Date: 20100205

Docket: IMM-4743-08

Citation: 2010 FC 123

Ottawa, Ontario, February 5, 2010

PRESENT: The Honourable Leonard S. Mandamin

BETWEEN:

AHMED ABDEL HAFIZ AHMED RIHAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Ahmed Abdel Hafiz Ahmed Rihan applies for judicial review of a decision rendered by a Member of the Immigration and Refugee Board of Canada, Refugee Protection Division (the RPD) on October 15 2008, denying the Applicant is a Convention Refugee or a person in need of protection.

[2] The RPD excluded the Applicant from refugee status pursuant to Article 1F(b) of the *Convention Relating to the Status of Refugees*, 189 U.N.T.S. 2545 (the Convention) because of an Interpol notice issued by Egypt seeking the Applicant's arrest and extradition to serve a sentence for fraud.

[3] The Applicant seeks an order pursuant to s.18.1(3) of the *Federal Courts Act* setting aside the RPD's decision and remitting the matter to a differently constituted panel for determination in accordance with such directions the Court may provide.

[4] I grant the application for judicial review as I find the RPD erred in its decision. The matter is remitted for the following reasons.

BACKGROUND

[5] The Applicant, an Egyptian citizen, fled Egypt for Canada on January 24, 2006 because he feared persecution for his liberal beliefs. The Applicant provided a statement and testified about his situation in Egypt. He was a prominent sports personality and on the board of directors at the Maadi Sporting Club. The Applicant opposed fundamentalist members of the board pushing for a restrictive dress code for and the segregation of female club members. Around the same time state security agents told him they received complaints he was printing irreligious material and they cautioned him to be careful because fundamentalists were planning to harm him. Soon after young men began threatening him and his family. His wife was warned to divorce him or else she would be attacked too. Two incidents prompted him to take the threats seriously, a suspicious automobile

accident involving his son and a robbery at his printing warehouse. The police would not help because the influence of fundamentalism is on the rise generally in Egypt and specifically in Maadi. (Tribunal Record, p. 93)

[6] The Applicant explained:

> "What happened is two days before travelling, that is on the 23rd, I got a letter that said he will harm my children and my wife if I didn't divorce my wife and unless I don't interfere in their matters. And this took place after the robbery of my warehouses in Egypt and after the accident of my son. I took it very serious and my wife had letters of threats and phone calls and she knew the story because I used to hide it from her. So I had to divorce her and travel the same day." (Tribunal Record p. 225)

Notwithstanding the Egyptian divorce, the Applicant's wife remains committed to him, but she stayed behind because they have money and assets in Egypt.

[7] At the July 25th, 2006 intake examination the Applicant declared he had never committed or been charged with a crime in any country.

[8] The Minister intervened in the Applicant's refugee claim, bringing the RPD's attention to an October 26th, 2006 Interpol Red Notice. The notice indicated a September 15th, 2005 conviction for "fraud and deception; uttering unfunded cheques" and it showed the Applicant was sentenced to serve 6 years in prison.

THE DECISION UNDER REVIEW

[9] The RPD excluded the Applicant on the basis of the Interpol Red Notice because of section 98 of the *Immigration and Refugee Protection Act* (IRPA) which gives effect to Article 1F(b) of the Convention, a provision that excludes from refugee status claimants who have committed serious crimes.

[10] The RPD did not believe the Applicant's assertion he was ignorant of his conviction since he was in Egypt when the conviction was entered. The RPD gave significant weight to the Interpol Red Notice; finding it came from a reliable, reputable and objective source. The RPD found: "At the May 2008 sitting, the claimant was asked to explain what occurred regarding the warrant and he said that the situation was resolved and the money had been returned." The RPD noted the Applicant was convicted *in absentia* but it went on to say the conviction was not relevant to the issue of exclusion, rather, "The important point was the commission of the crime." Relying on testimony from the Applicant's witness, Amin Ekram Al-Yahki, the RPD found restitution confirmed a crime was committed. The RPD found a letter from the apparent victim of the fraud withdrawing his complaint and abandoning the civil claim against the Applicant was "not without self-interest" and accordingly gave it little weight.

[11] The RPD found "the Interpol Red Notice is still outstanding and that the claimant is a convicted felon, who is wanted in Egypt to serve a six year prison sentence, regardless of whether the civil aspect of the crime has been settled or not."

[12] The RPD referred to the UNHCR Handbook to describe the purpose of Article 1 F(b):

> …to protect the community of a receiving country from the danger of admitting a refugee who has committed a serious common crime. It also seeks to render due justice to a refugee who has committed a common crime (or crimes) of a less serious nature or has committed a political offence.

[13] The RPD decided the offence was a serious crime noting the maximum penalty in Canada's *Criminal Code* for fraud over $5,000 is 14 years imprisonment. The RPD found the Applicant committed a serious criminal act because of the amount involved, approximately $51,000, and because he was sentenced to six years.

[14] The RPD concluded these were "serious reasons for considering" the Applicant has committed a serious non-political crime outside Canada prior to his admission here as a refugee. She therefore found he fell within Article 1 F(b). The RPD did not do an alternative analysis to determine if he was a Convention refugee or a person in need of protection.

