Federal Court  Cour fédérale

Date: 20220517

Docket: IMM-4366-21

Citation: 2022 FC 736

Ottawa, Ontario, May 17, 2022

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

FOSTER EVERTON BROWN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision by the Refugee Appeal Division [RAD] of the Immigration and Refugee Board dated June 4, 2021 [Decision]. The RAD confirmed a decision of the Refugee Protection Division [RPD] which determined the Applicant is excluded from refugee protection by virtue of Article 1F(b) of the of United Nations Convention Relating to the Status of Refugees, 1951, CTS 1969/6; 189 UNTS 150 [*Convention*]

and section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [*IRPA*]. In the alternative, the RPD found the Applicant does not face a forward-looking risk under subsection 97(1) of *IRPA*, a finding that was not considered by the RAD and which is therefore not considered in there Reasons.

II. Facts

[2] The Applicant is a male 59-year-old citizen of Jamaica. He claims in 2012 he was assaulted and threatened by three gang members while operating his taxi in Kingston. He refused to give them rides and was assaulted as a result. The Applicant says he reported the incident, the police entered the incident into their diaries, and they took the Applicant's report.

[3] The next day the Applicant moved to another region of Jamaica where he stayed at a friend's home for a week. He says he was afraid because he learned from his family and friends that gang members were asking about his whereabouts and making threats.

[4] However, before the events surrounding the Applicant's refugee claim occurred, the Applicant left Jamaica and illegally entered to the US. While in the US, the Applicant did not make any effort to regularize his status. In fact, in or around 2000 he was charged and convicted in Texas under state law in relation to having more than 5 pounds but less than 50 pounds of marijuana in his possession. He later testified before the RPD that he was "somewhere around" 50 pounds of marijuana in his possession. He pleaded guilty, was convicted and imprisoned, then deported to Jamaica. This conviction is the subject of the inadmissibility finding now in issue, and is dealt with in more detail shortly.

[5] After being deported to Jamaica, he illegally entered Canada in 2012 using a smuggler and fraudulent passport. However, he did not apply for refugee status until 2015, a delay of some three years. His claim was originally heard by the RPD in June and October 2015 (the first RPD hearing), but because the panel who heard the matter was no longer available, no decision was rendered, and the matter was re-heard by a differently-constituted panel on December 16, 2019, (the second RPD hearing and the one now at issue).

[6] In his BOC and in his testimony before the RPD, the Applicant made the following statements, none of which were true:

a) he had not previously travelled to or lived in any countries other than Jamaica and Canada;

b) he had never been convicted of any criminal offence in any country;

c) he had never been arrested or incarcerated;

d) he had never been ordered to leave any country; and

e) he had never used any other name.

[7] However, between the first and second sittings of the first RPD hearing, the Minister disclosed biometric information received from the US Department of Homeland Security confirming a biometric match of fingerprints taken from the Applicant by Canadian authorities with fingerprints taken from a person named George Hines who was apprehended in Houston, Texas on December 8, 2000. This is the same person as the Applicant.

[8] At the second RPD hearing, the Applicant acknowledged his previous evidence and testimony were false. He admitted to pleading guilty and being convicted of a criminal offence in

Texas, namely a third degree felony for possession of marijuana in 2000. He admitted he was sentenced to two years in prison, served one year in prison after which he was released and ordered to leave the US (which as noted, he had entered illegally). He further admitted that at the time of the arrest, he was in possession of fraudulent identification in the name of George Hines, whose date of birth was different from the Applicant's date of birth.

A. *Decision of the RPD*

[9] The RPD found serious reasons for considering the Applicant committed a serious non-political crime in the US, and is therefore excluded from refugee protection in accordance with Article 1F(b) of the *Convention* and section 98 of *IRPA*.

[10] The RPD also found, in the alternative, the Applicant was neither a *Convention* refugee, nor a person need of protection because: a) his risk had no nexus to a *Convention* ground and b) he did not credibly establish, on a balance of probabilities, the alleged attackers have any interest in his whereabouts he had no forward-looking risk if he returned to Jamaica.

III. Decision under review

A. *Applicable legal principles*

[11] The determinative issue before the RAD was whether the Applicant is excluded under Article 1F(b) for committing a serious non-political crime outside of the country of refuge and prior to admission to Canada. However, given the Applicant plead guilty to the office in Texas, the only issue is whether the crime is "serious".

[12] In this connection, the RAD noted the factors for assessing whether the felony crime was serious, as outlined by the Federal Court of Appeal in *Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404 [*Jayasekara*]:

- the nature and elements of the crime
- the mode of prosecution
- the penalty prescribed
- the facts surrounding commission of the crime; and
- mitigating and aggravating circumstances underlying the conviction.

