (b), Décary J.A. was not addressing the specific question at issue in the present appeal, namely, whether Article 1F (b) applies to a refugee claimant who has completed a sentence for a crime which, if committed in Canada, is punishable by a maximum of at least 10 years' imprisonment, but who poses no danger to the public.

[43] It is thus clear from *Zrig* that, even before *Jayasekara* was decided, the Court had disavowed the holding in *Chan* that Article 1F (b) only extends to preventing a refugee claimant from avoiding extradition. *Jayasekara* hammered another nail into *Chan*'s coffin by deciding that Article 1F (b) does not cease to apply because the claimant has been convicted of a serious crime and has completed the sentence. This conclusion had been foreshadowed by Décary J.A. in *Zrig*, where he said (at para. 129) that Article 1F (b) enabled a state to exclude perpetrators of serious crimes, whether or not they had been convicted and served the sentences imposed on them.

[44] Further, by excluding facts "extraneous to the facts and circumstances underlying the conviction" from the factors to be considered in assessing the seriousness of the crime, the Court in

Jayasekara in effect overruled the holding in *Chan* that Article 1F (b) does not exclude a claimant who has completed his sentence, unless, perhaps, the claimant poses a danger to the public in Canada.

[45] I am willing to assume for present purposes that the Court in *Jayasekara* erred in saying that statutory amendments had undermined the conclusion in *Chan* that a wider reading of Article 1F (b) was inconsistent with the scheme of the statute. Nonetheless, this error is an insufficient basis for finding that the decision in *Jayasekara* was wrongly decided and should not be followed. Having approved the multiple purposes of Article 1F (b) that Décary J.A. identified in *Zrig* and having reviewed international jurisprudence, the Court clearly intended to restate the applicable law. In these circumstances, the error alleged is not material. In the light of *Zrig* and *Jayasekara*, it is clear that *Chan* is no longer good law.

[46] Nor do I agree with Mr Febles' second ground for saying that *Jayasekara* was wrongly decided, namely that the cases cited by the Court in *Jayasekara* do not support the propositions in paragraph 44 of the reasons. In my view, only one of those cases (*Miguel-Miguel v. Gonzales*, 500 F.3d 941) was arguably not directly on point. This is not a basis on which *Jayasekara* can be said to have been wrongly decided.

(c) Interpreting Article 1F (b)

[47] This is sufficient to dispose of the appeal. Nonetheless, because the parties have fully canvassed the meaning of Article 1F (b) as it appears in IRPA, and the issue is important, I shall address Mr Febles' broader argument that *Jayasekara* should not be followed because it rests on a

fundamental misunderstanding of the purposes of Article 1F (b) and renders incoherent the scheme of IRPA with respect to criminality.

[48] Mr Febles' argument is that Article 1F (b) applies first and foremost to refugee claims by fugitives from justice in the country where they are suspected of having committed a serious non-political crime. It was intended to apply only exceptionally to those who have completed their sentence, that is, when they pose a continuing danger to the receiving state.

[49] This position is supported by the United Nations High Commissioner for Refugees, (UNHCR) *Guidelines on International Protection: Application of Exclusion Clause: Article 1F of the Convention relating to Refugees,* (HCR/GIP/03/05, 4 September, 2003) (Guidelines). Paragraph 23 of the Guidelines states that a claimant's expression of regret for the crime may be considered in determining whether exclusion is justified. The UNHCR's *Handbook on Procedures and Criteria for determining Refugee status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979) also indicates that Article 1F (b) was intended to protect receiving states from having to afford refugee protection to dangerous criminals: see paras. 148 and 157.

[50] These documents are not determinative of the interpretation of the Convention. In my view, on the basis of the text of Article 1F (b), its known purposes, the scheme of IRPA, and international jurisprudence, Article 1F (b) should be interpreted as excluding rehabilitation and present dangerousness from the assessment of the seriousness of a crime committed by a refugee claimant before coming to Canada.