ISSUES

[15] The Applicant alleges the RPD erred in fact and law and exceeded her jurisdiction in finding the Applicant should be excluded on convention grounds.

[16] In my view, two issues resolve this case:

a. Did the RPD base her decision on an erroneous finding of fact made in a perverse manner without regard for the evidence before it?

b. Did the RPD err in fact and law with respect to its conclusion the Interpol Red Notice alone constitutes a "serious reason for considering" a qualifying crime was committed in light of other evidence before it?

LEGISLATION

[17] A person who has committed a serious non-political crime does not qualify as a Convention Refugee or a person in need of protection. Section 98 of IRPA provides:

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. Exclusion par application de la Convention sur les réfugies	98. La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugies ne peut avoir la qualité de réfugié ni de personne à protéger.

[18] Article 1F(b) of the *United Nations Convention Relating to the Status of Refugees* states:

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 donc 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 réfugies

STANDARD OF REVIEW

[19] A standard of review analysis is not necessary in every case. Where the standard of review on an issue before the Court is well settled by jurisprudence the reviewing court may apply that standard of review: *Dunsmuir v. New Brunswick* 2008 SCC 9 para. 54.

[20] This Court has found, and I agree, the question of exclusion under section 98 is a question of mixed law and fact with some discretion, it should be reviewed on the standard of reasonableness: *Jayasekara v. Canada (Minister of Citizenship and Immigration)* 2008 FC 238 at para. 10, aff'd 2008 FCA 404 (*Jayasekara*).

APPLICANT'S SUBMISSIONS

[21] The Applicant submits the RPD erred in rejecting the Applicant's assertion he was never notified of the civil and criminal proceedings against him. He also asserts the RPD's dismissal of the letter from the alleged fraud victim was unreasonable because the letter demonstrates no serious crime was committed.

[22] The Applicant's counsel argued his client committed no crime. He insisted the evidence discloses the Applicant provided two cheques to an investor as security to the latter's investment in a business venture. The investor subsequently received a villa as full payment on his investment but the Applicant negligently failed to retrieve his cheques because he trusted the investor. When he discovered the cheques were the basis of his conviction the Applicant's family intervened and

confronted the investor about filing a false accusation. As a result, the investor wrote a letter to Interpol stating he was withdrawing his complaint.

[23] In the alternative, the Applicant's counsel submitted that if the RPD found a crime was committed, the writing of a bad cheque is not a qualifying crime. Counsel argued the Applicant is credible because he testified in a forthright manner for some eight hours, without embellishment.

[24] The Applicant further submits the RPD erred by rejecting the evidence from Mr. al-Yahki, the Applicant's Egyptian lawyer.

[25] The Applicant argues the Minister's case depends exclusively on the Interpol Red Notice. He adds, without corroboration the notice is insufficient evidence to support a serious reason to consider a crime was committed. The Applicant refers to *Gurajena v. Minister of Citizenship and Immigration* 2008 FC 724 (*Gurajena)* in support of this submission.

[26] The Applicant argues one of the purposes of Article 1F(b) is to prevent those who are trying to avoid justice from evading extradition. Therefore, a claimant who has expiated a serious non-political criminal act should not be excluded. He relies on paragraph 23 of the Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, which reads:

> Where expiation of the crime is considered to have taken place, application of the exclusion clause may no longer be justified. This may be the case where the individual has served a penal sentence for the crime in question, or perhaps where a significant period of time has elapsed since commission

> of the offence. Relevant factors would include the seriousness of the offence, the passage of time, and any expression of regret shown by the individual concerned. In considering the effect of any pardon or amnesty, consideration should be given to whether it reflects the democratic will of the relevant country and whether the individual has been held accountable in any other way. Some crimes are, however, so grave and heinous that the application of Article 1F is still considered justified despite the existence of a pardon or amnesty. (emphasis added)

[27] The Applicant submits the RPD would have concluded differently had it considered the relevant factors in Mr. Justice Gilles Létourneau's reasons in the Federal Court of Appeal's decision in *Jeyasekara* interpreting Article 1F(b).

RESPONDENT'S SUBMISSIONS

[28] The Respondent submits the status of the sentence does not preclude exclusion under Article 1F(b) of the Convention. In *Jayasekara,* the Court of Appeal concluded Article 1F(b) is not limited to fugitives from foreign justice, and it can be applied to persons who have served their sentences or who have had their foreign criminal issues resolved and settled.

[29] The Respondent submits the Applicant did not present evidence demonstrating the Applicant's criminal issues in Egypt are formally resolved, expiated or expunged. According to the Applicant's lawyer in Egypt, the "victim reconciliation" document was neither filed, nor ratified by that country's court of appeal in order to "cancel" the sentence. The Respondent therefore argues the RPD concluded reasonably in finding the criminal sentence is outstanding.

[30] Moreover, the Respondent submits the question of whether or not the Applicant has a criminal record in Egypt is not determinative of exclusion. Article 1F(b) concerns serious reasons to consider the Applicant committed a serious non-political crime. A criminal record, while likely a serious reason, is not the only reason to believe a serious crime has been committed.

