Federal Court  Cour fédérale

**Date: 20230224**

**Docket: IMM-9426-21**

**Citation: 2023 FC 265**

**Toronto, Ontario, February 24, 2023**

**PRESENT: Madam Justice Go**

**BETWEEN:**

**Shwan Jaffar NADER**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. Overview

[1] The Applicant, Shwan Jaffar Nader, is a refugee claimant who has been charged with several offences in the United Kingdom [UK]. One of the offences in question is presumptively "serious" under Article 1F(b) of the *United Nations Convention and Protocol relating to the Status of Refugees,* 1951 [Refugee Convention], which excludes claimants who have committed

serious non-political crimes from making refugee claims. The Applicant is also facing non-serious charges that were allegedly laid and/or committed afterward.

[2] The question before me is this: Can an adjudicator consider the evidence of the non-serious crimes as aggravating circumstances in order to find the Applicant excluded under Article 1F(b) for having committed ***a*** serious non-political crime?

[3] The Applicant seeks judicial review of the Refugee Appeal Division's [RAD] decision to uphold the Refugee Protection Division's [RPD] decision denying his claim for refugee protection. The RPD rejected the Applicant's claim on May 27, 2021 upon finding that he is neither a Convention refugee nor a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] [RPD Decision]. Specifically, the RPD found that the Applicant is excluded under Article 1F(b) of the Refugee Convention. On December 7, 2021, the RAD dismissed the Applicant's appeal of the RPD Decision, confirming the RPD's findings [Decision].

[4] The Applicant argues that the Decision was unreasonable because the RAD erred in its application of the Article 1F(b) test, and made an unreasonable assessment of the contextual factors.

[5] I conclude that the RAD improperly aggregated several non-serious crimes to find the Applicant has committed a serious non-political crime. I therefore grant the application.

## II. Issues and Standards of Review

[6] The Applicant raises two issues, namely:

a. The RAD applied the wrong test for Article 1F(b) exclusion; and
b. The RAD's assessment of contextual factors is unreasonable.

[7] The Respondent argues that the Decision was reasonable as the RAD appropriately balanced aggravating and mitigating factors in its assessment of Article 1F(b) in determining whether the crime at issue is serious.

[8] The parties agree that the RAD's Decision is to be reviewed on a standard of reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 16–17.

[9] 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. The onus is on the Applicant to demonstrate that the Decision is unreasonable. To set aside a decision on this basis, the reviewing court must be satisfied that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency": *Vavilov* at para 100.

## III. Analysis

### A. The Factual Context

[10] The Applicant, now aged 29, is a citizen of Iraq. The Applicant's father obtained permanent residence status in the UK from an asylum claim after fleeing Iraq in 1997 and brought the Applicant to the UK in 2003 as a child.

[11] The Applicant was convicted as a juvenile in the UK for certain criminal offences. In November 2017, the Applicant was arrested and charged with handling stolen goods (11 motorcycles with an estimated value exceeding $80,000 CAD), possession of a controlled substance (cannabis) with intent to supply, and possession of a prohibited weapon (a taser stun gun). The Applicant pled guilty to the weapon charge and not guilty to the stolen goods and controlled substance charge. The Applicant had a trial date for July 2018 for the two outstanding charges and left the UK for Iraq shortly prior to the trial date.

[12] The Applicant travelled to Canada from Iraq in November 2018 and made a claim for refugee protection on January 2, 2019. The Applicant did not disclose the aforementioned circumstances in his initial Basis of Claim [BOC].

[13] The Applicant submitted an amended BOC and narrative on March 8, 2021, in addition to other supplementary disclosures in February and March 2021. These disclosures followed various actions taken by the Minister in their intervention of the RPD Decision, as well as other issues that arose pertaining to the Applicant's true identity. Both the Applicant and his spouse, who is also in Canada, testified at the RPD hearing.

