Federal Court  Cour fédérale

**Date: 20220513**

**Docket: IMM-3694-20**

**Citation: 2022 FC 711**

**Toronto, Ontario, May 13, 2022**

**PRESENT: Justice Andrew D. Little**

**BETWEEN:**

**A.B.**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

JUDGMENT AND REASONS

[1] The applicant asks this Court to set aside a decision of the Refugee Appeal Board (the *"RAD"*) dated July 27, 2020. The RAD concluded that he was neither a Convention Refugee under section 96 nor a person in need of protection under subsection 97(1) of the *Immigration and Refugee Protection Act* (the "IRPA").

[2] For the RAD, the determinative issue was exclusion under IRPA section 98 and Article 1F(b) of the Convention. The RAD determined that the applicant had committed a serious non-

political crime outside Canada, namely, his sustained and frequent use of a fraudulent passport he knew to be forged for the purposes of subparagraph 57(1)(*b*)(i) of the *Criminal Code*, RSC 1985, c C-46.

[3] Applying the judicial review principles described in *Vavilov v Canada (Citizenship and Immigration)*, 2019 SCC 65, I have concluded that the RAD's decision was reasonable.

[4] The application will therefore be dismissed.

## I. Background and Events Leading to this Application

[5] The applicant is a citizen of Iran. His claim for protection was based on his fear of the Iranian government targeting him after he refused to complete corrupt business deals for the government.

[6] In 2010, the applicant travelled to Malaysia. There, he responded to an advertisement in a Farsi magazine claiming to offer assistance to obtain a passport from Guatemala. The applicant paid an agent US$70,000 and provided his Iranian birth certificate. He also provided the agent with a false name for use on the passport. He received the Guatemalan passport in 2011.

[7] In September 2013, the applicant fled Iran permanently using the Guatemalan passport.

[8] Prior to leaving Iran, the applicant used the Guatemalan passport to travel to the Seychelles and to register a business in Dubai in order to be eligible to move there.

[9] After he fled Iran, he used the Guatemalan passport to move to Dubai and obtain a driver's license. He also travelled to six countries in Western Europe and to several other countries. He used it to apply for a temporary resident visa in Canada, which was rejected. He used it on a visit to New Zealand, where he used it to apply for visas and permanent resident status. He used it again for a travel visa for Australia and an application for a visitor visa, which was not issued. Further, he purchased property in New Zealand worth $3 million.

[10] In addition, the applicant used the Guatemalan passport to apply for citizenship and a passport in Antigua and Barbuda. He used his passport from Antigua and Barbuda to travel.

[11] The applicant claimed that he continued to use his Guatemalan passport to avoid being tracked by Iranian agents. However, he began to suspect that the Iranian government had located him in New Zealand and was providing false information to the government of New Zealand about him. In May 2015, he therefore fled to Canada and submitted a claim for refugee protection soon after.

[12] The applicant claimed that he did not know his passport was fraudulent until July 2015.

## II. The RPD and RAD Decisions

[13] The Refugee Protection Division (the "RPD") concluded that the applicant was excluded from refugee protection under Article 1F(b) of the Convention and section 98 of the IRPA. The RPD determined that he had used a forged passport in Canada, conduct captured by sections 57 and 403 of the *Criminal Code*. The RPD concluded that the crimes were serious, because those provisions of the *Criminal Code* carried maximum terms of imprisonment of 14 and 10 years, respectively.

[14] On appeal, the RAD agreed with the RPD's determination relating to exclusion. The RAD found that the applicant's actions were equivalent to uttering a forged passport under subparagraph 57(1)(*b*)(i) of the *Criminal Code*. The RAD concluded that the RPD had erred by finding that the applicant's actions were captured by section 403. The RAD also concluded that the RPD erred by presuming the seriousness of the conduct based on the maximum length of the criminal sentence under section 57 and by failing to apply the Supreme Court's decision in *Febles v Canada*, 2014 SCC 68, [2014] 3 SCR 431.

[15] However, the RAD found the RPD was correct to conclude that the applicant was excluded under Article 1F(b) and IRPA section 98 for using a forged passport. The RAD found that the applicant's testimony that he believed the passport to be genuine was "a clear implausibility". The RAD found that the applicant paid the agent US$70,000 and had no contact with Guatemalan authorities to obtain the passport. He invented an identity for himself and chose the name that was to appear in the passport, without registering an unofficial name change in any country.