[31] The Respondent insists the RPD was reasonable by basing her decision "serious reasons for considering" a "serious non-political crime" was committed on the following factual conclusions:

a. The Interpol Red Notice dated October 26th, 2006 indicates the Applicant was convicted in Egypt of fraud, deception and issuing unfunded cheques in an amount equal CAD $51,000, and was sentenced to six-years in prison. The withdrawal of the civil suit does not mean no crime was committed.

b. According to his own evidence, the Applicant claims to have paid restitution to the victim. Restitution compensates wrongdoing.

c. The Applicant's crime was driven by self-interest and avarice.

d. The seriousness of the crime is established by the amount involved and the sentence imposed.

e. The same offence is punishable in Canada by a maximum penalty of 14 years.

[32] The Respondent concludes there is no reason for the Court to interfere with the RPD's decision.

THE HEARINGS

[33] The RPD hearing process in Mr. Rihan's case was disjointed, confusing and suffered from serious drawbacks with respect to taking evidence and hearing submissions. The language translation was a major obstacle to clear communication. Problems arose with the translation of the Refugee Protection Officer's (the RPO) inquiries. At one point the Officer said to the Applicant:

> RPO: Okay. Now I am going to give you general instruction, I don't know whether you are listening to me or Mr. Interpreter or both and by listening to two people at once you are not hearing much. But a question that says when, what month, the answer should be two [sic] thing, what month, what year. The question should not have to be repeated three times. (Tribunal Record pp. 245 – 246)

I draw attention to this extract, which resembles other exchanges throughout the hearing and highlights the confusion plaguing this process. Confusion also surfaces throughout the transcripts of the Applicant's witnesses: his wife's and his Egyptian lawyer whose long distance telephone connection was lost on one occasion.

[34] There are also several spellings of the same names in the record. For example, Mr. al-Jezawi is the alleged victim of the fraud at issue in this case. His name is spelled "Al-Gizware", "El-Gizawy" and "Elgezary" at different points in the transcript. Mr. Rihan's lawyer in Egypt is Amin Ekram Arnest al-Yahki, his name is spelled "Elyahky" throughout the transcript.

[35] However, the predominant obstacle to any coherence in this whole process was two mid-course changes of presiding RPD members. A total of three RPD members heard this case at different times.

[36] The first hearing was initially declared abandoned because the Applicant didn't show up. However, the hearing was reinstated and reset to September 13, 2007 after the first RPD learned the Applicant was ill due to a heart condition on the day of his hearing.

[37] A second RPD member presided over the September 13, 2007 sitting and heard testimony from the Applicant, the Applicant's wife, and the Applicant's Egyptian lawyer, Mr. al-Yahki. The latter, Mr. al-Yahki, has represented Mr. Rihan since 1996. He testified he practices criminal, administrative and business law. His office employs other lawyers and support staff. This hearing concluded on September 28, 2007 with oral submissions by the RPO and the Applicant's counsel. The Minister's counsel attended but did not participate.

[38] In her submissions the RPO noted the Minister's allegation of a serious reason for considering the Applicant committed a serious non-political crime. The Officer acknowledged the Applicant's assertion the charges were fabricated. The RPO also noted the Applicant's initial claim involved harassment by fundamentalists. The RPO noted that after oral testimony, the harassment issue became more political in nature because the Applicant's wife testified the harassment was perpetrated by men affiliated with the Muslim Brotherhood. The Muslim Brotherhood is identified as an extremist organization with political ties in Egypt. The RPO also made submissions concerning the questions of credibility and inclusion.

[39] The presiding RPD member concluded the hearing and reserved, indicating the decision would be issued in writing.

[40] Subsequently, the Applicant was informed by letter from the RPO that:

> While hearing evidence at the hearing, the claimant's wife testified that the victim of the crime and the Muslim Brotherhood worked in concert to manufacture evidence against the claimant, and that the claimant's conviction in absentia is not only false but also further indication of the persecution that he has faced and will continue to face if he returns to Egypt.
>
> The Presiding Member has directed me to inform you of this so that you have the opportunity to address this issue in your submissions, should you choose to.
> (Tribunal Record, page 64)

[41] The RPD member did not issue a decision. She was replaced by a third RPD member.

[42] On May 2, 2008, a new hearing began with the new RPD Member, Harriet Wolman. The Minister's counsel chose to participate in addition to the RPO and the Applicant's counsel. The hearing commenced on a *de novo* basis with the transcripts of previous testimony accepted as evidence. The new RPD member said:

> From my perspective <u>I am prepared to accept the transcript as - - because it's sworn testimony</u>. So basically we're not going to rehear the claim from the beginning. I don't - - you know, I'm willing to hear comments from everybody but I feel we can just proceed.
> …
> When we get to that point I feel we will have heard enough testimony and <u>if there are any further representations, not repetitive of the previous ones, it there are further representations based on what we hear this morning then I'm happy to hear them</u> and consider them before I make my decision.
> (emphasis added)

[43] The Applicant testified again and was examined by his counsel and cross-examined by both the RPO and the Minister's counsel.