(i) *text*

[51] Article 1F (b) applies to "a serious crime of a non-political nature". It is drafted in very broad terms. Unlike other provisions of IRPA, Parliament has not expressly limited the application of the Article to claimants who pose a current danger to the Canadian public. Courts should normally avoid an interpretation of legislation that requires words to be read into it: *R. v. McIntosh*, [1995] 1 S.C.R. 686 at para. 26; and see *S. v. Status Appeals Authority*, [1998] 2 NZLR 291 (CA) applying this interpretative principle to Article 1F (b).

[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.

(ii) *purposes*

[53] The interpretation of statutory language must always be considered in light of the purposes of the provision in question. However, when the meaning of a statute seems clear and unequivocal from its text, statutory purpose may be less important in the interpretative exercise, although "the court must always seek to read the provisions of an Act as a harmonious whole": *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 at para. 10.

[54] Mr Febles' central argument is that because he has served his sentence, and is therefore not a fugitive from justice in the United States, the only purpose of Article 1F (b) relevant to the facts of this case is the protection of the public in Canada from currently dangerous criminals.

[55] Accordingly, he says, the RPD could only have found that he was excluded from refugee status after considering whether he was rehabilitated and currently posed a danger to the public in Canada. An interpretation of Article 1F (b) to include non-fugitives who are rehabilitated and pose no danger to the host state would, he argues, be inequitable.

[56] I do not agree. In my view, Mr Febles' argument oversimplifies the purposes underlying Article 1F (b). In *Jayasekara*, Létourneau J.A. quoted with approval (at para. 28) the description of the various purposes of Article 1F (b) identified by Décary J. A. in *Zrig*, which I have set out at paragraph 41 of these reasons.

[57] Décary J.A. was not, of course, dealing with the issue raised by the present appeal. It is not altogether clear whether he was of the view that the purposes of Article 1F (b) requires a discrete consideration of the claimant's present dangerousness, or whether he considered that the dangerousness of a claimant was inherent in the nature of the crime committed.

[58] However, the issue now before us has recently been addressed by the European Court of Justice and the German Federal Administrative Court in a case involving a refugee claimant who had not completed his sentence in Turkey before he went to Germany and claimed refugee status. The Courts stated that Article 1F (b), which is incorporated into the law of the European Union by

Directive 2004/83/EC, does not require that a refugee claimant with a serious criminal conviction must also pose a present danger to the receiving state. Because international law should be interpreted as uniformly as possible, this Court should attach significant weight to pronouncements by senior courts in other jurisdictions on the very issue that is before us.

[59] Thus, in *B (Area of Freedom, Security and Justice)*, [2010] EUECJ C-57/09 (*B*), the European Court wrote (at para. 104):

> … the grounds for exclusion at issue were introduced with the aim of excluding from refugee status persons who are deemed to be undeserving of the protection which that status entails and of preventing that status from enabling those who have committed certain serious crimes to escape criminal liability. Accordingly, it would not be consistent with that dual objective to make exclusion from refugee status conditional upon the existence of a present danger to the host Member State. [Emphasis added]

[60] The German Federal Administrative Court (BVerwG 10 C 48.07 OVG 8 A 2632/06.A, October 14, 2008), which had referred *B* to the European Court, delved deeper into the purposes underlying Article 1F (b) by examining its legislative history. Thus, it wrote (at paras. 29-30):

> [The exclusion clauses] are intended to protect refugee status from abuse, by keeping it from being granted to undeserving applicants.
>
> …
>
> According to the *Travaux Préparatoires* [of the Convention], the fundamental difference between reasons for exclusion – tied to previous personal misconduct – and the exceptions from the non-*refoulement* imperative – intended to protect the host state – was evident in the deliberations. In the case of the exclusion clauses, the deciding factor for the representatives of the states was not whether the refugee currently posed a danger, but the distinction between 'bona fide' and criminal refugees. … The group of persons covered by the exclusion clauses because of their misconduct, was not to be set on a par with 'bona fide refugees.' The intent was to prevent refugee status from being discredited by including criminals in the group of recognised refugees ('refugees whose actions might bring discredit on that status'…). There is no support in either the background materials to the Geneva Refugee Convention or the international practice of nations for the UNHCR's opinion that the aim and purpose of

> considering a serious non-political crime a reason for exclusion is to protect the community of a receiving country from the danger as admitting a refugee who has committed a serious common crime. [Emphasis added]

[61] The Court stated its conclusion succinctly (at para. 28):

> Mere 'unworthiness for protection' on the basis of prior acts suffices for the application of the exclusion clauses; it is not necessary that the foreigner should still pose such dangers as he manifested in his previous conduct.