## B. Overview of the Legislative Framework and Leading Cases

[14] Article 1F(b) of the Refugee Convention is incorporated into section 98 of the *IRPA* as follows:

| | |
|---|---|
| **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. |

[15] Article 1F(b) excludes from the Refugee Convention's protection individuals who are found to have committed a serious non-political crime outside the country of refuge prior to their admission into the country as a refugee.

[16] The Minister bears the burden to establish that the offences were committed and prove the following elements occurred:

| | |
|---|---|
| ***Convention and Protocol relating to the Status of Refugees*, 1951**<br>***Convention relative au statut des réfugiés (et protocole)*, 1951** | |
| **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 : |
| he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; | qu'elles ont commis un crime contre la paix, un crime de guerre ou un crime contre l'humanité, au sens des instruments internationaux élaborés pour prévoir des dispositions relatives à ces crimes; |
| he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; | qu'elles ont commis un crime grave de droit commun en dehors du pays d'accueil avant d'y être admises comme réfugiés; |
| he has been guilty of acts contrary to the purposes and principles of the United Nations. | qu'elles se sont rendues coupables d'agissements contraires aux buts et aux principes des Nations Unies. |

[17] The standard of proof is more than mere possibility but less than balance of probabilities standard, as set out in by the Supreme Court of Canada [SCC] in *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 [*Ezokola*] at para 101.

[18] The Refugee Convention does not define what a "serious crime" is.

[19] In *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68 [*Febles*], the SCC noted that Canadian courts presumptively view offences which, had they been committed in Canada could attract a custodial sentence of ten years or more, as "serious": at para 62.

[20] The SCC also cautioned that the analysis of whether a crime is "serious" should not be mechanical or decontextualized, and that the factors set out by the Federal Court of Appeal [FCA] in *Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404 [*Jayasekara*] could be applied to rebut the presumption: *Febles* at para 62.

[21] In *Vucaj v Canada (Citizenship and Immigration)*, 2013 FC 381 [*Vucaj*] at para 33, the Court summarized the four factors set out by the FCA in *Jayasekara*:

1. The elements of the crime.
2. The mode of persecution.
3. The penalty prescribed.
4. The facts and the mitigating and aggravating circumstances underlying the conviction.

[22] The SCC in *Febles* also noted that "only factors related to the commission of the criminal offences can be considered, and whether those offences were serious within the meaning of Article 1F*(b)*": at para 6.

## C. Analysis of the Decision

[23] The Applicant makes two separate but related arguments which I will address below:

a. The RAD erred by bolting on "unrelated" non-serous crimes in arriving at the conclusion that the handling stolen goods charge at issue satisfied the Article 1F(b) serious threshold; and

b. The RAD's assessment of the contextual factors and the resulting finding that the handling stolen goods crime is "serious" under Article 1F(b) was unreasonable.

*Issue 1: Did the RAD err by aggregating several, unrelated, non-serious crimes in finding the Applicant has committed a serious non-political crime?*

[24] The Applicant submits that Article 1F(b) requires a refugee adjudicator to identify "a serious non-political crime" that is independently sufficient to satisfy the "serious threshold", and an adjudicator may not augment the seriousness of an identified crime by pointing to evidence of a claimant's commission of other unrelated crimes.

[25] Having reviewed the Decision and considered the jurisprudence, I find the RAD erred by aggregating the taser and cannabis charges when finding that the handling stolen goods charge constituted a serious non-political crime.

RAD Decision

[26] Under the heading "[t]he offence of 'handling stolen goods' is serious in nature", the RAD considered the value of the stolen motorcycles forming the substance of the charge. The RAD then examined the equivalent offence under paragraph 355(a)(i) of the *Criminal Code*, RSC, 1985, c C-46, noting that it is a hybrid offence carrying a maximum term of imprisonment of ten years if pursued on indictment. The RAD found that it could not speculate on how a prosecutor in the UK would elect to proceed, but concluded that the presumption described in *Febles* that the crime is serious applied due to the maximum sentence of ten years: at para 62.