[44] The Minister's counsel submitted there are serious reasons for considering the Applicant committed a serious non-political crime in Egypt before coming to Canada. The RPD made no further submissions.

[45] Applicant's counsel did not repeat his previous submissions as directed. He refuted the basis for finding the Applicant committed a crime. He stressed the importance of considering testimony from the Applicant and the Applicant's witnesses in the earlier hearing.

ANALYSIS

[46] Before examining the RPD's treatment of the evidence, it is useful to review the jurisprudence concerning Article 1F(b).

[47] A spectrum of interpretations of Article 1F(b) of the Refugee Convention emerged from the jurisprudence. Justice Bastarache's obiter in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, [1998] S.C.J. No. 46 (QL) at paragraph 73 (*Pushpanathan)* gives the article its most narrow interpretation. He suggested the article was meant to prevent fugitives from foreign justice using a claim of refugee status to shield them from extradition. *Pushpanathan* decided a certified question concerning Article 1F(c) of the convention, the interpretation of 1F(b) in that decision is concerned with understanding the exclusionary provisions of the article by reference to a crime committed in Canada. More specifically, whether drug trafficking is a serious non-political criminal act.

[48] The Federal Court of Appeal in *Chan v. Canada (Minister of Citizenship and Immigration),* [2000] 2 FC 290 *(Chan)* later used this reasoning to allow the appeal of a claimant convicted and sentenced for offences related to drug trafficking. The offence was a serious non-political crime and the sentence was served. The Court of Appeal therefore held the claimant was not a fugitive and would not be excluded by Article 1F(b). It decided against the Minister who was arguing for a broader interpretation of the Article. The Court held under the statutory scheme of the day a broader interpretation would deny a hearing to legitimate refugee claimants who have served a sentence for serious non-political crimes without considering their rehabilitation.

[49] Changes to the *Immigration and Refugee Protection Act* later opened the door to a wider view of Article 1F(b). The Federal Court of Appeal reconsidered the article's meaning in *Zrig v. Canada (Minister of Citizenship and Immigration)*, 2003 FCA 178 (*Zrig)*. This time, the question hinged on whether the claimant should be excluded based on his association to a terrorist group in Tunisia. A considerable body of evidence pointed to the group's involvement in serious non-political crimes predicated on violence and intimidation. Evidence and admissions demonstrated the claimant was a member of the group at its highest echelons; however no evidence linked him conclusively to any of the qualifying crimes. Nevertheless, Madame Justice Danièle Tremblay-Lamer of this Court agreed an inference could be drawn to find the claimant was likely aware of his group's involvement in at least one of a series of serious non-political criminal acts perpetrated after his promotion to a high position.

[50] The Court of Appeal distinguished the facts in *Zrig* from earlier jurisprudence on Article 1F(b), thereby broadening the Article's application. The Court of Appeal distinguished the analysis in *Chan* because the Applicant in *Zrig* was neither charged nor convicted of the crimes at issue before the Refugee Board: *Zrig*, para. 64. Mr. Justice Marc Nadon then found Justice Bastarache's reasoning did not limit the meaning of Article 1F(b) to cover only extraditable crimes in Canada. He wrote at paragraph 67:

> "Such a limitation would be surprising to say the least, since first it is in no way contained in the wording of Article 1F(b), and second, the limitation would lead to an absurd situation in which extraditable criminals would be excluded from refugee protection whereas offenders whose crimes were not extraditable crimes would not be excluded because Canada had not concluded an extradition treaty with the country in which the serious non-political crimes were committed."

[51] The Court of Appeal went on to consider other interpretations of Article 1F(b) held by the British Court of Appeal and the Australian Federal Court as well as academic writing in the Travaux Préparatoires. Together, these sources led the Court of Appeal to find there was no intended limitation in Article 1F(b) restricting it to prevent claims for refuge from persecution as a shield from extradition.

[52] The Court of Appeal finds complementary purposes of Article 1F(b) at paragraphs 118 and 119 in *Zrig*:

> "My reading of precedent, academic commentary and of course, though it has often been neglected, the actual wording of Article 1F of the Convention, leads me to conclude that the purpose of this section is to reconcile various objectives …

> These purposes are complementary. The first indicates that the international community did not wish persons responsible for persecution to profit from a convention designed to protect the victims of their crimes. The second indicates that the signatories of the Convention accepted the fundamental rule of international law that the perpetrator of a political crime, even one of extreme seriousness, is entitled to elude the authorities of the State in which he committed his crime, the premise being that such a person would not be tried fairly in that State and would be persecuted. The third indicates that the signatories did not wish the right of asylum to be transformed into a guarantee of impunity for ordinary criminals whose real fear was not being persecuted, but being tried, by the countries they were seeking to escape. The fourth indicates that while the signatories were prepared to sacrifice their sovereignty, even their security, in the case of the perpetrators of political crimes, they wished on the contrary to preserve them for reasons of security and social peace in the case of the perpetrators of serious ordinary crimes. This fourth purpose also indicates that the signatories wanted to ensure that the Convention would be accepted by the people of the country of refuge, who might be in danger of having to live with especially dangerous individuals under the cover of a right of asylum." (emphasis added)

[53] The Court of Appeal concluded there is no distinction, except with respect to the obvious, between Articles 1F(a) and (b). Article 1F(a) refers to specific serious international crimes: "…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", while F(b) refers to the commission of "…a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee". In finding this, the Court of Appeal broadened the applicability of the article to find Zrig's association to a terrorist organization that perpetrated violent acts during his membership at a high level was a serious reason for considering he had committed qualifying crimes. It denied Zrig's appeal and upheld the trial judge's conclusion.