[16] The RAD noted that the applicant did not solely use the Guatemalan passport to escape Iran, but also used it to travel to Western Europe, Malaysia, Oman and Canada, to open businesses and apply for residency in New Zealand. The RAD concluded that he "uttered a forged passport, using it while he knew it was forged as it has been issued to an identity invented by" the applicant. Therefore, his actions fell within section 57 of the *Criminal Code*.

[17] The RAD concluded that the crime and the applicant's actions were serious. As noted already, the RAD concluded that the RPD erred by failing to consider the principles outlined by the Supreme Court in *Febles* and by making a presumptive finding of seriousness based on the maximum sentence for an offence under subsection 57(1). The RAD noted that *Febles* required "a more contextualized approach and consideration of what sentence the offence would have attracted in Canada". The RAD considered the maximum term of imprisonment for uttering a forged passport and a variety of aggravating and mitigating factors.

[18] The RAD conducted an analysis based on *Febles* to determine the seriousness of the applicant's actions and whether the presumption of seriousness was rebutted. It found that the applicant's actions were serious, based on his sustained and frequent use of the fraudulent passport and his continued, but implausible, assertion that it was genuine. I will return to the RAD's *Febles* reasoning below.

[19] The RPD and the RAD each made other findings and conclusions that are not pertinent to this application for judicial review.

[20] In this Court, the applicant took the following positions to argue that the RAD's decision should be set aside as unreasonable under *Vavilov* principles:

- the RAD erred in law in finding that the applicant's conduct fell within subparagraph 57(1)(*b*)(i) of the Criminal Code;
- the RAD erred in law in finding that the applicant's actions were those of a "repeat offender"; and
- the RAD erred in finding that the applicant knew his passport was not genuine.

## III. Standard of Review

[21] The standard of review is reasonableness, as described in *Vavilov*. Reasonableness review is a deferential and disciplined evaluation of whether an administrative decision is transparent, intelligible and justified: *Vavilov,* at paras 12-13 and 15.

[22] The starting point is the reasons provided by the decision maker: *Vavilov*, at para 84. The reviewing court must read the reasons holistically and contextually, and in conjunction with the record that was before the decision maker: *Vavilov*, at paras 91-96, 97, and 103; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, at paras 28-33.

[23] The Court's review considers both the reasoning process and the outcome: *Vavilov*, at paras 83 and 86. A reasonable decision is one that is based on an internally coherent and a rational chain of analysis and is justified in relation to the facts and law that constrain the decision maker: *Vavilov*, esp. at paras 85, 99, 101, 105-106 and 194; *Entertainment Software*

*Association v Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100, at paras 24-35.

[24] The Supreme Court has identified two types of fundamental flaws in administrative decisions: a failure of rationality internal to the reasoning process; and when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it: *Vavilov*, at para 101; *Canada Post*, at paras 32, 35 and 39.

[25] A minor misstep or peripheral error will not justify setting aside a decision. In order to intervene, the court must find an error in the decision that is sufficiently central or significant to render the decision unreasonable: *Vavilov*, at para 100; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156, at para 36; *Alexion Pharmaceuticals Inc v Canada (Attorney General)*, 2021 FCA 157, at para 13.

[26] On a judicial review application, this Court's role is not to agree or disagree with the decision under review, to reassess the merits or to reweigh the evidence: *Vavilov*, at para 125; *Gordillo v. Canada (Attorney General)*, 2022 FCA 23, at para 62. The Court's task is to determine whether the decision maker made one or more of the kinds of errors described in the appellate cases above and if so, whether the decision should be set aside as unreasonable.

## IV. Analysis

[27] Section 98 of the *IRPA* provides that "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." Article 1,

subsection F(b), provides that the provisions of the *Refugee Convention* shall not apply to any person with respect to whom "there are serious reasons for considering that … he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee."

[28] Article 1F(b) serves one main purpose: to exclude persons from refugee protection who have committed a serious crime: *Febles* at para 35.

[29] A "serious non-political crime" under Article 1F(b) is not defined in the Convention. It is therefore determined on a case-by-case basis. The Federal Court of Appeal has identified the following factors as pertinent to an assessment of the seriousness of a crime in a given case: the elements of the crime, the mode of prosecution, the penalty prescribed, the specific facts of the case, and the mitigating and aggravating circumstances: see *Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404, [2009] 4 FCR 164, at para 44; *Gardijan v Canada (Citizenship and Immigration)*, 2022 FC 421, at paras 38-39.