[27] The RAD then proceeded to assess if this presumption could be rebutted based on the caution in *Febles*. The RAD agreed with the Applicant that the RPD erred by finding the UK prosecution proceeded by way of indictment when there was no evidence of such. While the RAD acknowledged that the mode of prosecution is one of the *Jayasekara* factors, it found that the error was not material to the RPD Decision.

[28] Further, the RAD rejected the Applicant's argument that the RPD erred by failing to assess the large sentencing range for the offence at issue. The RAD also rejected the Applicant's argument that the crime at issue was less serious because it was non-violent in nature, as the RAD found that the crime was nonetheless not "victimless."

[29] The RAD then went on to consider the aggravating and mitigating factors as part of its determination of the seriousness of the offence of handling stolen goods.

[30] The RAD considered a number of factors including the Applicant's criminal record as a juvenile and his guilty plea to the weapons offence, which the RAD determined introduced "another element of violence when considering the outstanding charges from a holistic perspective." The RAD also included the cannabis offence as an "aggravating factor in the 1F(b) analysis and in considering the totality of the situation presented by the Applicant in that regard."

[31] The RAD stated at para 35:

> It is also instructive that the [Applicant] has chosen to plead guilty to the charge of possession of a prohibited weapon. Again, in considering the [Applicant's] claim taking a holistic approach, while he argues that the stolen property charge is non-violent in nature, the fact that he has chosen to plead guilty to a weapons offence, in my view, introduces a completely different element to the equation. As with the cannabis charge, I am unable to determine whether this charge individually warrants exclusion under Article 1F(b) but I do consider that a prohibited weapon charge in conjunction with the charges for handling stolen property and possession of cannabis with intent to distribute, are aggravating factors which point toward the [Applicant's] exclusion under Article 1F(b) of the Refugee Convention.

[32] After noting certain post-offence conduct of the Applicant, the RAD concluded:

> [37] .... I consider that the aggravating factors of previous criminal convictions, as well as the drug and weapon charges that were commenced against the [Applicant] when the handling stolen goods charge was laid leads me to the conclusion that handling stolen goods is a serious non-political offence.

<u>Errors of RAD in Relying on Weapon and Cannabis Charges to Find Handing Stolen Goods a Serious Violent Non-Political Crime</u>

[33] The Decision makes clear that the RAD considered the weapon and cannabis charges as aggravating factors in two ways. First, the RAD found the Applicant's guilty plea to the weapon

charge added a "different element" to the equation in considering whether the handling stolen property charge was "non-violent." Second, the RAD relied on the cannabis and weapon charges to conclude that handling stolen goods is a serious non-political crime.

[34] I find the approach adopted by the RAD inconsistent with the teachings of the SCC in *Febles* and that of the FCA in *Jayasekara*.

[35] In *Febles*, the SCC was asked to provide clarity on the meaning of the phrase "has committed a serious non-political crime" under Article 1F(b). Writing for the majority, then Chief Justice McLachlin of the SCC explained at para 14:

> …the main issue in the present case is whether "has committed a serious … crime" is confined to matters relating to the crime committed, or should be read as also referring to matters or events after the commission of the crime, such as whether the claimant is a fugitive from justice or is unmeritorious or dangerous at the time of the application for refugee protection.

[36] After discussing several considerations as to how the Refugee Convention should be interpreted, Chief Justice McLachlin concluded at para 15:

> …these considerations…lead me to conclude that the phrase "has committed a serious … crime" refers to the crime at the time it was committed. Article 1F*(b)*, in excluding from refugee protection people who have committed serious crimes in the past, does not exempt from this exclusion persons who are not fugitives from justice, or because of their rehabilitation, expiation or non-dangerousness at the time they claim refugee protection.
>
> [emphasis added]

[37] The SCC reiterated that "[t]he ordinary meaning of the terms used in Article 1F(b) – 'has committed a serious … crime outside the country of refuge prior to his admission to that country' – refers only to the crime at the time it was committed": *Febles* at para 17.