[54] What emerges is Article 1F(b) leaves signatories to the convention a fair degree of latitude to exclude both criminal and possibly criminal applicants. The Article is not restricted to extraditable crimes, nor must there be proof of a conviction or even an allegation of a qualifying crime made by authorities in other countries.

[55] That being said, Canada's commitment to Convention refugees requires the RPD members properly scrutinize the evidence before them before applying the exclusionary articles of the convention.

[56] With the scope of Article 1F(b) settled by the Court of Appeal in *Zrig*, I now turn my attention to the factors that should be taken into account while deciding if there are sufficient reasons for exclusion.

Did the RPD base her decision on an erroneous finding of fact made in a perverse manner without regard for the evidence before it?

[57] This Court must, on the one hand, ask if a board has properly considered the evidence while, on the other hand, resist the temptation to supplant its own take on the evidence. Mr. Justice John Evans, as he then was, explained the concept succinctly in *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425 at paragraph 14 *(Cepeda-Gutierrez)*:

> "It is well established that section 18.1(4)(d) of the Federal Court Act does not authorize the Court to substitute its view of the facts for that of the Board, which has the benefit not only of seeing and hearing the witnesses, but also of the expertise of its members at assessing evidence relating to facts that are within their area of specialized expertise... In order to attract

> judicial intervention under section 18.1(4)(d) the applicant must satisfy the Court, not only that the Board made a palpably erroneous finding of material fact, but also that the finding was made "without regard to the evidence".” (emphasis added)

And then at paragraph 17 he wrote:

> However, the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": Bains v. Canada (Minister of Employment and Immigration) (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact. (emphasis added)

[58] In *Ozdemir v. Canada (Minister of Citizenship and Immigration)*, 2001 FCA 331 Justice Evans revisited the question of how Boards should address evidence, he wrote at paragraph 10:

> Nor will a reviewing court infer from the failure of reasons for decision specifically to address a particular item of evidence that the decision-maker must have overlooked it, if the evidence in question is of little probative value of the fact for which it was tendered, or if it relates to facts that are of minor significance to the ultimate decision, given the other material supporting the decision.

[59] I take from this jurisprudence that a board need not express a conclusion on every piece of evidence. However, if the board is silent on evidence that contradicts, or supports an opposite conclusion, then this Court may infer the board made an erroneous finding of fact.

[60] The RPD found the Applicant committed a serious non-political crime based on two conclusions. The first concerns her finding restitution was made, the second is the information contained in the Interpol Red Notice.

[61] The RPD finds the conviction reported in the Interpol Red Notice "is not the relevant issue". She concludes a serious non-political crime was committed based on the testimony of Applicant's Egyptian lawyer, Mr. al-Yakhi, that restitution was made. She asks, "…why would there be restitution if no crime had been committed?" The member essentially argues a condition precedent to restitution is wrongdoing. And in this case, she finds this is a reason to believe the qualifying crime was committed. However, Mr. al-Yakhi testified that no restitution was paid by the Applicant.

[62] Mr. al-Yakhi explained a reconciliation report settles a lawsuit in Egyptian courts, but none was made since al-Jizawe signed a waiver without concurrence by the Applicant.

> RPO: Now, you were speaking of a reconciliation report. Who prepares that?
>
> Witness: <u>The reconciliation report must be prepared or edited by two parties.</u>
>
> RPO: <u>Who are these two parties?</u>
>
> Witness: <u>Elgezary and Rihan (ph), but the fact is that it is just a waiver from Elgazery by himself without the statement or presence of Rihan.</u>
>
> RPO: Has that been done in this case, in Mr. Rihan's case?
>
> Witness: It did.

(Transcript/Record p. 401)

[63] The RPD ignores the testimony by Mr. Rihan, Ms. Hassanein and Mr. al-Yakhi that no restitution was ever paid. They all stated in one form or another the allegedly fraudulent cheques were security on a villa investment and the investment transaction was completed properly without need to deposit the security cheques.

[64] Mr. Rihan provided the following testimony:

> Q: (Minister's Counsel) So – okay. In order for Interpol to put this out and I read testimony that said that your lawyer has copies of the cheques, it says that you gave him 250,000 in return for that 250,000 and you gave them in the form of two cheques.
>
> A: (Rihan) He took his money after we sold the villa with the profit, the interest, so it was more than [sic] 250 pounds. The only mistake is that I didn't take cheque from him.