[13] The RAD also relied on F*ebles v Canada (Minister of Citizenship and Immigration)*, 2014 SCC 68 at para 62 [*Febles*] which instructs that if a maximum sentence of ten years or more may be imposed is a strong indication the crime is serious, which is a rebuttable presumption.

B. *US Conviction*

[14] The Applicant was charged with and convicted of Possession of Marijuana under *Texas Controlled Substances Act*, Section 481.121(b)(4), which is a third degree felony encompassing quantities of more than five pounds but less than fifty pounds of marijuana. Section 12.34 of the *Texas Penal Code* provides that a conviction for a third degree felony shall be punished by imprisonment for not less than two years and not more than ten years, and a fine of up to $10,000.

[15] As noted, the Applicant's evidence was that he had "somewhere around" 50 pounds of marijuana at the time of his arrest. At the time of his arrest, he was a passenger in a vehicle in which marijuana was found when police stopped the car. Two other passengers were in the car but only the Applicant was charged. He was charged in the name of George Hines because at the time, that was the name on his identity document, namely a fraudulent driver's license.

[16] The charge was laid December 15, 1999. The Applicant plead guilty, was convicted on February 25, 2000, and sentenced to confinement for two years. He testified he was released from prison after a year but documentation from the Texas Department of Public Safety reflects he was in custody from May 4, 2000, to December 14, 2001.

C. *Applicable Canadian criminal law provision*

[17] The RPD found the same facts, if committed in Canada would probably constitute the offences of distribution, or possession for the purpose of distribution, of more than 30 grams of cannabis under subsections 9(1)(a) or 9(2) of the *Cannabis Act*, SC 2018, c 16.

[18] It is important to note the Applicant did not challenge the RPD's finding that the offences under subsections 9(1)(a) or 9(2) are the relevant Canadian offences disclosed by the facts and the RAD agreed. In particular, while the Applicant now relies on section 8 of the *Cannabis Act*, he made no submissions to that effect to either the RPD or the RAD: his arguments today raise a new issue not dealt with on the record under judicial review, a point I will deal with later in these Reasons.

[19] The RAD noted these are hybrid offences in Canada, in that they may be prosecuted either by way of summary conviction or by way of indictment. Notably, when prosecuted by indictment, a person convicted is liable to imprisonment for up to 14 years; when prosecuted summarily, a person convicted is liable to a fine of not more than $5,000 or imprisonment for a term of not more than six months, or both.

D. *Application of Jayasekara factors*

[20] The RAD noted the following *Jayasekara* factors and found:

- The offence involves between five and fifty pounds of marijuana, which is classified as a third degree felony in Texas. Based on the Applicant's testimony, there was evidence to support the RPD's finding the amount was approximately 50 pounds. However, whether it was 5 pounds or 50 pounds, offences under the Canadian *Cannabis Act* require only that the quantity be more than 30 grams.

- The Applicant was charged in Texas for Possession of Marijuana, which has various possible degrees of seriousness depending on the quantity. The sentence imposed was the minimum sentence given the quantity of marijuana, although it is not the minimum sentence for possession. However, a light sentence does not necessarily detract from the crime's seriousness (*Jayasekara* at para 41-42).

- The RPD considered the Applicant's testimony he was homeless when the crime took place to be a mitigating factor, and considered the fact the Applicant used a false identity was an aggravating factor.

- When considering the Canadian criminal context, a conviction for distribution or possession for the purpose of distribution under section 9 of the *Cannabis Act* requires possession of more than 30 grams of cannabis. Five pounds is more than 75 times that quantity. [The Court notes that 50 pounds is 750 times the 30 gram threshold.] Therefore, the

offences of distribution or possession for the purpose of distribution under section 9 are similar to trafficking offences, rather than offences for simple possession under section 8.

- Regarding sentencing range in Canada, the RAD found, given the large quantity of cannabis involved, the offence may not be considered at the less serious end of the spectrum, although it is arguable that, assuming this is a first offence, it is not at the upper end of the range that would attract a maximum 14 year sentence. However, given the quantity of cannabis involved, the facts would likely lead to a prosecution by indictment in Canada.

- The circumstances of the offence justify the application of a presumption that the offence is serious. In the RAD's assessment, the evidence does not rebut the *Febles* presumption. The RAD noted a crime may be serious even if it does not attract a maximum ten-year sentence. On a balance of probabilities, the RAD found the offence is serious.

IV. Issue

[21] The sole issue is whether the RAD acted unreasonably in assessing the Applicant's crime as "serious" for the purposes of the *Convention* and section 98 of *IRPA*.

V. Standard of Review

[22] The standard of review in this case is reasonableness.