[38] For that reason, the SCC in *Febles* refused to allow the claimant's post-offence conduct to breathe life into the meaning of the phrase "has committed a serious…crime." In rejecting the consideration of post-offence conduct, the SCC was concerned about "upsetting the balance between humane treatment of victims of oppression and other interests of signatory countries, which they did not renounce simply by together making certain provisions to aid victims of oppression": *Febles* at para 29. The SCC adopted the following as the statement of the twin purposes of the Refugee Convention: *Febles* at para 29.

> In *R. (European Roma Rights Centre) v. Immigration Officer at Prague Airport*, [2004] UKHL 55, [2005] 2 A.C. 1, the U.K. House of Lords stated that the *Refugee Convention* "represent[s] a compromise between competing interests, in this case between the need to ensure humane treatment of the victims of oppression on the one hand and the wish of sovereign states to maintain control over those seeking entry to their territory on the other" (para. 15).

[39] With the twin purposes in mind, the SCC found at para 30:

> …While exclusion clauses should not be enlarged in a manner inconsistent with the *Refugee Convention*'s broad humanitarian aims, neither should overly narrow interpretations be adopted which ignore the contracting states' need to control who enters their territory. Nor do a treaty's broad purposes alter the fact that the purpose of an exclusion clause is to exclude. In short, broad purposes do not invite interpretations of exclusion clauses unsupported by the text.

[40] In my view, the notion of restricting the temporal consideration of a serious non-political crime to the time when the crime was committed was also embedded in the FCA's decision in *Jayasekara*. As the FCA explained at para 44:

> …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**.
>
> [emphasis added]

[41] By adding the qualifier "underlying the conviction", the FCA in my view was prescribing the boundaries within which adjudicators should consider mitigating and aggravating circumstances when assessing the seriousness of a crime. It is not an open invitation to consider any and all factors that may demonstrate the general criminality of the Applicant, or their overall rehabilitative or recidivist potential. Rather, the FCA's comment requires adjudicators to focus on the circumstances surrounding the conviction of the actual crime in question.

[42] I find support for my observation in this regard in the examples of mitigating and aggravating factors that the FCA provided at paras 45 to 46:

> [45] **For instance, a constraint short of the criminal law defence of duress may be a relevant mitigating factor in assessing the seriousness of the crime committed**. The harm caused to the victim or society, the use of a weapon, the fact that the crime is committed by an organized criminal group, etc. would also be relevant factors to be considered.
>
> [46] I should add for the sake of clarity that Canada, like Great Britain and the United States, has a fair number of hybrid offences, that is to say offences which, **depending on the mitigating or aggravating circumstances surrounding their commission**, can be prosecuted either summarily or more severely as an indictable

> offence. In countries where such a choice is possible, **the choice of the mode of prosecution is relevant to the assessment of the seriousness of a crime if there is a substantial difference between the penalty prescribed for a summary conviction offence and that provided for an indictable offence**.
>
> [emphasis added]

[43] All of the above-cited examples presented by the FCA in *Jayasekara* relate to the commission or prosecution of the index crime, as opposed to the consideration of an individual's general characteristics and conduct.

[44] In this case, the cannabis and weapon charges were allegedly laid after the police found the cannabis and taser at the Applicant's home during a police search in November 2017. On the other hand, the motorcycles were recovered from a search in March 2017 of the Applicant's previous place of employment.

[45] The Applicant submits, and I agree, that the RAD did not explain how the cannabis and weapon charges were related to the handling stolen goods charge such that the former exacerbates the seriousness of the latter. The RAD simply aggregated all the charges and the guilty plea, as part of the aggravating circumstances underlying the commission of the stolen goods charge, without first considering whether or not all of these charges were in fact an integral part of the commission of a serious crime.