[65] Descriptions of the business transaction between Mr. Rihan and Mr. al-Jezawi (Al-Gizware) are also provided by Ms. Hassanein, the Applicant's wife:

> Witness: Yes, there was a business between them for some construction I (inaudible) –
>
> RPO: Okay.
>
> Interpreter: And he got a villa in return.
>
> RPO: Who gave them the villa?
>
> Witness: Ahmid Rihann.
>
> RPO: Okay. Just because there is money referred to in here, insufficient cheque.

> Interpreter: Excuse me?
>
> RPO: There is money referred to in this letter from Mr. Al-Gizware about insufficient funds cheque. And you have also, are probably concluding, speaking of money when you speak of motivation that the brotherhood offered to Mr. Al-Gizware. But now there is a third set of money and that's wages or return.
>
> Witness: No. All I am saying is that he took his money through having a villa.
>
> RPO: Okay. He is Mr. Al-Gizware?
>
> Witness: Yes.
>
> RPO: And he took his money from whom for what purpose?
>
> Witness: He took his money from Ahmed Rihan in return for some construction work they did together.
>
> RPO: Money or a villa?
>
> Witness: He took a villa in Insokman (ph).

[66] Mr. al-Yahki, the Applicant's lawyer, testified he knows Mr. al-Jezawi (Elgezary), the alleged victim, through the work he has done for the Applicant. He testified:

> Counsel: Do you know the relationship, business relationship between Ahmend Abul Fooder Elgezary and Ahmed Rihan?
>
> Witness: Yes.
>
> Counsel: What kind of relationship, business relationship they have, as far as you know?
>
> Witness: Commercial relationship. Ahmed Abul Fodder Elgezary bought a villa from Ahmed Rihan.
>
> Counsel: And?

> Witness: Ahmed Abul Fodder Elgezary bought a villa through a contract, the villa in (inaudible).
>
> Counsel: I'm sorry?
>
> Interpreter: I will ask you to repeat this again please.
>
> Counsel: Please.
>
> Witness: Ahmed Abul Fod (ph) has guarantee cheques or security cheques for the villa. Ahmed Abul Fod got the villa and through their accounting department of Ahmed Fod office, a lawsuit was instituted against Ahmed Rihan because of the cheques, but when it was found out that Ahmend Abul Fod didn't have the right to do so, he waived those lawsuits.
>
> Counsel: when did this lawsuit started, if you know?
>
> Witness: Most probably in 2005.
>
> Counsel: Was Ahmed Rihan aware of this lawsuit.
>
> Witness: Never.
>
> (Emphasis added)

[67] The Applicant's Egyptian lawyer clarified further, explaining the complainant did not receive any money as restitution:

> Counsel: You said that you are a lawyer representing Mr. Rihan in this case. What was –what your recommendation to him what he had to do in this case? What is the best way to approach it to solve this?
>
> Witness: That he would first talk to Ahmed Elgezary and review the accounts with him.
>
> Counsel: But Ahmed Elgezary, he waived his right, and in his letter to the Interpol it says that he got his money.
>
> Witness: He didn't take any return.
>
> Counsel: so, why he wrote this one down?

> Witness: Because he has found out that there was an error in account – in the accounting, and because he found out that the villa that he got now, its value is much more higher than the cheques that were indebted by Ahmed.
>
> Counsel: Let me ---
>
> Witness: This is what Elgezary stated.
>
> Counsel: Stated ---
>
> Witness: To me.
>
> (Emphasis added)
>
> (Transcript/Record p. 391)

[68] A careful review of the transcripts show the Applicant maintained Mr. al-Jezawi received payment (of a villa) on his investment and denied any restitution for unfunded cheques was paid.

[69] No other evidence supports the finding Mr. Rihan ever paid restitution to Mr. al-Jezawi for unfunded cheques. It is inferred as a notion by Minister's council based on the letter from Mr. al-Jezawi withdrawing his allegation. The witnesses' testimony was entirely to the contrary, always supporting the allegations Mr. Rihan was framed, and Mr. al-Jezawi, the framer, eventually withdrew his complaint because he had received his profit from his investment in the form of a villa. The RPD misconstrued this evidence.

[70] Having regard to the evidence before the RPD, I find the RPD was wrong in finding restitution was paid. This finding undermines the reason the Board Member finds Mr. Rihan committed a serious crime.

Did the RPD err in fact and law with respect to her conclusion the Interpol Red Notice alone constitutes a "serious reason for considering" a qualifying crime was committed in light of other evidence before her?

[71] The RPD put significant weight on the allegations in the Interpol Red Notice.

[72] The Red Notice reads in part:

> 2.1 SUMMARY OF THE FACTS OF THE CASE: Egypt, Cairo: In 2005, REEHAN received EGP 250,000 from the victim and gave him two cheques for that amount. The victim believed the money would be invested in the AL-REEHAN *Investment Company* and would receive proceeds from the investments every month. However, REEHAN failed to make any such payments, and the victim discovered the cheques were unfunded.
>
> 2.2 ACCOMPLICES: N/A
>
> 2.3 CHARGE ON WHICH CONVICTED: Fraud and deception, uttering unfunded cheques.
>
> 2.4 LAW COVERING OFFENCE: Articles 238 and 304/2 of the Egyptian Code of Criminal Procedure, and Articles 336/337 and 1 of the Egyptian Penal Code.
>
> 2.5 SENTENCE IMPOSED: 6 years imprisonment.
>
> (Record p. 470)

[73] The Red Notice refers to ss. 238 and 304/2 of the Egyptian Code of Criminal Procedure. Those provisions provide for conviction and sentencing *in absentia*.