[23] In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, issued at the same time as the Supreme Court of Canada's decision in Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65 [*Vavilov*], the majority per Justice Rowe explains what is

required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

> [31] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
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> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
>
> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).
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> [Emphasis added]

[24] The Supreme Court of Canada in *Vavilov* at para 86 states, "it is not enough for the outcome of a decision to be justifiable. Where reasons for a decision are required, the decision must also be justified, by way of those reasons, by the decision-maker to those to whom the

decision applies," and provides guidance that the reviewing court decide based on the record before them:

> [126] That being said, a reasonable decision is one that is justified in light of the facts: *Dunsmuir*, para. 47. The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them: see *Southam*, at para. 56. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. In *Baker*, for example, the decision maker had relied on irrelevant stereotypes and failed to consider relevant evidence, which led to a conclusion that there was a reasonable apprehension of bias: para. 48. Moreover, the decision maker's approach would *also* have supported a finding that the decision was unreasonable on the basis that the decision maker showed that his conclusions were not based on the evidence that was actually before him: para. 48.
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> [Emphasis added]

[25] Furthermore, *Vavilov* makes it clear the role of this Court is not to reweigh and reassess the evidence unless there are "exceptional circumstances". The Supreme Court of Canada instructs:

> [125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.
>
> [Emphasis added]

[26] The Federal Court of Appeal recently held in *Doyle v Canada (Attorney General),* 2021 FCA 237 that the role of this Court is not to reweigh and reassess the evidence:

> [3] In doing that, the Federal Court was quite right. Under this legislative scheme, the administrative decision-maker, here the Director, alone considers the evidence, decides on issues of admissibility and weight, assesses whether inferences should be drawn, and makes a decision. In conducting reasonableness review of the Director's decision, the reviewing court, here the Federal Court, can interfere only where the Director has committed fundamental errors in fact-finding that undermine the acceptability of the decision. Reweighing and second-guessing the evidence is no part of its role. Sticking to its role, the Federal Court did not find any fundamental errors.
>
> [4] On appeal, in essence, the appellant invites us in his written and oral submissions to reweigh and second-guess the evidence. We decline the invitation.

VI. Relevant legislation and jurisprudence

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

Article 1F(b)	**Article 1F(b)**
F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:	**F.** Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser:
(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;	**b)** Qu'elles ont commis un crime grave de droit commun en dehors du pays d'accueil avant d'y être admises comme réfugiés;

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

Exclusion-Refugee Convention	**Exclusion par application de la Convention sur les réfugiés**
98 A person referred to in section E or F of Article 1 of the Refugee Convention is not 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.

[29] In *Abbas v Canada (Citizenship and Immigration)*, 2019 FC 12, I summarized judicial review jurisprudence regarding exclusion under section 98 of the *IRPA* and Article 1F(b) of the *Convention*:

> [19] As to what constitutes a "serious" crime, the Supreme Court of Canada in *Febles v Canada (Minister of Citizenship and Immigration)*, 2014 SCC 68, per McLachlin CJ [*Febles*], instructs at para 62:
>
> > [62] The Federal Court of Appeal in *Chan v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 17150 (FCA), [2000] 4 F.C. 390 (C.A.), and *Jayasekara* has taken the view that where a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada, the crime will generally be considered serious. I agree. However, this generalization should not be understood as a rigid presumption that is impossible to rebut. Where a provision of the Canadian Criminal Code, R.S.C. 1985, c. C-46, has a large sentencing range, the upper end being ten years or more and the lower end being quite low, a claimant whose crime would fall at the less serious end of the range in Canada should not be presumptively excluded Article 1F(b) is designed to exclude only those whose crimes are serious. The UNHCR has suggested that a presumption of serious crime might be raised by evidence of commission of any of the following offences: homicide, rape, child molesting,

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

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

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

VII. Analysis

[30] The Applicant submits the RAD erred in determining his criminality was serious. He notes he was charged with and convicted of Possession of Marijuana under the *Texas Controlled Substances Act*, Section 481.121(b)(4), and that this is a third degree felony encompassing quantities of more than five pounds but less than fifty pounds of marijuana:

> Sec. 481.121. OFFENSE: POSSESSION OF MARIHUANA.
>
> (a) Except as authorized by this chapter, a person commits an offense if the person knowingly or intentionally possesses a usable quantity of marihuana.
>
> (b) An offense under Subsection (a) is:
>
> (1) a Class B misdemeanor if the amount of marihuana possessed is two ounces or less;
>
> (2) a Class A misdemeanor if the amount of marihuana possessed is four ounces or less but more than two ounces;
>
> (3) a state jail felony if the amount of marihuana possessed is five pounds or less but more than four ounces;
>
> **(4) a felony of the third degree if the amount of marihuana possessed is 50 pounds or less but more than 5 pounds;**
>
> (5) a felony of the second degree if the amount of marihuana possessed is 2,000 pounds or less but more than 50 pounds; and
>
> (6) punishable by imprisonment in the Texas Department of Criminal Justice for life or for a term of not more than 99 years or less than 5 years, and a fine not to exceed $50,000, if the amount of marihuana possessed is more than 2,000 pounds.
>
> …
>
> [Emphasis added]

