Federal Court of Appeal  Cour d'appel fédérale

Date: 20121207

Docket: A-90-12

Citation: 2012 FCA 325

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

BETWEEN:

ERIK FEIMI

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.
STRATAS J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20121207

Docket: A-90-12

Citation: 2012 FCA 325

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

BETWEEN:

ERIK FEIMI

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT

EVANS J.A.

A. *INTRODUCTION*

[1] This is an appeal by Erik Feimi, a national of Albania, from a decision by the Federal Court (2012 FC 262), in which Justice Martineau (Application Judge) dismissed his application for judicial review to set aside a decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB), dated July 26, 2011.

[2] In that decision, the RPD rejected Mr Feimi's claim for refugee protection, on the ground that he was excluded from the definition of a refugee by Article 1F (b) of the *United Nations Convention relating to the Status of Refugees*, July 28, 1951, [1969] Can. T.S. No. 6 (Convention), which is incorporated into Canadian domestic law by section 98 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA). On the basis of Mr Feimi's conviction in Greece in 1997 for the crime of murder in a fit of anger, the RPD held that there were serious reasons for considering that he had committed a "serious non-political crime" within the meaning of Article 1F (b).

[3] The Court heard this appeal after *Febles v. Minister of Citizenship and Immigration* (Court File No. A-379-11). The issues in the two cases overlap to a significant degree, but not entirely. Central to both is the following question: is a claimant's rehabilitation and current dangerousness relevant to an assessment by the RPD of whether a crime committed by a refugee claimant before arriving in Canada is "serious" for the purpose of Article 1F (b), and thus excludes her from obtaining refugee status?

[4] In *Febles v. Canada (Minister of Citizenship and Immigration)*, 2012 FCA 324 (*Febles*), the Court decides that a claimant's rehabilitation and current dangerousness are not relevant to an exclusion determination under Article 1F (b). A copy of the reasons given in *Febles* will be inserted into Mr Feimi's file (Court File No. A-90-12). It is not necessary to repeat here the reasons given in *Febles* on the issues common to both cases, or to set out again the relevant provisions of IRPA.

B. *FACTUAL BACKGROUND*

[5] A Greek court found that, while living in Greece, Mr Feimi had fatally stabbed another Albanian in the course of a fight that had resulted from his attempt to protect his sister from a sexual assault by the deceased. He was convicted of murder in a fit of anger, carrying arms without a licence, and the illegal use of arms. He was sentenced to imprisonment for 12 years and six months, which a Greek appellate court subsequently reduced by 12 months.

[6] Mr Feimi was released from prison on June 11, 2003, after serving half of his original sentence. Greek authorities escorted him to the Albanian border. He and his family say that they could no longer live in Albania because the killing had provoked a blood feud between them and the family of the deceased.

[7] Mr Feimi arrived in Canada in December 2004 and claimed refugee protection. He was referred to the Immigration Division of the IRB. On April 12, 2005, it found him inadmissible for serious criminality and issued a deportation order against him.

[8] On June 1, 2005, the Canada Border Services Agency (CBSA), an agency of the Ministry of Public Safety and Emergency Preparedness, informed Mr Feimi that it was seeking an opinion on whether he was a danger to the public in Canada. On January 4, 2007, a delegate of the Minister of Citizenship and Immigration (MCI) declined to provide an opinion that Mr Feimi was dangerous. Accordingly, his claim for refugee protection was not ineligible to be referred to the RPD: IRPA, para. 101(2)(*b*).

[9] On March 22, 2010, the Minister of Public Safety and Emergency Preparedness (MPSEP) served notice that he intended to intervene at the RPD hearing to make submissions that Mr Feimi was excluded from refugee protection by Article 1F (b) of the Convention on the ground that there were serious reasons for considering that he had committed a "serious non-political crime" before his arrival in Canada.