[30] The available maximum punishment under Canadian law is a relevant consideration. In *Febles*, the Supreme Court held that "[w]hile consideration of whether a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada is a useful guideline, and crimes attracting a maximum sentence of ten years or more in Canada will generally be sufficiently serious to warrant exclusion, the ten-year rule should not be applied in a mechanistic, decontextualized, or unjust manner": *Febles*, at para 62. Some types of offences are not serious in the requisite sense (e.g. petty theft) while others (e.g. murder) presumptively

warrant exclusion from refugee protection: *Hasani v Canada (Citizenship and Immigration)*, 2020 FC 125, at para 33; *Febles*, at para 62.

[31] With this legal framework in mind, I turn to the applicant's submissions.

**A. Did the RAD make a reviewable error by finding that the applicant's conduct fell within subparagraph 57(1)(*b*)(i) of the Criminal Code?**

[32] Subparagraph 57(1)(*b*)(i) of the *Criminal Code* provides that everyone who, while in or out of Canada, knowing that a passport is forged, uses, deals with or acts on it, is guilty of an indictable offence and liable to imprisonment for a term not exceeding 14 years.

[33] Subsection 57(2) provides in material part for a hybrid offence (i.e., punishable either by way of indictable offence or on summary conviction) for every one who, while in or out of Canada, for the purpose of procuring a passport, makes a written or an oral statement that he knows is false or misleading. For an indictable offence, the punishment under paragraph 57(2)(*a*) is imprisonment for a term not exceeding two years.

[34] Forgery is defined in section 366 of the *Criminal Code*. It provides as follows:

| **Forgery and Offences Ressembling Forgery** | **Faux et infractions similaires** |
|---|---|
| **Forgery**<br>**366 (1)** Every one commits forgery who makes a false document, knowing it to be false, with intent | **Faux**<br>**366 (1)** Commet un faux quiconque fait un faux document le sachant faux, avec l'intention, selon le cas : |
| **(a)** that it should in any way be used or acted on as genuine, to the prejudice of | **a)** qu'il soit employé ou qu'on y donne suite, de quelque façon, comme authentique, au |

any one whether within Canada or not; or

**(b)** that a person should be induced, by the belief that it is genuine, to do or to refrain from doing anything, whether within Canada or not.

préjudice de quelqu'un, soit au Canada, soit à l'étranger;

**b)** d'engager quelqu'un, en lui faisant roire que ce document est authentique, à faire ou à s'abstenir de faire quelque hose, soit au Canada, soit à l'étranger.

**Making false document**

**(2)** Making a false document includes

**(a)** altering a genuine document in any material part;

**(b)** making a material addition to a genuine document or adding to it a false date, attestation, seal or other thing that is material; or

**(c)** making a material alteration in a genuine document by erasure, obliteration, removal or in any other way.

**Faux document**

**(2)** Faire un faux document comprend :

**a)** l'altération, en quelque partie essentielle, d'un document authentique;

**b)** une addition essentielle à un document authentique, ou l'addition, à un tel document, d'une fausse date, attestation, sceau ou autre chose essentielle;

**c)** une altération essentielle dans un document authentique, soit par rature, oblitération ou enlèvement, soit autrement.

**When forgery complete**

**(3)** Forgery is complete as soon as a document is made with the knowledge and intent referred to in subsection (1), notwithstanding that the person who makes it does not intend that any particular person should use or act on it as genuine or be induced, by the belief that it is genuine, to do or refrain from doing anything.

**Quand le faux est consommé**

**(3)** Le faux est consommé dès qu'un document est fait avec la connaissance et l'intention mentionnées au paragraphe (1), bien que la personne qui le fait n'ait pas l'intention qu'une personne en particulier s'en serve ou y donne suite comme authentique ou soit persuadée, le croyant authentique, de faire ou de s'abstenir de faire quelque chose.

| | |
|---|---|
| **Forgery complete though document incomplete** | **Le faux est consommé même si le document est incomplet** |
| **(4)** Forgery is complete notwithstanding that the false document is incomplete or does not purport to be a document that is binding in law, if it is such as to indicate that it was intended to be acted on as genuine. | **(4)** Le faux est consommé, bien que le document faux soit incomplet ou ne soit pas donné comme étant un document qui lie légalement, s'il est de nature à indiquer qu'on avait l'intention d'y faire donner suite comme authentique. |
| **Exception** | **Exception** |
| **(5)** No person commits forgery by reason only that the person, in good faith, makes a false document at the request of a police force, the Canadian Forces or a department or agency of the federal government or of a provincial government. | **(5)** Nul ne commet un faux du seul fait qu'il a fait de bonne foi un faux document à la demande des forces policières, des Forces canadiennes ou d'un ministère ou organisme public fédéral ou provincial. |

[35] The applicant submitted that the *Criminal Code* provisions make a critical distinction between documents that are forged, and genuine documents that are fraudulently obtained, which is reflected in subsections 57(1) and (2) of the *Criminal Code*. According to the applicant, even accepting the facts as found by the RPD, the most serious allegation that could be levelled against the applicant was that he should have known that his Guatemalan passport was fraudulently obtained under subsection 57(2). The applicant also noted that the RAD made no finding that the passport was altered in any way nor that the applicant was aware of any such alteration for the purposes of the definition of forgery in section 366. The applicant therefore submitted that the RAD erred in law by finding that the passport was forged.

[36] For the purposes of the analysis of a “serious non-political crime”, the applicant stressed the different maximum sentences applicable to offences under subsections 57(1) and (2) – 14 years versus 2 years upon indictment – and that the lesser offence was not presumptively “serious”. The applicant’s position was that the RAD erred in law by conducting its seriousness analysis under Article 1F(b) using a sentencing range up to 14 years.

[37] I do not agree with the applicant’s submission. The question is whether the RAD, in determining that the applicant’s conduct was “serious”, made a reviewable error by failing to abide by the legal constraints in the *Criminal Code*, sections 57 and 366. In my view, the RAD did not.

[38] The RAD decided that subparagraph 57(1)(*b*)(i) applied to the applicant’s conduct, because he used a non-genuine passport while he knew it was forged. The RAD found it was forged because the applicant’s testimony was not consistent with a general procedure for obtaining a legitimate passport. The RAD found that the applicant paid US$70,000 to an agent and had no contact with Guatemalan authorities. He submitted his real Iranian birth certificate (which contained his real name). In addition, he chose the name that was to appear in the passport without registering an official name change in any country. That name was not his real name and reflected an identity he had created. The RAD went on to discuss the various ways the applicant had used the passport, noting expressly that it was forged.

[39] Although the applicant submitted otherwise, in my view, it was open to the officer as a matter of law to decide that subparagraph 57(1)(*b*)(i) was applicable to the facts. For present

purposes, the gist of the offence in subparagraph 57(1)(*b*)(i) was that the applicant used a passport knowing that it was forged. The applicant's position was that in law, the passport could not be "forged" under section 366 because the evidence and RAD's findings suggested that the applicant had obtained the passport fraudulently under subsection 57(2) and did not suggest that the passport had been altered under section 366, undermining the RAD's conclusion that the passport was forged.

[40] Although the RAD did not expressly refer to the definition in section 366, it stated expressly that the passport was forged and made factual findings consistent with that conclusion. The Guatemalan passport was a false document because it contained a fictitious name invented and provided by the applicant. The process he used to obtain the Guatemalan passport was not legitimate, as he paid an agent in Malaysia US$70,000 to obtain it and had no contact with Guatemalan authorities. These findings are consistent with section 366, which provides that forgery is the making of a false document, knowing it to be false, with intent that it should be used or acted upon as genuine. For the RAD to decide that the relevant offence in Canada was subparagraph 57(1)(*b*)(i), the RAD did not have to conclude that the applicant had altered a genuine passport or had himself participated in the making of the fraudulent Guatemalan passport. It was sufficient for the Guatemalan passport itself to be forged under the *Criminal Code* and that the Applicant knew it to be forged and used it. That the facts considered by the RAD could also or alternatively show that he committed an offence under subsection 57(2) did not detract from the RAD's ability to find that his conduct amounted to an offence under subsection 57(1).

[41] The applicant's submissions relied on *Hasani* and *Mustafa v Canada (Citizenship and Immigration)*, 2016 FC 116. In my view, the reasoning in those cases does not apply here.

[42] In *Hasani*, the RPD had concluded that certain refugee travel documents were forged passports. In concluding that the RPD's decision was unreasonable, Norris J. found that it was patently obvious on the face of the travel documents that they were not passports. In addition, he found that it was unreasonable for the RPD to have concluded that the documents were forged. Justice Norris noted that forgery has a specific meaning in Canadian law: to make a false document for certain prohibited purposes, including by making material changes to a genuine document under *Criminal Code* subsection 366(2). My colleague noted that in that case, the travel documents were "genuine documents and they had not been altered in any way": *Hasani,* at para 61. Thus, "[i]n the absence of any evidence that the documents were not genuine or, if genuine, had been altered in a material way, it was unreasonable for the RPD to have concluded that they were forged".

[43] The present case is different because, for the reasons already mentioned, the RAD determined that the Guatemalan passport was not genuine on the evidence, and the applicant knew it. The applicant did not challenge the finding that the passport was not genuine on this application and, in my view, that finding was open to the officer on the evidence in the record. The RAD also found it was implausible that the applicant believed the Guatemalan passport was genuine.

[44] In *Mustafa*, Phelan J. dismissed an application for judicial review of an RPD decision that determined that the applicants were excluded owing to serious non-political crimes committed in the United States. The determinative issue was credibility. However, Justice Phelan also considered exclusion (expressly in *obiter*). The crime that formed the basis of the allegation was the knowing use, in or out of Canada, of a forged passport under paragraph 57(1)(*b*) of the *Criminal Code*. The factual basis was the principal claimant's admission that he obtained a fraudulent Bangladesh passport by obtaining a false date of birth document with a new birthday and a new name. The passport had not been altered nor did the principal claimant make the passport himself. Justice Phelan stated that the RPD erred by incorrectly interpreting subsection 57(1) of the *Criminal Code* to include documents that were not forged, recognizing the distinction between the sentences for using a forged document in paragraph 57(1)(*b*) and making a false statement to procure a passport in subsection 57(2): *Mustafa*, at paras 26 and 29. That error led to the RPD's conclusion that a serious offence had occurred outside Canada.

[45] In this case, the RAD reasonably concluded on the evidence that the passport was forged and applied paragraph 57(1)(*b*) to the applicant's repeated uses of it, which distinguishes the circumstances and reasoning in *Mustafa*.

[46] Lastly, the Court cannot reconsider the merits of the RAD's conclusions by evaluating the applicant's conduct (or the RAD's findings about it) against the *Criminal Code* provisions, or by determining that the RAD should have applied subsection 57(2) rather than paragraph 57(1)(*b*). To do so would take a correctness approach to this application and put the Court into the shoes of the decision maker, which is not permitted on a judicial review.

[47] I conclude that the applicant has not demonstrated that the RAD made a reviewable error by finding that the applicant's conduct fell within subparagraph 57(1)(*b*)(i) of the *Criminal Code.*

**B. Did the RAD make a reviewable error by finding that the applicant's actions were those of a "repeat offender"?**

[48] The applicant submitted that since *Febles*, the core component of the "seriousness" analysis is to consider the sentence that the individual would likely have received if the offence had been committed and the individual were prosecuted and sentenced in Canada: *Febles,* at para 62. An individual is not presumptively excluded if the sentence would be at the low end of the sentencing range.

[49] Relying on *Jung v Canada (Citizenship and Immigration)*, 2015 FC 464 and *Tabagua v Canada (Citizenship and Immigration)*, 2015 FC 709, the applicant argued that the critical factor was whether the applicant's conduct fell within the low end of the sentencing range. He identified two potential reviewable errors in the RAD's analysis, which I will assess in sequence.

[50] In its reasons, the RAD described in detail how the applicant had used the passport, as follows:

> [43] He used the passport as follows:
>
> - travel to Western Europe (Germany, United Kingdom, France, Netherlands, Italy, Spain);
> - travel to United Arab Emirates (UAE), Oman, Seychelles, Malaysia;
> - obtained a citizenship in Antigua and Barbuda by donating $100,000 USD to a charity in said country;

- transit visa for Australia as well as an application for a visitor's visa, which was never issued;
- temporary residence visa for Canada for a 2014 trip;
- visit to New Zealand and application for permanent residence status under Guatemalan identity; and
- registration of a business in Dubai (UAE).

[51] After referring to sentencing cases, the RAD stated:

> [45] The [applicant] likely would have attracted a low sentence in Canada (given that it is his first offence). However, the sentence would likely be longer as the [applicant] did not limit his use of the forged passport merely to flight from Iran. If he had limited his use of the forged passport in this way, it likely would not be considered a crime at all.
>
> […]
>
> [47] I am tasked with determining seriousness without a yardstick. Clearly, the [applicant]'s actions are less serious than aggravated assault, but his actions are not outside the realm of seriousness, such as shoplifting, for example.
>
> [48] The [applicant] argues that the sentencing range is 4 months to 23 months, with the 23-month sentence being for a repeat offender. The [applicant]'s actions are equivalent to those of a repeat offender due to his frequent use of the Guatemalan passport. Therefore, he would have attracted a more serious sentence in Canada.
>
> [49] After consideration of the [applicant]'s actions, I find that his conduct is serious.

[52] The applicant's first submission was that the RAD's reasons contained an internal inconsistency: at paragraph 45 of its reasons, the RAD stated that the applicant "likely would have attracted a low sentence in Canada (given that it is his first offence)", but later in paragraph 48, the RAD treated the applicant as a "repeat offender". The applicant relied on *Vavilov*, at paras 102-103.

[53] I am not persuaded that the RAD made a reviewable error as alleged. Just before paragraph 45, the RAD found that the applicant made "sustained use" of the Guatemalan passport and that this was an aggravating factor when considering the seriousness of his crimes. The applicant's position on inconsistency fails to account for the sentence immediately following the reference to a first offence in paragraph 45, in which the RAD expressly refers to a longer sentence due to the frequent use of the fraudulent passport – which is the basis for the RAD's later approach to sentencing in its paragraph 48. Read in context, I find no inconsistency that amounts to a fatal flaw and no lack of a rational chain of reasoning that might give rise to a reviewable error as contemplated by *Vavilov*. The RAD's reasoning, in this respect, "adds up" and was intelligible. See *Vavilov*, at paras 100-103.

[54] The applicant's second argument for a reviewable error was based on criminal law sentencing principles and the following statement in *Vavilov*, at paragraph 112:

> There may be circumstances in which it is quite simply unreasonable for an administrative decision maker to fail to apply or interpret a statutory provision in accordance with a binding precedent. For instance, where an immigration tribunal is required to determine whether an applicant's act would constitute a criminal defence under Canadian law…, it would clearly not be reasonable for the tribunal to adopt an interpretation of a criminal or provision that is inconsistent with how Canadian criminal courts have interpreted it.

[55] The applicant submitted that the RAD failed to apply the well-established "Coke principle" that governs the sentencing of repeat offenders: *R v Skolnick*, [1982] 2 SCR 47, at pp. 50 and 57-59. The applicant submitted that the Coke principle would prevent him from being sentenced as a repeat offender. He had not been convicted and sentenced in any other place, so

he would not be treated as a repeat offender for sentencing in Canada or receive a longer sentence as one.

[56] The respondent submitted that the RAD reasonably used the applicant's repeated use of the forged passport as an aggravating factor, which moved the applicant's culpability towards the serious end of the spectrum and would have attracted a more several criminal sanction. The respondent submitted that the principle in *Skolnick* served to give the applicant notice before imposing a criminal punishment and was not applicable in the immigration context.

[57] The Coke principle has been described in various ways. In essence, it is that if an individual is convicted of an offence and then commits an offence later, the subsequent conviction may not be used as an aggravating factor to determine a fit sentence for the first offence: *R v Wilson*, 2020 ONCA 3, at paras 60 and 67. That is, higher penalties only apply to subsequent offences (i.e. only when the accused has already been convicted of a prior offence(s)). The Court of Appeal observed in *R v Wilson* that a repeat offender who has already been sentenced for offending may require increased punishment to achieve specific deterrence since they have not learned from their earlier sentence. The repeat offender's degree of responsibility is heightened by the contempt their subsequent conduct may show for the sentencing process. These considerations do not operate if the offender committed the offence being sentenced before being punished for the subsequent offences: *R v Wilson*, at para 61.

[58] While the Coke principle is well established, its application is not without limitations. The Coke principle may be ousted by statutory language or by necessary implication, as it does

not operate where its application will not serve its purpose: *R v Wilson*, at paras 67-68. In *R v Wilson*, the Court of Appeal for Ontario concluded that the Coke principle does not apply to a dangerous offender determination under the *Criminal Code*, which is aimed at establishing patterns of behaviour and evaluating future risks to public safety under the statutory criteria.

[59] The Coke principle is not violated if a subsequent conviction is used to assess an offender's prospects for rehabilitation, which are assessed as of the time of sentencing: *R v RM*, 2020 ONCA 231, at para 37; *R v Pete*, 2019 BCCA 244, at para 40.

[60] The scope of the Coke principle has also been the subject of some debate concerning whether it is a general rule of sentencing (as the applicant submitted in the present case) or a canon of statutory interpretation: compare *R v Pete* with *Jollie v R*, 2020 NBCA 58; *Andrade v R*, 2010 NBCA 62; and *G.D. c R*, 2013 QCCA 726. In other provinces, trial level courts seem to take the view in *Andrade*: see *R v Shaikh*, 2020 ONSC 438, at paras 27-32 and the cases cited there. The general rule approach suggests that the use of a prior offence(s) as an aggravating factor in sentencing is left to the sentencing judge to consider with the rest of the factual matrix.

[61] Returning to this case, in my view, reading the entire section of the RAD's analysis applying *Febles*, the RAD did not make a reviewable error by stating that the applicant's "actions are equivalent to those of a repeat offender due to his frequent use of the Guatemalan passport" in paragraph 48 of its reasons.

[62] The resolution of this application does not require a determination of the scope or content of the Coke principle as it may apply to a determination under Article 1F(b) and section 98. For present purposes, it is enough to assume that the applicant is correct that, if he had not been charged or convicted with any offence in the past, he would not be sentenced as a repeat offender in a Canadian criminal court for his uses of a forged passport. However, even if correct, it is not determinative of whether the RAD made a reviewable error in this case.

[63] The applicant did not challenge the RAD's ability to use the facts related to all of his prior uses of the passport when considering seriousness of his action. His argument was that in law, it was "uncontestable" that Canadian criminal courts would not sentence him as a repeat offender.

[64] In reaching its decision, the RAD was not tasked to determine a specific sentence and did not do so. The RAD was considering the seriousness of the applicant's actions in the range of sentencing for the purposes of Article 1F(b) and IRPA section 98. Accordingly, what the RAD in fact concluded was quite limited: due to his frequent use of the fraudulent Guatemalan passport, the applicant's conduct "would have attracted a more serious sentence in Canada".

[65] Was it unreasonable for the RAD to reach that conclusion? I do not believe so. In its analysis of the seriousness of the applicant's conduct, the RAD said it had to determine seriousness "without a yardstick" – that is, in the absence of guidance from case law on the sentencing ranges for the particular actions of the applicant. The RAD had already referred to the applicant's travel to more than ten countries using the fraudulent Guatemalan passport, as well as

his use of it to apply for visas, obtain citizenship in Antigua and Barbuda, apply for permanent residence in New Zealand and register a business in Dubai.

[66] The RAD's reference to "repeat offender" in paragraph 48 of its reasons responded to the applicant's submission in his written argument to the RAD about the range of sentencing. That written submission, which was in the Certified Tribunal Record, argued that the sentencing range was a low of 4 months to a high of 23 months for a repeat offender. It did not mention any other sentencing principles, including the Coke principle. The RAD's reasoning likened the applicant's actions to those of a repeat offender, given the frequency of the applicant's use of the fraudulent passport.

[67] I am not persuaded that the Coke principle constrained the RAD not to consider the applicant's frequent and knowing uses of the fraudulent passport in determining whether his actions were serious for the purposes of Article 1F(b) and IRPA section 98. In this Court, as before the RAD, the applicant did not refer to any specific case law under section 57 with similar factual circumstances as the present case. There are various scenarios that could play out for the applicant's circumstances in a Canadian criminal court, including being charged with numerous counts under subparagraph 57(1)(*b*)(i) of the *Criminal Code*, each based on a single use of the fraudulent passport. After leaving Iran, he crossed a dozen borders using a passport he had procured and knew to be fraudulent, and also used it to make several applications to different governments for citizenship, permanent residence, visas and a business licence. It is hard to accept that the applicant, if sentenced in Canada in relation to his knowing and persistent uses of the fraudulent passport, would be treated the same way as a person who used a fraudulent

passport to cross a border once or twice or, as the RAD noted, as a person who used it to flee her native land and came directly to Canada to claim refugee protection. Indeed, the applicant did not argue so in this Court.

[68] It is possible that the RAD's use of the phrase "equivalent to" might not be entirely suitable if it were used by a Canadian criminal court in sentencing a first offender. However, the RAD's comment specifically concerned the frequency of the applicant's actions, not his status as a first offender (his "actions are equivalent to those of a repeat offender due to his frequent use of the Guatemalan passport"). The RAD's consideration of the applicant's sustained or frequent use of the passport was an aggravating factor in relation to the seriousness of the applicant's actions for exclusion purposes under the IRPA section 98 and Article 1F(b), along with his continued assertion that he believed the passport to be genuine (which the RAD found implausible). Those factors led to its overall conclusion under the *Febles* analysis that the applicant's actions were serious. It was open to the RAD to reach that conclusion based on the factors it considered and the factual findings it made: *Jayasekara*, at para 44.

[69] In sum, the applicant's submissions did not persuade me that the RAD's reasoning offended a binding principle of sentencing in criminal law so as to render it unreasonable. The RAD did not fail to respect the legal constraints bearing on its decision as alleged by the applicant.

[70] For completeness, I note that the respondent argued that immigration decision makers are not necessarily trained lawyers and should not be held to the highest standards of legal reasoning

(citing *Mason*, at para 39). The respondent also maintained that the applicant's position was an example of the "judicialization" of the administrative process that *Mason* warned about. It is unnecessary to comment on how the Federal Court of Appeal's comments in *Mason* may or may not apply to the RAD's reasoning in this case.

### C. Did the RAD make a reviewable error by finding that the applicant knew his passport was not genuine?

[71] The applicant challenged the RAD's conclusion that his belief that the passport was genuine was implausible.

[72] The RAD found that while there was nothing unusual or illegal about the use of an agent, the applicant's testimony was not consistent with a general procedure for obtaining a legitimate passport. In 2010, the applicant paid US$70,000 and had no contact with Guatemalan authorities at the time he applied for the passport through the agent in Malaysia, whom he located through an advertisement in a Farsi publication in Malaysia. The RAD recognized that there was nothing inherently wrong with using an agent to assist in obtaining a passport.

[73] The applicant argued in this Court that the RAD ignored evidence of his contact with Guatemalan officials and evidence that he took steps to ensure that the document was issued by the Guatemalan state. To support his position, the applicant referred to evidence in a New Zealand immigration intelligence report dated June 26, 2015, which indicated that the passport was linked to a criminal syndicate of public officials arrested for facilitating illegal migration into Guatemala. However, the contents of that report do not demonstrate that the applicant in fact

interacted with Guatemalan authorities in 2010 when he applied for the passport in Malaysia, nor that he had a reasonable basis for believing he was doing so.

[74] Accordingly, the applicant has not shown a reviewable error in the RAD's factual conclusion or its conclusion on implausibility: *Vavilov*, at paras 99-101 and 125-126.

[75] The balance of the applicant's submissions on this issue argued that the RAD did not make the correct decision. The Court cannot consider those submissions.

## V. Conclusion

[76] The application is therefore dismissed. Neither party proposed a question to certify for appeal and none will be stated.

[77] On April 14, 2022, the Court provided a draft confidential version of these Reasons to the parties' counsel so they could identify any confidential information that should be redacted. Counsel confirmed that no redactions were needed.

**JUDGMENT in IMM-3694-20**

**THIS COURT'S JUDGMENT is that**:

1. The application is dismissed.

2. No question is certified for appeal under paragraph 74(*d*) of the *Immigration and Refugee Protection Act*.

"Andrew D. Little"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | IMM-3694-20 |
| **STYLE OF CAUSE:** | A.B. v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | OCTOBER 6, 2021 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | A.D. LITTLE J. |
| **DATED:** | MAY 13, 2022 |

**APPEARANCES:**

| | |
|---|---|
| Jared Will | FOR THE APPLICANT |
| Bernard Assan | FOR THE RESPONDENT |

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| Bernard Assan<br>Attorney General of Canada<br>Toronto, Ontario | FOR THE RESPONDENT |