[31] I note that even in Texas the offence with which he was charged could have resulted in ten years imprisonment, in that section 12.34 of the *Texas Penal Code* provides a conviction for a third degree felony shall be punished by imprisonment for not less than two years and not more than ten years, and a fine of up to $10,000:

> Sec. 12.34 THIRD DEGREE FELONY PUNISHMENT
>
> (a) An individual adjudged guilty of a felony of the third degree shall be punished by imprisonment in the Texas Department of Criminal Justice for any term of not more than 10 years or less than 2 years.
>
> (b) In addition to imprisonment, an individual adjudged guilty of a felony of the third degree may be punished by a fine not to exceed $10,000.

[32] The RAD upheld the RPD in finding subsections 9(1)(a) or 9(2) of the *Cannabis Act* are the applicable Canadian law. The Applicant did not dispute the applicability of subsections 9(1)(a) or 9(2) either before the RPD or on his appeal to the RAD. On both occasions he was represented by counsel:

Distribution	**Distribution**
9 (1) Unless authorized under this Act, it is prohibited	**9 (1)** Sauf autorisation prévue sous le régime de la présente loi:
(a) for an individual who is 18 years of age or older	**a)** il est interdit à tout individu âgé de dix-huit ans ou plus:
(i) to distribute cannabis of one or more classes of cannabis the total amount of which is equivalent, as determined in accordance with	**(i)** de distribuer une quantité totale de cannabis d'une ou de plusieurs catégories, équivalant, selon l'annexe 3, à plus de

Schedule 3, to more than 30 g of dried cannabis,	trente grammes de cannabis séché,
(ii) to distribute cannabis to an individual who is under 18 years of age,	**(ii)** de distribuer du cannabis à un individu âgé de moins de dix-huit ans,
(iii) to distribute cannabis to an organization, or	**(iii)** de distribuer du cannabis à une organisation,
(iv) to distribute cannabis that they know is illicit cannabis;	**(iv)** de distribuer du cannabis, s'il sait qu'il s'agit de cannabis illicite;
…	…
Possession for purpose of distributing	**Possession en vue de la distribution**
(2) Unless authorized under this Act, it is prohibited to possess cannabis for the purpose of distributing it contrary to subsection (1).	**2)** Sauf autorisation prévue sous le régime de la présente loi, il est interdit d'avoir du cannabis en sa possession en vue de le distribuer d'une manière qui contrevient au paragraphe (1).

[33] The Applicant now submits for the first time that the RAD erred in upholding the RPD's equivalency analysis finding section 9 of the *Cannabis Act* is the Canadian equivalent of the crime for which he was convicted in Texas. The Applicant notes he was neither charged with, nor convicted of, an offence related to trafficking or distribution in Texas. His conviction was of possession only. Therefore, the Applicant submits the applicable Canadian law is section 8 of the *Cannabis Act*:

Possession	**Possession**

8 (1) Unless authorized under this Act, it is prohibited

(a) for an individual who is 18 years of age or older to possess, in a public place, cannabis of one or more classes of cannabis the total amount of which, as determined in accordance with Schedule 3, is equivalent to more than 30 g of dried cannabis;

(b) for an individual who is 18 years of age or older to possess any cannabis that they know is illicit cannabis;

(c) for a young person to possess cannabis of one or more classes of cannabis the total amount of which, as determined in accordance with Schedule 3, is equivalent to more than 5 g of dried cannabis;

(d) for an individual to possess, in a public place, one or more cannabis plants that are budding or flowering;

(e) for an individual to possess more than four cannabis plants that are not budding or flowering; or

8 (1) Sauf autorisation prévue sous le régime de la présente loi:

a) il est interdit à tout individu âgé de dix-huit ans ou plus de posséder, dans un lieu public, une quantité totale de cannabis, d'une ou de plusieurs catégories, équivalant, selon l'annexe 3, à plus de trente grammes de cannabis séché;

b) il est interdit à tout individu âgé de dix-huit ans ou plus d'avoir du cannabis en sa possession lorsqu'il sait qu'il s'agit de cannabis illicite;

c) il est interdit à tout jeune d'avoir en sa possession une quantité totale de cannabis, d'une ou de plusieurs catégories, équivalant, selon l'annexe 3, à plus de cinq grammes de cannabis séché;

d) il est interdit à tout individu d'avoir en sa possession, dans un lieu public, une ou plusieurs plantes de cannabis qui sont en train de bourgeonner ou de fleurir;

e) il est interdit à tout individu d'avoir en sa possession plus de quatre plantes de cannabis qui sont ni en train de bourgeonner ni en train de fleurir;

(f) for an organization to possess cannabis.	**f)** il est interdit à toute organisation d'avoir du cannabis en sa possession.

[34] However and respectfully, it is pertinent to note (as submitted by the Respondent), the Applicant did not challenge the findings of the comparable crime in Canada either before the RPD or the RAD. The RAD affirmed the RPD in finding the same facts, if committed in Canada, would probably constitute the offences of distribution, or possession for the purpose of distribution, of more than 30 grams of cannabis under subsections 9(1)(a) or 9(2) of the *Cannabis Act*. The Applicant failed to raise any issues with the equivalency analysis either before the RPD or the RAD.

[35] In these circumstances, I agree with the Respondent's submissions that the Applicant's challenge of the equivalency analysis is not properly before this Court. The Applicant failed to raise an issue with the equivalency analysis before the RPD. On his appeal to the RAD he therefore did not comply with Rule 3(3)(g) of the *Refugee Appeal Division Rules*, SOR/2012-257 [*RAD Rules*]:

Content of appellant's record	**Contenu du dossier de l'appelant**
3(3) The appellant's record must contain the following documents, on consecutively numbered pages, in the following order:	**3(3)** Le dossier de l'appelant comporte les documents ciaprès, sur des pages numérotées consécutivement, dans l'ordre qui suit:
...	…
(g) a memorandum that includes full and detailed submissions regarding	**g)** un mémoire qui inclut des observations complètes et détaillées concernant:

(i) the errors that are the grounds of the appeal,	**(i)** les erreurs commises qui constituent les motifs d'appel,
(ii) where the errors are located in the written reasons for the Refugee Protection Division's decision that the appellant is appealing or in the transcript or in any audio or other electronic recording of the Refugee Protection Division hearing,	**(ii)** l'endroit où se trouvent ces erreurs dans les motifs écrits de la décision de la Section de la protection des réfugiés portée en appel ou dans la transcription ou dans tout enregistrement audio ou électronique de l'audience tenue devant cette dernière,
(iii) how any documentary evidence referred to in paragraph (e) meets the requirements of subsection 110(4) of the Act and how that evidence relates to the appellant,	**(iii)** la façon dont les éléments de preuve documentaire visés à l'alinéa e) sont conformes aux exigences du paragraphe 110(4) de la Loi et la façon dont ils sont liés à l'appelant,
(iv) the decision the appellant wants the Division to make, and	**(iv)** la décision recherchée,
(v) why the Division should hold a hearing under subsection 110(6) of the Act if the appellant is requesting that a hearing be held.	**(v)** les motifs pour lesquels la Section devrait tenir l'audience visée au paragraphe 110(6) de la Loi, si l'appelant en fait la demande.
[Emphasis added]	[Je souligne]

[36] In *Dahal v Canada (Citizenship and Immigration)*, 2017 FC 1102 [per Crampton CJ] [*Dahal*], the applicants raised issues on judicial review they did not raise before the RAD. As a consequence the Chief Justice found these issues may not be raised before this Court on judicial

review. He relied on jurisprudence of the Supreme Court of Canada to the effect that any discretion on this point will not be exercised in favour of an applicant on judicial review where the issue could have been but was not raised before the tribunal, see *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, at paras 22 to 26:

> A. Judicial Review of an Issue That Was Not Raised Before the Tribunal
>
> [22] The ATA sought judicial review of the adjudicator's decision. Without raising the point before the Commissioner or the adjudicator or even in the originating notice for judicial review, the ATA raised the timelines issue for the first time in argument. The ATA was indeed entitled to seek judicial review. However, it did not have a right to require the court to consider this issue. Just as a court has discretion to refuse to undertake judicial review where, for example, there is an adequate alternative remedy, it also has a discretion not to consider an issue raised for the first time on judicial review where it would be inappropriate to do so: see, e.g., *Canadian Pacific Ltd. v. Matsqui Indian Band*, 1995 CanLII 145 (SCC), [1995] 1 S.C.R. 3, *per* Lamer C.J., at para. 30: "[T]he relief which a court may grant by way of judicial review is, in essence, discretionary. This [long-standing general] principle flows from the fact that the prerogative writs are extraordinary [and discretionary] remedies."
>
> [23] Generally, this discretion will not be exercised in favour of an applicant on judicial review where the issue could have been but was not raised before the tribunal (*Toussaint v. Canada Labour Relations Board* (1993), 160 N.R. 396 (F.C.A.), at para. 5, citing *Poirier v. Canada (Minister of Veterans Affairs)*, 1989 CanLII 5208 (FCA), [1989] 3 F.C. 233 (C.A.), at p. 247; *Shubenacadie Indian Band v. Canada (Human Rights Commission)*, 1997 CanLII 6370 (FC), [1998] 2 F.C. 198 (T.D.), at paras. 40-43; *Legal Oil & Gas Ltd. v. Surface Rights Board*, 2001 ABCA 160, 303 A.R. 8, at para. 12; *United Nurses of Alberta, Local 160 v. Chinook Regional Health Authority*, 2002 ABCA 246, 317 A.R. 385, at para. 4).
>
> [24] There are a number of rationales justifying the general rule. One fundamental concern is that the legislature has entrusted the determination of the issue to the administrative tribunal (*Legal Oil & Gas Ltd.*, at paras. 12-13). As this Court explained in *Dunsmuir*, "[c]ourts . . . must be sensitive . . . to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by