[46] I also agree with the Applicant that the RAD erred by concluding that the taser charge added an element of violence to the equation. As the Applicant points out, the RAD failed to connect the taser charge to the handling stolen goods charge, for example by explaining how the

mere possession of an unlicensed weapon at the Applicant's home rendered the crime of possessing stolen motorcycles more violent.

[47] I acknowledge the Respondent's submission that the RAD was hamstrung by the limited evidence before it, which is a consequence of the Applicant having fled the UK before his trial. However, the absence of evidence cannot be the basis for linking the taser and cannabis charges to the handling stolen goods charge. Further, the RAD found the Applicant to not be credible overall, but never once rejected all of the Applicant's and his wife's testimony about the timing of the various offences committed in the Decision.

[48] While the facts are different, I find the Court's decision in *Vucaj* applicable. In *Vucaj*, the Court concluded that the RPD erred by aggregating crimes when it added the sentences of two crimes together to find that the 10-year threshold was met and that Article 1F(b) was triggered: at paras 11-12.

[49] As the Court in *Vucaj* explained at para 31:

> …There is no provision in the legislation for determining whether an applicant is excluded from the Convention by adding up the maximum sentences in Canada for each of the crimes that he or she has committed over his or her lifetime and then determining that cumulatively the maximum term of imprisonment would be more than 10 years. Article 1F(b) of the Convention states that a refugee claimant shall be excluded from the Convention if there are serious reasons for considering that he or she has committed "a" serious non-political crime outside the country of refuge prior to being admitted into the country of refuge. The sentence imposed for each offence therefore needs to be considered individually, and the RPD committed an error in adding up the maximum sentences for each one of the convictions.

[50] In addition to the improper aggregation of sentences, the Court in *Vucaj* also concluded that the RPD failed to conduct a proper and complete seriousness analysis, namely by failing to adequately assess the four *Jayasekara* factors to determine whether the presumption of seriousness could be rebutted: at paras 34-35 and 40.

[51] The Respondent distinguishes *Vucaj* from the case at bar, submitting that *Vucaj* stands for the proposition that adding up non-serious crimes to come up with "a" serious crime is not permitted. The Respondent asserts that the RAD did not add up sentences here, as the handling stolen property crime on its own in Canada carries a maximum sentence of 10 years. The Respondent maintains that the RAD did not add up the taser and cannabis charges to find that the presumption of seriousness applied, but merely considered the entirety of circumstances to determine the seriousness of the crime in context.

[52] It is true that the RAD in this case did not add up the potential sentences that the Applicant could receive for the cannabis and weapon charges to conclude that the handling stolen goods charge was a serious crime. However, the RAD did, as noted above, rely on these two other charges to augment the seriousness of the handling stolen goods charge.

[53] The Respondent also argues that there is no bar to considering the totality of the charges issued against an applicant when determining whether the main offence is "serious" pursuant to Article 1F(b), again noting that *Vucaj* and other authority do not have the effect of stating this proposition.

[54] I am not persuaded by this argument. The Court in *Vucaj* found impermissible the aggregation of sentences of multiple crimes to arrive at the 10-year threshold. It would not be logical to permit on the other hand the aggregation of the underlying offences that gave rise to the sentences to find that the primary offence is "serious."

[55] I note however, as the Respondent submits, Justice Noël's comment in *Vucaj* suggesting that the RPD could have considered the applicant's "pattern of criminal behaviour as part of its consideration of aggravating and mitigating factors": at para 39. I regard this specific comment *obiter* and not determinative of the issues in *Vucaj*.

[56] Further, I note that in some decisions, this Court appears to adopt a broader concept of mitigating and aggravating factors. However, these cases tend to involve conduct related to the specific type of crime under consideration. For instance, the Court found repeated offences of drinking and driving to be an aggravating factor when considering whether the charge of second degree assault with a vehicle was a serious crime: *Gudima v Canada (Citizenship and Immigration)*, 2013 FC 382 at para 13.

[57] These considerations, in my view, are also relevant in considering where an applicant's conduct would fall within the sentencing range, in cases where the applicant has not been convicted and sentenced.