[62] I agree that it is clear from the *Travaux Préparatoires* that the drafters did not intend to limit the exclusion provision to fugitives from justice. However, I am less sure than the Courts in *B* that the *Travaux Préparatoires* conclusively demonstrate that the drafters intended to exclude other refugee claimants with a serious criminal record, even though they were rehabilitated and not a danger. Much of the discussion involved the definition of the crimes that would exclude a claimant from refugee status, and the concern of the United Kingdom Delegate that individuals who had committed a minor offence should not be excluded. On the other hand, I do not see in the *Travaux Préparatoires* evidence of an intention on the part of the Delegates only to exclude from refugee status criminals convicted of a serious crime who have served their sentence if they remain dangerous.

[63] I conclude, therefore, that the purposes underlying Article 1F (b) do not so clearly limit its intended scope to protecting the state of refuge from currently dangerous criminals as to warrant an interpretation that is markedly narrower than the ordinary meaning of the text.

(iii) statutory context

[64] Mr Febles argues that a theme running through IRPA is that the adverse consequences that flow from serious criminality can be mitigated if the claimant satisfies the MCI that she is

rehabilitated. Thus, he says, it would be inconsistent with the statutory scheme of IRPA to interpret Article 1F (b) as excluding from refugee status those who have committed serious crimes outside Canada, regardless of how long ago the crimes were committed or whether they are rehabilitated and currently pose no danger to the public.

[65] The problem with this argument, in my view, is that it pays insufficient attention to the different purposes served by the provisions in question. A claim is ineligible even to be referred to the RPD for adjudication if the claimant is inadmissible for serious criminality by virtue of a conviction outside Canada and the Minister is of the opinion that the claimant is a danger to the public in Canada: IRPA, paragraphs 101(1)(*f*), and (2)(*b*). A purpose of this provision is to enable the speedy removal from Canada of dangerous persons: *Harris v. Canada (Minister of Citizenship and Immigration)*, 2001 FCA 235, [2001] 4 F.C. 495 at para. 28.

[66] There is no inconsistency between a CBSA officer's decision not to seek an opinion from the MCI on whether Mr Febles' claim was ineligible to be referred to the RPD because of his present dangerousness, and the decision of the MPSEP to intervene at the RPD to argue that Article 1F (b) excludes Mr Febles from the refugee definition because of his convictions. The tests for ineligibility and exclusion are simply not the same.

[67] Dangerousness to the Canadian public is also relevant under IRPA's provisions on pre-removal risk assessment. Thus, under the statutory provisions relevant to the present case, a claim for protection by Mr Febles, a person inadmissible by reason of serious criminality, would be considered by the MCI on the basis of the risks set out in section 97 of IRPA, and whether he is a danger to the

public: paragraphs 112(3)(*b*) and 113(d)(*i*). Thus, protecting the public from convicted criminals who still pose a danger to Canada may trump a claim for protection.

[68] If an application by Mr Febles for protection were allowed on a PRRA, on the ground that the personal risks that he would face if returned outweighed the risk to the Canadian public if he remained, his removal would be stayed: paragraph 114(1)(*b*). Further, section 7 of the *Canadian Charter of Rights and Freedoms* (Charter) will normally also prevent the MCI from removing an individual to a country where their Charter-protected rights may be in jeopardy: *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3 at para. 58.

[69] Applying for and obtaining a stay of removal from the MCI under the PRRA provisions may not be as satisfactory to Mr Febles on grounds of process and substance as an application to the RPD for the grant of refugee protection and the rights attached to that status. Nonetheless, protection would comply with the non-*refoulement* principle for those who are excluded from refugee status for serious criminality, but if removed are at risk of death, torture, cruel and unusual treatment or punishment, or the deprivation of other rights guaranteed by section 7 of the Charter.