> Parliament and legislatures" (para. 27). Accordingly, courts should respect the legislative choice of the tribunal as the first instance decision maker by giving the tribunal the opportunity to deal with the issue first and to make its views known.
>
> [25] This is particularly true where the issue raised for the first time on judicial review relates to the tribunal's specialized functions or expertise. When it does, the Court should be especially careful not to overlook the loss of the benefit of the tribunal's views inherent in allowing the issue to be raised. (See *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650, at para. 89, *per* Abella J.)
>
> [26] Moreover, raising an issue for the first time on judicial review may unfairly prejudice the opposing party and may deny the court the adequate evidentiary record required to consider the issue (*Waters v. British Columbia (Director of Employment Standards)*, 2004 BCSC 1570, 40 C.L.R. (3d) 84, at paras. 31 and 37, citing *Alberta v. Nilsson*, 2002 ABCA 283, 320 A.R. 88, at para. 172, and J. Sopinka and M. A. Gelowitz, *The Conduct of an Appeal* (2nd ed. 2000), at pp. 63-68; *A.C. Concrete Forming Ltd. v. Residential Low Rise Forming Contractors Assn. of Metropolitan Toronto and Vicinity*, 2009 ONCA 292, 306 D.L.R. (4th) 251, at para. 10 (*per* Gillese J.A.)).

[37] In this connection, Chief Justice in *Dahal* held:

> [35] However, where the RAD simply provides a brief summary of the RPD's findings regarding matters that were not raised on appeal, and then makes a general statement that it concurs with those findings, the situation is entirely different. In such circumstances, the errors alleged to have been made by the RAD are in essence errors that were allegedly made by the RPD. Where an applicant fails to raise an issue on appeal before the RAD in respect of those aspects of the RPD's decision, it should not be able to do so before this Court. To conclude otherwise would be to permit an applicant to, in effect, do an "end run" around the RAD. I agree with the Respondent that this would be contrary to the scheme set forth in the *Rules*.
>
> …
>
> [37] By simply satisfying itself that no such additional errors were made, the RAD's decision should not become vulnerable to being set aside on judicial review, based solely on its general

> concurrence with findings made by the RPD in respect of matters that were not raised on appeal by the Applicants. In my view, this would largely vitiate the purpose of Rule 3(3)(g) of the *Rules*, which requires an appellant to identify (i) the errors that are the grounds of the appeal, and (ii) where those errors are located in the RPD's decision, or in the transcript recording of its hearing.

[38] The Applicant had the obligation to provide submissions regarding the errors that form the grounds of his appeal to the RAD. This he failed to do regarding his new arguments concerning section 8 of the *Cannabis Act*. In doing so he attempts to mount an end run around the RAD which is not allowed per *Dahal.* And see *Shaibu v Canada (Citizenship and Immigration)*, 2022 FC 109 [per Gleeson J] at para 8-9; *Fagite v Canada (Citizenship and Immigration)*, 2021 FC 677 [per Pallotta J] at para 19; *Xiao v Canada (Citizenship and Immigration)*, 2021 FC 386 [per McHaffie J] at para 39; *Canada (Citizenship and Immigration) v RK*, 2016 FCA 272 [per Dawson JA, Near and Woods JJA concurring] at para 6; *Adams v Canada (Citizenship and Immigration),* 2018 FC 524 [per Lafrenière J] at para 28; *Ghauri v Canada (Citizenship and Immigration)*, 2016 FC 548 [per Gleeson J] at para 34.

[39] When asked on this point at the hearing, counsel for the Applicant urged this new point be considered (although it formed no part of and was contrary to the record he asked the Court to judicially review) because of the stakes involved, namely he might now be removed from Canada, as he was removed previously from the United States, without the merits of his refugee claim being determined. That however is the potential consequence of every hearing involving section 98 of *IRPA.* Moreover, the time to recognize and respond properly in this respect was either at the RPD, or on appeal to and under the appeal rules enacted for the RAD.

[40] Regardless of the Applicant's impermissible submissions, in the alternative the Respondent submits the equivalency analysis was reasonable. I agree.

[41] An equivalency analysis may be conducted in three ways, see *Hill v Canada (Minister of Employment & Immigration)* (1987), 73 NR 315, 1987 CarswellNat 15 (WL Can) (CA), at para 16:

> 1. Comparing of the precise wording in each statute both through documents and, if available, through the evidence of an expert or experts in the foreign law and determining therefrom the essential ingredients of the respective offences;
>
> 2. Examining the evidence adduced before the adjudicator, both oral and documentary, to ascertain whether or not that evidence was sufficient to establish that the essential ingredients of the offence in Canada had been proven in the foreign proceedings, whether precisely described in the initiating documents or in the statutory provisions in the same words or not; or
>
> 3. Using a combination of one and two.

[42] The RAD's reasons indicate the RPD examined the Canadian and Texas statutes, as well as the documentation substantiating the Texas court proceeding, to ascertain whether the essential ingredients of the parallel offence in Canada were satisfied:

> [29] When considering the Canadian criminal context, a conviction for distribution or possession for the purpose of distribution under section 9 of the *Cannabis Act*, requires possession of only more than 30 grams of cannabis. Five pounds is more than seventy-five times that quantity, and fifty pounds is more than 750 times that quantity. This is not a situation in which the quantity of drugs involved suggests distribution of a small quantity. Jurisprudence indicates that drug trafficking offences are usually sufficiently serious to warrant exclusion from refugee protection. The offences of distribution or possession for the purpose of distribution under section 9 of the Cannabis Act are, in substance, similar to

> trafficking offences, rather than offences for simple possession, which are under section 8.

[43] Therefore in my respectful opinion, the RAD had reasonable grounds to find the Applicant was convicted of an offence outside Canada that if it had been committed in Canada would constitute an offence under an Act of Parliament (section 9 of the *Cannabis Act*) punishable by a maximum term of imprisonment of at least 10 years and indeed to a maximum of 14 years:

Punishment	**Peine**
9(5) Subject to section 51, every person that contravenes subsection (1) or (2)	**9(5)** Sous réserve de l'article 51, quiconque contrevient aux paragraphes (1) ou (2) commet une infraction et encourt, sur déclaration de culpabilité :
(a) is guilty of an indictable offence and is liable	**a)** par mise en accusation:
(i) in the case of an individual who is 18 years of age or older, to imprisonment for a term of not more than 14 years,	**(i)** s'agissant d'un individu âgé de dix-huit ans ou plus, un emprisonnement maximal de quatorze ans,
(ii) in the case of a young person, to a youth sentence under the Youth Criminal Justice Act, or	**(ii)** s'agissant d'un jeune, une peine spécifique prévue sous le régime de la Loi sur le système de justice pénale pour les adolescents,
(iii) in the case of an organization, to a fine in an amount that is in the discretion of the court; or	**(iii)** s'agissant d'une organisation, une amende dont le montant est fixé par le tribunal;

(b) is guilty of an offence punishable on summary conviction and is liable

b) par procédure sommaire:

(i) in the case of an individual who is 18 years of age or older who contravenes any of subparagraphs (1)(a)(i), (iii) and (iv) and (c)(i) and (ii) — or subsection (2) other than by possessing cannabis for the purpose of distributing it contrary to subparagraph (1)(a)(ii) — to a fine of not more than $5,000 or imprisonment for a term of not more than six months, or to both,

(i) s'agissant d'un individu âgé de dix-huit ans ou plus, pour une contravention à l'un des sous-alinéas (1)a)(i), (iii) ou (iv) ou c)(i) ou (ii) — ou au paragraphe (2) dans un autre cas que la possession de cannabis en vue de le distribuer d'une manière qui contrevient au sous-alinéa (1)a)(ii) — une amende maximale de cinq mille dollars et un emprisonnement maximal de six mois, ou l'une de ces peines,

(ii) in the case of an individual who is 18 years of age or older who contravenes subparagraph (1)(a)(ii) — or subsection (2) if the possession was for the purpose of distribution contrary to subparagraph (1)(a)(ii) — to a fine of not more than $15,000 or imprisonment for a term of not more than 18 months, or to both,

(ii) s'agissant d'un individu âgé de dix-huit ans ou plus, pour une contravention au sous-alinéa (1)a)(ii) — ou au paragraphe (2) dans le cas de la possession de cannabis en vue de le distribuer d'une manière qui contrevient au sous-alinéa (1)a)(ii) —, une amende maximale de quinze mille dollars et un emprisonnement maximal de dix-huit mois, ou l'une de ces peines,

(iii) in the case of a young person, to a youth sentence under the Youth Criminal Justice Act, or

(iii) s'agissant d'un jeune, une peine spécifique prévue sous le régime de la Loi sur le

	système de justice pénale pour les adolescents,
(iv) in the case of an organization, to a fine of not more than $100,000.	**(iv)** s'agissant d'une organisation, une amende maximale de cent mille dollars.
[Emphasis added]	[Je souligne]

[44] As noted, a crime will generally be considered as serious where a maximum sentence of 10 years or more could have been imposed had the crime been committed in Canada, see *Febles* at para 62:

> [62] The Federal Court of Appeal in *Chan v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 17150 (FCA), [2000] 4 F.C. 390 (C.A.), and *Jayasekara* has taken the view thatwhere a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada, the crime will generally be considered serious. I agree. However, this generalization should not be understood as a rigid presumption that is impossible to rebut. Where a provision of the *Canadian Criminal Code*, R.S.C. 1985, c. C-46, has a large sentencing range, the upper end being ten years or more and the lower end being quite low, a claimant whose crime would fall at the less serious end of the range in Canada should not be presumptively excluded Article 1F(b) is designed to exclude only those whose crimes are serious. The UNHCR has suggested that a presumption of serious crime might be raised by evidence of commission of any of the following offences: homicide, rape, child molesting, wounding, arson, drugs trafficking, and armed robbery (Goodwin-Gill, at p. 179). These are good examples of crimes that are sufficiently serious to presumptively warrant exclusion from refugee protection. However, as indicated, the presumption may be rebutted in a particular case. While consideration of whether a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada is a useful guideline, and crimes attracting a maximum sentence of ten years or more in Canada will generally be sufficiently serious to warrant exclusion, the ten-year rule should not be applied in a mechanistic, decontextualized, or unjust manner.

[45] I note that *Febles* cautions, "this generalization should not be understood as a rigid presumption that is impossible to rebut." Therefore, in this case the RAD reasonably applied the *Jayasekara* factors which identify factors to evaluate whether a crime is "serious" for the purposes of Article 1F(b) and concluded:

> [31] I have previously noted and have considered the elements of the crime, the mode of prosecution (both in Texas and in Canada), the facts surrounding the offence, and the mitigating and aggravating factors. I find that the circumstances of the offence in question justify the application of a presumption that the offence is serious, and I find that the evidence does not rebut the presumption that the crime in question should be considered serious. A crime may be serious even if it does not attract a maximum ten-year sentence. As noted previously, drug trafficking offences are generally considered by Canadian courts to be serious.39 I see no reason why the offences of distribution or possession for the purposes of distribution should be treated differently. Even absent a presumption of seriousness, I would have found that the evidence establishes, on a balance of probabilities, that the offence is serious.

[46] In reviewing the Applicant's submissions, it appears he places a great deal of emphasis on the particular charge laid in Texas, along with the particular resulting conviction and sentence, which were for possession of marijuana and two years imprisonment. In this case, it appears there was a plea and sentence deal followed by deportation. These may or may not have been part of a package possibly including other elements, we do not know. A great deal may depend on prosecutorial discretion in respect of which there is often little or nothing on the public record. In my view, particular charges laid in a foreign jurisdiction and their resulting disposition by a foreign court do not determine the Canadian equivalence, rather, what is required is a comparison of the "essential elements" of the respective offences. This requires a comparison of the definitions of those offences including defences particular to those offences or those classes of offences, see *Nshogoza v Canada (Citizenship and Immigration)*, 2015 FC 1211

[per Gascon J] at para 28, citing to *Li v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 1060 (FCA) at para 18.

[47] In addition, the Applicant also challenges the RAD's finding that he was "transporting" and therefore "distributing" on the basis of the "otherwise making available" wording included in the definition of distributing. He says this finding is unreasonable. However, to accept the Applicant's argument that both tribunals erred in finding his actions would attract a charge under s. 9 of the *Cannabis Act*, the Applicant asks this Court to accept his implicit assertion he possessed 50 pounds of marijuana for personal use. Implicitly, he submits although he was involved in the transportation of the 50 pounds of contraband, he was simply moving it from one place of which he had control to another place of which he had control. (For example, from his storage facility to his residence or from one place over which he had control to another.)

[48] Notably however, he led no evidence to this effect. In my view there is no merit in any implicit assertion the Applicant had 50 pounds of marijuana in his possession for personal use. Neither the RPD nor the RAD accepted any such implicit assertion, and with respect, the concurrent findings of the two panels below are in my view reasonable in this and other respects.

VIII. Conclusion

[49] In my respectful view, the Decision is transparent, intelligible and justified given the record and constraining jurisprudence. Therefore judicial review will be dismissed.

IX. Certified Question

[50] Neither party proposed a question of general importance, and none arises.

JUDGMENT in IMM-4366-21

THIS COURT'S JUDGMENT is that judicial review is dismissed, no question of general importance is certified, and there is no Order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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