RAD improperly considered Post-Offence Conduct

[58] By aggregating the taser and cannabis charges with the handling stolen goods charge, I also find the RAD improperly considered post-offence conduct. I start by acknowledging the Respondent's argument that, other than the Applicant's discredited evidence, there was limited evidence before the RPD on when the taser and cannabis crimes were committed.

[59] However, I agree with the Applicant that the RAD did not appear to have rejected wholesale the testimony of the Applicant's spouse, who testified that the police recovered the cannabis from their home during a November 2017 visit, and that the police found the taser during the same visit. In any event, the RAD did not make any findings suggesting that the taser and weapon crimes were committed prior to the handling stolen goods offence.

[60] The Applicant relies on *Lin v Canada (Citizenship and Immigration)*, 2021 FC 1329 [*Lin*], where the Court found it unreasonable for the RPD to augment the seriousness of the crime based on post-offence conduct, agreeing with the applicant's arguments relying on *Febles* similar to those advanced in the case at bar: at paras 36-38.

[61] The Applicant maintains that the taser and cannabis charges were unrelated elements of post-offence conduct to the stolen goods charge, noting the testimonial evidence before the RAD. The Applicant asserts that there was no evidence that the items recovered at the Applicant's home were connected to the stolen motorcycles. Based on the Court's findings in *Lin*, the Applicant argues that the "extraneous" charges not found to be "serious" on their own should not have been considered post-offence conduct aggravating factors.

[62] The Respondent submits that *Febles* only excluded from consideration post-offence conduct which is "extraneous" to the crime, and that absconding from prosecution, fleeing to the alleged country of persecution, and seeking refuge in Canada without disclosing the foregoing are "surely relevant" to the crime in question. The Respondent further submits that the RAD made clear that whether it accepted the after-the-fact and evolving explanations for why the Applicant left the UK before his trial, it would still have found the crime at issue to be serious.

[63] In my view, the RAD in this case never made a finding as to whether the weapon and cannabis charges were related, or extraneous, to the handling stolen goods charge. It is not appropriate for the Respondent to bolster the Decision by reading in a justification that was not provided.

[64] I acknowledge the RAD did state that even if it was wrong in finding that being a fugitive from justice is an aggravating factor, it would not change its conclusion about the seriousness of the handling stolen goods offence. I note, however, that a similar qualifier was never made when the RAD aggregated the taser and cannabis charges as part of its seriousness analysis.

[65] Based on all of the above, I find that the RAD erred by aggregating several non-serious charges faced by the Applicant to find that the Applicant committed ***a*** serious non-political crime.

*Issue 2: Was the RAD's assessment of contextual factors unreasonable?*

[66] The Applicant also argues that the RAD's assessment of the contextual factors was unreasonable and that the resulting finding that the handling stolen goods crime is "serious" under Article 1F(b) was unreasonable as well.

[67] The Applicant raises several arguments in this regard. I need not consider all of them as I find the RAD's error in applying the wrong test determinative of the application. I will simply note that some of my findings above would also render the RAD's assessment of the contextual factors unreasonable.

[68] To start, I find the RAD's failure to address whether the various charges were related rendered its contextual analysis unreasonable.

[69] I also agree with the Applicant's criticism of the RAD's interpretation of *Febles* that "the SCC seems to limit post-offence conduct to mitigating factors, as opposed to factors which might be aggravating in nature when considered against the seriousness of the offence." Here, I find instructive Justice Brown's reasons in *Lin* rejecting a similar argument asserting that *Febles* included an asymmetric limitation:

> [37] The Respondent submits *Febles* does not forbid consideration of post-offence actions referring the Court to *Tabagua* at paragraph 12. I disagree because that reference in *Tabagua* formed no part of the ratio of Justice Gleason's reasons. Instead, I am bound by what the Supreme Court of Canada in *Febles* (2014), subsequent to *Jayasekara* (2008), held at paragraph 60:
>
> > [60] Article 1F(b) excludes anyone who has ever committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee. Its application is not limited to fugitives, and neither is the seriousness of the crime to be balanced against factors

> extraneous to the crime such as present or future danger to the host society or post-crime rehabilitation or expiation.
>
> [Emphasis added]
>
> [38] Therefore, in my respectful view, it was unreasonable for the RPD to consider post-offence conduct.