C. *DECISION OF THE RPD*

[10] On July 26, 2011, the RPD held that the crime of which Mr Feimi had been convicted in Greece was the equivalent of manslaughter. The crime was presumptively "serious" because if it had been committed in Canada it would have been punishable by a maximum of at least 10 years' imprisonment. The RPD also considered the factors listed in *Jayasekara v. Canada (Minister of Citizenship and Immigration),* 2008 FCA 404, [2009] 4 F.C.R. 164 (*Jayasekara*) for determining if Mr Feimi's crime was "serious".

[11] The RPD concluded that the circumstances surrounding the commission of the crime and the judicial process in Greece were insufficient to rebut the presumption of seriousness arising from the length of the maximum sentence that the equivalent offence carried in Canada. Having found that Mr Feimi had not shown remorse for his crime, the RPD did not accept that he was rehabilitated.

D. *DECISION OF THE FEDERAL COURT*

[12] In dismissing Mr Feimi's application for judicial review of the RPD's decision, the Application Judge reached the following conclusions. First, the MPSEP is entitled to intervene at an

RPD hearing, even though the MCI had previously denied a request for an opinion that the claimant was a danger to the public in Canada, and that his claim for refugee protection was therefore not ineligible to be referred to the RPD. Second, since a claimant's dangerousness is not relevant to a determination of whether a claim for refugee protection is excluded, the RPD did not err in law by failing to take into account the fact that Mr Feimi had not re-offended, and to adequately consider whether he was rehabilitated and posed a current danger. Third, on the basis of both the material before it and the *Jayasekara* factors, the RPD's conclusion that there were serious reasons for considering that Mr Feimi had committed a serious crime for the purpose of Article 1F (b) was not unreasonable.

[13] The Application Judge certified the following questions for appeal pursuant to paragraph 74(*d*) of IRPA.

> **1. Once the Minister of Citizenship and Immigration denies the request of the Canada Border Service Agency in the Ministry of Public Safety and Emergency Preparedness for a danger opinion for the purpose of paragraph 101(2)(*b*) of the *Immigration and Refugee Protection Act* can the Minister of Public Safety and Emergency Preparedness seek exclusion at a refugee protection hearing of the Refugee Protection Division, Immigration and Refugee Board based on the same underlying criminal conduct on which the Canada Border Service Agency sought a danger opinion?**
>
> **2. When applying Article 1F (b) of the *United Nations Convention relating to the Status of Refugees* is it relevant for the Refugee Protection Division, Immigration and Refugee Board to consider:**
>
> > **(a) whether the refugee claimant has been rehabilitated since the commission of the crime at issue; and**
> >
> > **(b) the fact that the Minister of Citizenship and Immigration has determined the refugee claimant not to be a danger to the public in Canada?**

E. *ANALYSIS*

(i) Standard of review

[14] The principal legal issue underlying the certified questions is the interpretation of Article 1F (b): in particular, whether a refugee claim is excluded by Article 1F (b) when a person who has committed a serious crime before arriving in Canada is rehabilitated and poses no current danger to the public. For the reasons given in *Febles* (at paras. 22-25), correctness is the standard of review applicable to this question.

[15] The second issue is whether, on the facts of this case, the MPSEP exercised his discretion unlawfully by intervening in Mr Feimi's exclusion hearing to make representations that his refugee claim was excluded by Article 1F (b). Reasonableness is the standard of review applicable to the exercise of statutory discretion: *Dunsmuir v*. *New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 53 (*Dunsmuir*).

[16] In addition to the certified questions, Mr Feimi challenges the conclusion of the RPD that his crime was "serious", even if it was not required to consider whether he was currently dangerous. Reasonableness is the standard applicable when, as here, questions of law and fact are "intertwined … and cannot be readily separated": *Dunsmuir* at para. 53.

[17] On an appeal from the Federal Court in an administrative law judicial review matter, this Court in effect stands in the shoes of the Federal Court and asks if the Application Judge selected the appropriate standard of review and, if so, applied it correctly: *Prairie Acid Rain Coalition v*.

Canada (Minister of Fisheries and Oceans), 2006 FCA 31, [2006] 3 F.C.R. 610 at paras. 13-14; *Canada Revenue Agency v. Telfer*, 2009 FCA 23, [2009] 4 C.T.C. 123 at paras. 18-19.