[70] The availability of protection under the PRAA provisions for non-dangerous criminals thus goes a long way to answering Mr Febles' argument that it is inequitable to exclude individuals from refugee protection on the basis of their criminal record and the surrounding facts without any consideration of whether they are currently dangerous.

[71] Mr Febles also argues that the broad interpretation of Article 1F (b) is inconsistent with the provision that individuals are not inadmissible under subsection 36(1) of the IRPA if they satisfy the MCI that they are rehabilitated and meet the criteria prescribed in paragraph 36(3)*(c)*. It suffices to say that the purposes served by the inadmissibility provisions are different from those of Article 1F (b).

[72] For example, one reason for the exclusion of claims for refugee protection by those who have committed serious crimes appears to be to protect the integrity of refugee status, a purpose for which an assessment of their current dangerousness is irrelevant. In addition, as already noted, those excluded from refugee status on the ground of serious criminality may still be permitted to remain in Canada if facing any of the specified risks in the country to which they would otherwise be removed.

[73] In summary, there is, in my view, no inconsistency between a broad interpretation of Article 1F (b) and other provisions of the IRPA dealing with criminality that would warrant interpreting the broad language of Article 1F (b) in the limited manner urged by Mr Febles. The scheme of IRPA suggests to me that when Parliament intends to make rehabilitation relevant, it says so expressly.

G. *CONCLUSIONS*

[74] For these reasons, I would dismiss the appeal and answer the certified question as follows.

Question: **When applying Article 1F (b) of the *United Nations Convention relating to the Status of Refugees*, is it relevant for the Refugee Protection Division of the Immigration and Refugee Board to consider the fact that the refugee claimant has been rehabilitated since the commission of the crime at issue?**

Answer: No.

"John M. Evans"

J.A.

"I agree
K. Sharlow J.A."

STRATAS J.A. (Concurring Reasons)

[75] I wish to comment on my colleague's discussion of the standard of review (paragraphs 22-25 of his reasons). In particular, I wish to address the suggestion that the need for uniformity in the interpretation of Article 1F (b) is a factor in favour of correctness review.

[76] World-wide uniform interpretations of the provisions in international conventions may be desirable. However, that depends on the nature of the provision being interpreted and the quality and acceptability of the interpretations adopted by foreign jurisdictions. For example, foreign interpretations may not always embody values and principles to which we subscribe. I do not read paragraph 4 of *Jayasekara*, *supra* as saying something different on this.

[77] In particular cases, our courts are well-placed to assess whether their decisions should conform to foreign decisions. But some of our tribunals are equally well-placed to assess that – sometimes even better-placed – armed as they are with specialized understandings, policy appreciation, and expertise. In some cases, reasonableness review, not correctness review, may be warranted.

[78] In *Dunsmuir*, *supra*, the Supreme Court has developed certain categories of questions which require correctness review. The interpretation of provisions in international conventions is not yet one of them. Nor should it be. International conventions address many subjects, some quite technical and narrow. Some of those subjects can benefit from interpretations and applications by tribunals with

specialized understandings, policy appreciation, and expertise. Again, on occasion, reasonableness review, not correctness review, may be warranted.

[79] In the end, the choice of standard of review makes no practical difference in this case:

- *Reasonableness review*. The cogent reasons offered by my colleague amply demonstrate that the RPD's interpretation of Article 1F (b) is well within the range of the acceptable and defensible and, therefore, passes muster under reasonableness review.

- *Correctness review*. The standard of review was not specifically addressed in *Jayasekara, supra,* but I agree that the reasoning in it smacks of correctness review. If, as my colleague suggests, the standard of correctness review is to be adopted in this case in accordance with paragraph 62 of *Dunsmuir, supra,* his reasoning amply demonstrates the correctness of the RPD's decision.

[80] For this reason, I agree with the Minister's submission that we need not determine the standard of review in this case.

[81] Subject to these comments, I concur with my colleague's reasons.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

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