[74] What is the meaning of "serious reasons for considering"? The RPD relies on the Federal Court of Appeal's judgment in *Moreno v. Canada (Minister of Employment and Immigration)*, (C.A.), [1994] 1 F.C. 298 (*Moreno)* to support the following proposition in her decision:

> "Regarding the standard of proof, the Court has found that "serious reasons for considering", which is a standard of proof that applies to questions of fact, rather than law, is a lesser standard than that of a balance of probabilities. To meet this standard, there needs not be evidence that the claimant has been charged, convicted, or criminally prosecuted. In the circumstances of this case, the claimant has been charged and convicted."

[75] Justice Robertson in *Moreno* draws a clear line between question of fact and questions of law in assessing how board members should interpret the meaning of "serious reasons to consider". He writes at paragraph 22:

> "…the requisite standard of proof comes into legal play only when the tribunal is called on to make determinations which can be classified as questions of fact. The "less-than-civil-law" standard is irrelevant when the issue being addressed is essentially a question of law".

[76] Justice Robertson considered the oft-cited passage of Justice Thurlow in *Attorney General of Canada v. Jolly*, [1975] F.C. 216 (C.A.). Justice Robertson found "reasonable grounds to believe" is similar in meaning to "serious reasons for considering". Justice Thurlow reviewed a delegate's conclusion there were reasonable grounds to believe the Black Panthers was a subversive organization at pages 225-226:

> "But where the fact to be ascertained on the evidence is whether there are reasonable grounds for such a belief, rather than the existence of the fact itself, it seems to me that to require proof of the fact itself and proceed to determine whether it has been established is to demand proof of a different fact from that required to be ascertained. It seems to me the use by the statute of the expression "reasonable grounds for believing" implies that the fact itself need not be established and that evidence which falls short of proving the subversive character of the organization will be sufficient if it is enough to show reasonable grounds for believing that the organization is one that advocates subversion by force, etc."

[77] This reasoning "loses much of its relevance" in *Moreno* (para. 20) because Justice Robertson finds the vast majority of cases where Article 1 F(a) are applied use the Applicant's own evidence to establish the grounds for exclusion, whereas in *Jolly* the Minister submitted evidence supporting the belief. But Justice Robertson nevertheless goes on to conclude at paragraph 25:

> "In my view the standard of proof envisaged by the exclusion clause was intended to serve an evidential function in circumstances where it is necessary to weigh competing evidence. It must not be permitted to overstep its legislated objective."(emphasis added)

[78] It is well settled the standard of proof in "serious reasons for considering" is something less than a balance of probabilities, but at the minimum, it must be more than "suspicion" or "conjecture": *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433 (C.A.).

[79] In this case, the question is whether or not the Interpol Red Notice, in light of the other evidence, is a serious reason for considering Mr. Rihan committed a qualifying crime.

[80] This is a mixed question of fact and law. The legitimacy of the conviction mentioned in the Red Notice is challenged, be that as it may, the notice is there and the RPD was required to deal with it. The question is, given all the evidence can the RPD only rely on the information in the notice as a serious reason for exclusion?

[81] Mr. Chief Justice Allan Lutfy considered this in *Gurajena* at paragraph 1:

> It may be that in some cases proof of a valid warrant issued by a foreign country would constitute "serious reasons for considering" that the applicant committed a serious non-political crime within the meaning of Article 1F(b) of the Convention: Qazi v. Canada (Minister of Citizenship and Immigration), [2005] F.C.J. No. 1461, 2005 FC 1204 at paragraph 18. The Federal Court of Appeal has also suggested that in other situations a warrant, in combination with other evidence, may be persuasive that the threshold of "serious reasons for considering" has been met: Xie v. Canada (Minister of Citizenship and Immigration), [2004] F.C.J. No. 1142, 2004 FCA 250 at paragraph 23. In any event, where evidence of a warrant is the sole evidence relied upon by the Refugee Protection Division, the panel must "go further" and determine whether the applicant is credible if, as in this case, the principal applicant alleges that the charges referred to in the warrant are fabricated: Qazi at paragraph 19.(emphasis added)

[82] I agree with the Chief Justice's assessment the panel must "go further" in examining if the applicant's allegation of fabricated charges is credible when the only evidence against him is a warrant.

[83] As mentioned, the Applicant's wife and lawyer testified at the hearing that no crime had been committed by the Applicant since the investor/alleged victim who initiated the lawsuit leading to the conviction had received a villa in full value for his investment. The Applicant's wife testified the charges stemmed from pressure by the Muslim Brotherhood to harass the Applicant. They added Mr. al-Jezawi, the alleged framer, was also a lawyer who acted for the Brotherhood. They both stated he had the opportunity, knowledge and influence to effect a conviction without the Applicant's knowledge.