(ii) The certified questions

> **Question 1: Once the Minister of Citizenship and Immigration denies the request of the Canada Border Service Agency in the Ministry of Public Safety and Emergency Preparedness for a danger opinion for the purpose of paragraph 101(2)(b) of the *Immigration and Refugee Protection Act* can the Minister of Public Safety and Emergency Preparedness seek exclusion at a refugee protection hearing of the Refugee Protection Division, Immigration and Refugee Board based on the same underlying criminal conduct on which the Canada Border Service Agency sought a danger opinion?**

[18] The claimant's dangerousness is the key component of a danger opinion given by the MCI at the request of the CBSA for the purpose of determining whether a refugee claim is eligible to be referred to the RPD. However, the Court has held in *Febles* that a claimant's current dangerousness is not relevant to a determination of whether the claim is excluded from the refugee definition by Article 1F (b).

[19] IRPA imposes no express limitations on the discretion of the MPSEP to intervene before the RPD:

170. The Refugee Protection Division, in any proceeding before it,	170. Dans toute affaire dont elle est saisie, la Section de la protection des réfugiés :
…	[…]
(e) must give the person and the Minister a reasonable opportunity to present evidence, question witnesses and make representations;	*e)* donne à la personne en cause et au ministre la possibilité de produire des éléments de preuve, d'interroger des témoins et de présenter des observations;
…	[…]

[20] Mr Feimi's argument that the MPSEP improperly exercised his discretion to intervene at the exclusion hearing was based largely on the fact that the MCI had declined to give an opinion that Mr Feimi was a danger to the public in Canada and that his claim was therefore not ineligible to be referred to the RPD. Mr Feimi submits that the fact that the MCI did not consider him a danger in effect estops the MPSEP from intervening before the RPD to argue for exclusion on essentially the same materials as those on which the MCI denied a request for a danger opinion.

[21] I do not agree. Since we have held in *Febles* that current dangerousness is not an issue at an exclusion hearing, there is no possible basis for concluding that the MCI's refusal of a danger opinion at the eligibility stage made it unreasonable for the MPSEP to intervene at Mr Feimi's exclusion hearing to argue that his crime was serious and Article 1F (b) applies. The issues at the eligibility and exclusion stages of processing a refuge claim are not the same. Thus, no question of estoppel can arise, even when the same criminal conduct underlies both the danger opinion at the eligibility stage and intervention at the exclusion hearing.

[22] Finally, the broad scope of the discretion of the MPSEP to intervene before the RPD imposes a heavy burden on an applicant to establish that it was exercised unreasonably. Mr Feimi has not even come close to discharging it.

[23] Accordingly I would answer Question 1 in the affirmative.

Question 2: When applying Article 1F (b) of the *United Nations Convention relating to the Status of Refugees* is it relevant for the Refugee Protection Division, Immigration and Refugee Board to consider:

> **(a) whether the refugee claimant has been rehabilitated since the commission of the crime at issue?**
>
> **(b) The fact that the Minister of Citizenship and Immigration has determined the refugee claimant not to be a danger to the public in Canada?**

[24] *Febles* answers both parts of this question. The rehabilitation of a claimant after the commission of a crime and his current dangerousness are irrelevant at the exclusion stage. Consequently, the fact that the MCI refused to give a danger opinion at the eligibility stage of the process is immaterial at the exclusion stage.

[25] Mr Feimi advanced an argument about the interpretation of Article 1F (b) based on the structure of the IRPA that was not made in *Febles*. He submitted that, if dangerousness is not relevant at the exclusion stage, a person who has not been found at the eligibility stage to be a danger, but whose claim is nonetheless excluded by Article 1F (b), would inevitably be granted protection at the pre-removal risk assessment stage (PRRA). This is because section 113 of the IRPA states that at a PRRA, the Minister is to weigh the risk to the individual, if removed, against the risk to the public in Canada posed by the claimant's dangerousness.