[70] As to the other aspects of the Decision that the Applicant asserts to be unreasonable, these issues are best left for the newly constituted panel to ponder on redetermination.

## IV. Certified Questions

[71] The Applicant requests that the Court certify the following questions:

a. For the purposes of an Article 1F(b) analysis, does *Febles* articulate an asymmetrical rule, whereby positive post-offence conduct may not be treated as a factor that migrates the seriousness of the identified crime, but negative post-offence conduct may be treated as a factor that aggravates the seriousness of the crime?

b. When determining whether an identified offence is "serious" in the meaning of Article 1F(b), is it reasonable for a refugee adjudicator to aggregate two (or more) offences, which on their own do not reach the "serious threshold", in order to arrive at the conclusion that an identified crime is "serious" in the meaning of Article 1F(b)?

[72] The elements of a properly certified question are set out in *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 at para 46:

> [46] ...The question must be a serious question that is dispositive of the appeal, transcends the interests of the parties and raises an issue of broad significance or general importance. This means that the question must have been dealt with by the Federal Court and must arise from the case itself rather than merely from the way in which the Federal Court disposed of the application. An issue that need not be decided cannot ground a properly certified question... Nor will a question that is in the nature of a reference or whose answer turns on the unique facts of the case be properly certified

> (*Mudrak v. Canada (Citizenship and Immigration)*, 2016 FCA 178, 485 N.R. 186, at paragraphs 15, 35).

[73] The Applicant submits that both questions are dispositive and transcend the issues of the particular case.

[74] I deal first with the Applicant's second proposed question. While I conclude that the RAD erred by aggregating the taser and cannabis charges when finding that the handling stolen goods charge constituted a serious non-political crime, I arrive at this conclusion by noting that the RAD failed to first consider if the non-serious charges were part-and-parcel of the commission of the stolen goods charge. My finding is thus based on the unique facts of the case and the specific findings made by the RAD, and does not, in my view, have broad significance beyond the context of this case. Nor does my finding transcend the interests of the parties.

[75] I am also not convinced that the law on this issue is not settled. I agree with the Applicant that similar questions as those raised in this case will arise again in the future. When they do, this Court will continue to be guided by *Febles* while examining the reasonableness of the impugned decisions in view of the factual and legal constraints within which the decision-makers operate.

[76] I turn now to the question of whether *Febles* articulates an asymmetrical rule. While I address this question when examining the reasonableness of the Decision, for the reasons already set out above, this question is not determinative of the application.

[77] In conclusion, I find neither of the Applicant's proposed questions meet the requirements for a properly certified question.

## V. Conclusion

[78] The application for judicial review is allowed.

[79] There is no question for certification.

**JUDGMENT in IMM-9426-21**

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

1. The application for judicial review is granted.

2. The matter is returned for redetermination by a different member of the RAD.

3. There are no questions to certify.

"Avvy Yao-Yao Go"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-9426-21 |
| **STYLE OF CAUSE:** | SHWAN JAFFAR NADER v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | HELD VIA VIDEOCONFERENCE |
| **DATE OF HEARING:** | DECEMBER 20, 2022 |
| **JUDGMENT AND REASONS:** | GO J. |
| **DATED:** | FEBRUARY 24, 2023 |

**APPEARANCES:**

| | |
|---|---|
| Steven Blakey | FOR THE APPLICANT |
| Kristina Dragaitis | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Steven Blakey<br>Waldman & Associates<br>Toronto, Ontario | FOR THE APPLICANT |
| Attorney General of Canada<br>Toronto, Ontario | FOR THE RESPONDENT |