[84] The Applicant's spouse testified the charges were fabricated at the instigation of the Muslim Brotherhood and Mr. al-Jezawi was involved in the fabrication of these charges, the ultimate convictions and then wrote the letter retracting his allegations:

> RPO: Okay. So you are saying, I am now going to ask a whole bunch of yes or no questions, are you saying that the Muslim Brotherhood fabricated charges against your husband?
>
> Witness: Yes.
>
> RPO: Are you saying that Mr. Al-Gizware was somehow involved in the fabrication of these charges and ultimate convictions?
>
> Witness: Yes.
>
> RPO: Are you saying that Mr. Al-Gizware has somehow believed that he did the wrong thing or made a mistake and that he shouldn't have been involved in this? And that's why he wrote this?
>
> Witness: Maybe he regretted, yes I don't want to say maybe.
>
> RPO: Okay. But do you – I am just trying to understand why someone who would be involved in the initial fabrication of charges would go to the problem or to the effort rather, of writing an international organization to say that the charges were a mistake or the conviction was a mistake.
>
> Witness: Because for us to sit like this now to cause turbulence around Ahmed and they put charges on him.
>
> (Transcript/Record, pp. 356)

[85] The Applicant's Egyptian lawyer, Mr. al-Yahki, testified his client was unaware of the lawsuit. He asserted the alleged victim's connections allowed him to secure a conviction without the Applicant ever knowing charges were laid against him:

> Witness: Elgezary deceived the court and gave the court papers saying or mentioning that Ahmed Rihan was notified.

> Counsel: And was Ahmed Rihan notified?
>
> Witness: Till now, no.
>
> Counsel: Okay. How did he do that? How he show the court that he notified Rihan and, in fact, he did not do that, if you know? I'm sorry, we did not hear you.
>
> Witness: Through conspiring with others and his contacts due to his former work as a police officer and because his father was a former Parliament member.
>
> (Transcript/Record, pp. 385)

[86] Much questioning and many submissions centred on the waiver sent to Interpol by the complainant. A certified translation and interpretation of that document states in part:

> Where I am the plaintiff with the civil right in the delinquency numbers 14108 for the year 2005 and 14109 for the year 2005 o the orchards delinquency
>
> And I have gained an appeal judgements in the two law suits against/Ahmed Abd-El Hafeiz Ahmed Rihan by an imprisonment each one for three years for issuing a [sic] Nun-sufficient-fund cheques by the amount of (Only 250,000 Geneh).
>
> Where he has paid these outstanding amount to us.
>
> Therefore I am [sic] honoered to offer my sincere thanks to your excellency For your appreciated efforts.
>
> I am presenting my withdrawal of my [sic] complain about named / Ahmed Abid-El hafeiz Ahmed Rihan (file No. 1108/10/2006).
>
> (Transcript/Record p. 446)

[87] The Applicant's wife explained how Mr. al-Jezawi came to write the waiver:

> RPO: Okay. Now it is also your testimony that the Muslim brotherhood have done something to make it appear like your husband is a wanted fugitive?
>
> Witness: exactly, you got to this point.
>
> RPO: Okay. But Mr. Al-Gizware has written a letter that the whole thing is a silly mistake, please cancel it. So is it your testimony that the brotherhood goes to this problem of manipulating a crime then the lawyer writes Interpol to say forget it?
>
> Witness: We believe something, we are not sure one hundred percent that he did this due to motivation from them and Ahmed's sister spoke to him and she told him we are going to report because you got your money, the full amount of your money and maybe we would – he was afraid because we were asking the Interpol because this is wrong and nobody submit a paper about $250,000.
>
> (Transcript/Record p. 348)

[88] The RPD made no reference to the Applicant's wife's testimony. Yet the previous RPD member accepted her allegation the criminal prosecution was a part of the Muslim Brotherhood's persecution of the Applicant as a theory worthy of further examination and scrutiny.

[89] The RPD neither referred to nor analyzed the testimony from the Applicant's wife or his Egyptian lawyer about the falsification of the charges against the Applicant. While the RPD member did not hear the testimony of either witness firsthand, she accepted their evidence by adopting the transcript record at the start of the third hearing.

[90] In my view, the RPD erred by finding the Interpol Red Notice alone sufficed as a "serious reason for considering" a serious crime was committed. The evidence from the Applicant's wife

and his Egyptian lawyer, Mr. al-Yahki, casts doubt on the information contained in the Interpol Red Notice. The jurisprudence called on her to assess the credibility of the Applicant's claim the charges against him were fabricated: *Gurajena*.

CONCLUSION

[91] I conclude the RPD erred in assessing the Applicant's evidence, misconstruing the evidence of the Applicant's Egyptian lawyer, and failing to consider evidence by both the Applicant's wife and his Egyptian lawyer.

[92] I find the RPD's decision is unreasonable and cannot stand. The application for judicial review is granted.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is granted.
2. The decision is quashed and the matter is remitted for redetermination by a differently constituted Panel.
3. No costs are award.
4. No question of general importance is certified.

"Leonard S. Mandamin"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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