[26] Mr Feimi argues that since the MCI has already refused to give a danger opinion there is nothing to weigh in the PRRA, and protection must automatically be granted. He concludes that an interpretation of Article 1F (b) that makes the PRRA pointless and creates unnecessary and wasteful administrative duplication cannot be correct. This problem would not occur, he says, if the RPD took current dangerousness into account in determining whether the claimant should be excluded from the status of refugee.

[27] I do not agree that interpreting Article 1F (b) to exclude a refugee claim by a person who has committed a serious crime, but is not now a danger, is inconsistent with the PRRA provisions of IRPA. First, an application by Mr Feimi for protection in a PRRA would not be pointless, because it would provide an opportunity for him to satisfy the MCI that he is a person at risk. Second, if Mr Feimi were found to be at risk, it would be open to the MCI to consider whether he is a danger to the public in Canada in light of the information then available, and to balance the risk to him if he is removed against the danger to the public if he is not.

[28] For these reasons, and those given in *Febles*, I would answer both parts of Question 2 in the negative.

(iii) Was the decision of the RPD that Mr Feimi's crime was "serious" unreasonable?

[29] The argument here is that, even if a claimant's dangerousness is irrelevant to a determination by the RPD of whether a crime is "serious" so as to exclude a refugee claim, the RPD in this case applied the *Jayasekara* factors unreasonably.

[30] Mr Feimi challenged the RPD's reasoning on some of the circumstances surrounding the crime and the fairness of the process before the Greek courts. As for the circumstances surrounding the crime, Mr Feimi relies principally on what he says is an erroneous finding by the RPD on the number of stab wounds that he inflicted on the deceased and the RPD's apparent confusion over whether there was one coroner's report or two. As evidence of the unfairness of the Greek judicial process, Mr Feimi claims that he was not provided with an interpreter at the trial and that his legal representation was inadequate.

[31] The question before the RPD was whether there were "serious reasons for considering" that Mr Feimi had committed a "serious non-political crime". It is undisputed that his crime was not political and that it was presumptively serious because, if he had been found guilty in Canada of the equivalent crime of manslaughter, he could have been sentenced to a maximum of at least 10 years' imprisonment.

[32] After a careful examination of the record, including the RPD's reasons, the Application Judge was not satisfied that the decision under review was unreasonable on the basis of either the evidence before the RPD or the factors identified in *Jayasekara*.

[33] For substantially the reasons given by the Application Judge, I am of the view that the intervention of this Court is not warranted, even though parts of the RPD's reasons may be open to question. The RPD's overall conclusion on the material before it that there were serious reasons for considering that Mr Feimi had committed a serious crime was not unreasonable.

F. *CONCLUSIONS*

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

> **Question 1: Once the Minister of Citizenship and Immigration denies the request of the Canada Border Service Agency in the Ministry of Public Safety and Emergency Preparedness for a danger opinion for the purpose of paragraph 101(2)(b) of the *Immigration and Refugee Protection Act* can the Minister of Public Safety and Emergency Preparedness seek exclusion at a refugee protection hearing of the Refugee Protection Division, Immigration and Refugee Board based on the same underlying criminal conduct on which the Canada Border Service Agency sought a danger opinion?**
>
> **Answer : Yes**

Question 2: **When applying Article 1F (b) of the *United Nations Convention relating to the Status of Refugees* is it relevant for the Refugee Protection Division, Immigration and Refugee Board to consider:**

(a) whether the refugee claimant has been rehabilitated since the commission of the crime at issue?

(b) The fact that the Minister of Citizenship and Immigration has determined the refugee claimant not to be a danger to the public in Canada?

Answer: **(a) No**

(b) No

"John M. Evans"

J.A.

"I agree
K. Sharlow J.A."

"I agree David Stratas J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-90-12
STYLE OF CAUSE:	FEIMI v MCI
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	November 19, 2012
REASONS FOR JUDGMENT BY:	EVANS J.A.
CONCURRED IN BY:	SHARLOW, STRATAS JJ.A.
DATED:	December 7, 2012

APPEARANCES:

David Matas	FOR THE APPELLANT
Sharlene Telles-Langdon	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Barrister & Solicitor Winnipeg, Manitoba	FOR THE APPELLANT
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT