Federal Court  Cour fédérale

Date: 20110530

Docket: IMM-3423-10

Citation: 2011 FC 627

Ottawa, Ontario, May 30, 2011

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

JOSE VICELIO LOPEZ VELASCO

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Minister applies for judicial review of the June 1, 2010 decision of the Member of the Refugee Protection Division of Immigration and Refugee Board (the RPD) rejecting the Minister's application under section 109 of the *Immigration and Refugee Protection Act*, S.C. 2001 c. 27 (*IRPA*) to vacate the Respondent's refugee protection conferred by the Convention Refugee Determination Division (CRDD) on November 30, 1994.

[2] The Minister alleged that the Respondent obtained the positive 1994 refugee determination as a result of misrepresenting or withholding material facts relating to a relevant matter, that being his conviction in 1992 of four misdemeanour offences under section 647.6 of the California Penal Code of "annoying or molesting children".

[3] The RPD found that the Respondent did not obtain his positive refugee determination as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter. In particular, the RPD found that had the same evidence regarding the Respondent's convictions been known to the CRDD in 1994, the Respondent would not have been excluded from refugee status under Article 1F(b) of the *Convention Relating to the Status of Refugees*, July 28, 1951, [1969] Can. T.S. No. 6 (the *Convention*) for the commission of "serious crimes".

[4] The Minister raises several issues but his principal submission is that the RPD erred in its analysis of what constitutes a serious crime under Article 1F(b) having regard to the Federal Court of Appeal decision in *Jayasekara v Canada (Minister of Citizenship and Immigration)* 2008 FCA 404 (*Jayasekara*).

[5] I have concluded for reasons that follow that the RPD did not err in coming to its decision and I dismiss this application for judicial review.

Facts

[6] Mr. Jose Vicelio Lopez Velasco (the Respondent) is a citizen of Guatemala. While a youth in 1980, he left Guatemala with his family and lived in Mexico as a refugee. He lost his status for working outside the refugee camp. In 1984 he joined guerrillas in Guatemala and stayed with them for eight months. He returned to Mexico then moved to the United States in 1988.

[7] In April 1992 Mr. Lopez Velasco, then 25 years old, was charged with four counts of the felony of committing a lewd act upon a child in violation of s. 288(a) of the *California Penal Code*. He pled not guilty. At trial, the District Attorney reduced the charges to the misdemeanour offence of annoying or molesting children under section 647.6 of the *Code*. Mr. Lopez Velasco pleaded *nolo contendere*. He was given a conditional sentence of 36 months and was required to serve 180 days in prison with 30 days credit for time in custody. The conditions were that he obey all laws, commit no like violation, have no contact with the victims and register as a sex offender.

[8] He came to Canada in November 1992 and made a refugee claim that he had a well-founded fear of persecution at the hands of the Army of Guatemala by reason of political opinion and membership in a particular social group, arising from the Army's accusations that the claimant and his family were guerrillas. In his Details of Arrival Form he answered "No" to the question of whether he had ever been convicted of any crime or offense in any country. In his Personal Information Form, Mr. Lopez Velasco again indicated that he had never been convicted or charged with a crime in any country.

Procedural History

[9] Mr. Lopez Velasco's refugee claim was accepted and he was determined to be a Convention refugee on November 30, 1994. The CRDD did not provide written reasons for its decision.

[10] In his application for permanent residence in Canada made on August 23, 1996, Mr. Lopez Velasco indicated that he had been convicted or charged with a crime in the United States.

[11] On February 14, 2001, the former Adjudication Division held an inquiry under the old *Immigration Act*, R.S.C., 1985, C. I-2 (*Immigration Act)* to determine whether Mr. Lopez Velasco was inadmissible to Canada due to his criminal conviction in the United States for annoying or molesting children. The Adjudicator found Mr. Lopez Velasco's conviction under section 647.6 of the *California Penal Code* for annoying or molesting children was equivalent to the offence of sexual interference under section 151 of the *Criminal Code*, R.S.C. 1985 c. C-46 (*Criminal Code*). The Adjudicator found there were reasonable grounds to believe Mr. Lopez Velasco had been convicted outside of Canada of an offence, that if committed in Canada that may be punishable under the *Criminal Code* by a maximum term of imprisonment of 10 years or more. The Adjudicator concluded that Mr. Lopez Velasco was inadmissible under section 19(1) (c.1) (i) of the *Immigration Act* and issued a deportation order against him.

[12] On June 28, 2002, the *Immigration Act* was repealed and the current *Immigration and Refugee Act* came into force. The transitional provisions of s.338 of the *Immigration and Refugee*

Protection Regulations, SOR/2002-227 (*IRP Regulations*) conferred refugee protection on Mr. Lopez Velasco.

[13] On March 4, 2009 the Minister of Public Safety and Emergency Preparedness made an application pursuant to s. 109 of *IRPA* to vacate and nullify Mr. Lopez Velasco's positive refugee determination on the grounds that he obtained his refugee status by directly or indirectly misrepresenting or withholding material facts that related to a relevant mater - specifically, that he had lied about his criminal record, and had this information been known, Mr. Lopez Velasco would have been excluded under Article 1F(b) of the *Convention* for having committed a serious non-political crime prior to entering Canada.

[14] The RPD hearing for the application to vacate was held on November 2, 2009. The RPD had before it the whole of the evidence including the exhibits and evidence produced at the original CRDD hearing. There was no written decision with respect to the positive original CRDD refugee determination, but there was a Notice of Decision dated November 30, 1998. The RPD also had evidence that the Minister submitted concerning the 1992 California charges including police reports and court records. Lastly the RPD had the testimony from the Respondent.

[15] At the hearing, the Respondent denied ever committing these crimes, claiming his landlady fabricated the story because he had asked for return of a deposit that he had given her, and submitted that in any case they were not "serious crimes" for the purposes of section 109. He

claimed that he did not answer "yes" to the question of whether he had ever been convicted in another country because he did not understand that he had been convicted.

Decision Under Review

[16] In its decision dated June 1, 2010, the RPD rejected the Minister's application to vacate and nullify the positive refugee determination made on November 30, 1994, regarding Mr. Lopez Velasco.

[17] The RPD found that the Respondent had been convicted and sentenced under section 647.6 of the 1992 California Code with "annoying or molesting children". The RPD rejected the Respondent's submission that he answered "no" in his application because he thought he had not been convicted. The RPD noted that misrepresentations or omissions need not have been made deliberately or intentionally, and found that, on a balance of probabilities, the Applicant had understood he had been convicted. The RPD decided that the Respondent's evidence that his criminal record was expunged in December 14, 2009 was not admissible because the RPD must consider whether there would have been a factual foundation for the Minister's claim in 1994.

[18] The RPD found there were misrepresentations or omissions made to the CRDD and there was serious reason to consider that the Respondent committed non-political crimes outside of Canada. The RPD then turned to the question of whether the crimes were "serious".

[19] The RPD accepted that it was the Respondent's status or potential exclusion at the time of his application for refugee status (and not at the time of the 2010 vacation hearing) which was to be considered and, for the purpose of analysis of the crimes, reference should be made to the laws of California and Canada as at the times they were committed in 1992.

[20] The RPD listed the factors that the Federal Court of Appeal stated in *Jayasekara v Canada (Minister of Citizenship and Immigration),* 2008 FCA 404 (*Jayasekara*) should be considered on the question of a serious crime in the context of Article 1F(b), being the elements of the crime, the mode of prosecution, the penalty prescribed, the facts, and the mitigating and aggravating circumstances underlying the convictions.

[21] In its analysis, the RPD distinguished *Noha v. Canada (Citizenship and Immigration*) 2009 FC 683 (*Noha*) on the fact that the applicant in that case admitted he was a person described in paragraph 36(1)(b) of *IRPA* (inadmissibility on grounds of serious criminality) and, consequently, there was no consideration of to hybrid offences as discussed in *Jayasekara*.

[22] The RPD observed that the District Attorney in California had chosen to reduce the original felony charges to misdemeanours. The RPD also noted that the equivalent conduct in Canada at the time was a hybrid offence under section 151 of the Canadian *Criminal Code*, which could be prosecuted by way of indictment, with a maximum sentence of 10 years, or by summary conviction, with a maximum sentence of 6 months. Finding that Parliament drew a significant difference between indictable and summary offences as measured by potential penalties, the RPD concluded

that a summary conviction under section 151 was not a "serious" crime for the purposes of determining exclusion under Article 1F(b). The RPD wrote:

> I conclude that there is a clear direction from Parliament that there is a range of culpability and that some sexually motivated crimes against children are not legally "serious" when making a determination regarding exclusion, even if my personal view might be that all such attacks deserve condemnation. It is for Parliament and not the RPD to distinguish among the range of such crimes, one of the primary distinguishing features being the potential punishment.

[23] The RPD considered the particulars of the Respondent's offences, including mitigating and aggravating circumstances. The RPD noted the authorities cited, in particular the *Jayasekara* case, and concluded that the presumption of seriousness was rebutted on the evidence before the panel.

[24] As a result, the RPD found that the Respondent did not obtain his positive refugee determination as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter. Had the same evidence regarding the Respondent's convictions been known in his original hearing, he would not have been excluded under Article 1F(b) for having committed a serious non-political crime. As such, the RPD dismissed the Minister's application to vacate the Respondent's refugee status.

Legislation

[25] The *Immigration and Refugee Protection Act*, 2001, c.27 (*IRPA)* provides:

36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for
(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;
(b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or
(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

36. (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :
a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;
b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;
c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.

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.

109(1) the Refugee Protection Division may, on application by the Minister, vacate a decision to allow a claim for refugee protection, if it finds that the decision was obtained as a result of directly or indirectly

109. (1) La Section de la protection des réfugiés peut, sur demande du ministre, annuler la décision ayant accueilli la demande d'asile résultant, directement ou indirectement, de présentations erronées sur un fait important quant à un objet pertinent, ou de réticence sur ce fait.

misrepresenting or withholding material facts relating to a relevant matter.
(2) the Refugee Protection division may reject the application if it is satisfied that other sufficient evidence was considered at the time of the first determination to justify refugee protection.
…

[26] The United Nations *Convention Relating to the Status of Refugees*, July 28, 1951, [1969] Can. T.S. No. 6 (the *Convention*).

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

[27] The *Immigration Act*, R.S.C. 1985, c. I-2 (repealed) provided:

2(1) … "Convention refugee" means any person … but does not include any person to whom the Convention does not apply pursuant to section E or F of Article 1 thereof, which sections are set out in the	2(1)… « réfugié au sens de la Convention » Toute personne : … Sont exclues de la présente définition les personnes soustraites à l'application de la Convention par les section E ou

schedule to this Act;	F de l'article premier de celle-ci dont le texte est reproduit à l'annexe de la présente loi.

[28] The *Criminal Code,* R.S.C. 1985, (as of 1992) provided:

151. Every person who, for a sexual purpose, touches, directly or indirectly with a part of the body or with an object, any part of the body of a person under the age of fourteen years is guilty of an indictable offence and is liable to imprisonment for a term not exceeding ten years or is guilty of an offence punishable on summary conviction.	151. Est coupable soit d'un acte criminel et passible d'un emprisonnement maximal de dix ans, soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire toute personne qui, à des fins d'ordre sexuel, touche, directement ou indirectement, avec une partie de son corps ou avec un objet, une partie du corps d'un enfant âgé de moins de quatorze ans.
787. (1) Except where otherwise provided by law, everyone who is convicted of an offence punishable on summary conviction is liable to a fine of not more than two thousand dollars or to imprisonment for six months or to both.	787. (1) Sauf disposition contraire de la loi, toute personne déclarée coupable d'une infraction punissable sur déclaration de culpabilité par procédure sommaire est passible d'une amende maximale de deux mille dollars et d'un emprisonnement maximal de six mois, ou de l'une de ces peines.

[29] The *Penal Code of California* (as of 1992) provided:

> 288 Lewd or lascivious acts involving children
> (a) Any person who shall wilfully and lewdly commit any lewd or lascivious act including any of the acts constituting other crimes provided for in Part 1 of this code upon or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or the child, shall be guilty of a felony

> and shall be imprisoned in the state prison for a term of three, six, or eight years.
>
> 647.6 Annoying or molesting children
> Every person who annoys or molests any child under the age of 18 is punishable by a fine not exceeding one thousand dollars ($1,000) or by imprisonment in the county jail for not exceeding one year or by both the fine and imprisonment….

Issues

[30] The Minister outlines the following as issues:

> Did the RPD err in determining that the Respondent's crime was not serious? Specifically, did the RPD err:
>
> a. In assessing the seriousness of the offence in Canada by
>
> - Misconstruing the *Jayasekara* decision?
> - Distinguishing the *Noha* decision?
> - Failing to consider the intentions of Parliament in determining whether the offence was serious?
>
> b. By failing to consider all of the aggravating circumstances and
>
> c. By ignoring evidence?

Standard of Review

[31] In *Dunsmuir v. New Brunswick*, 2008 SCC 9 (*Dunsmuir*), the Supreme Court of Canada decided that there were two standards of review, correctness and reasonableness. The standard of review for questions of law is correctness. The standard of review for questions of fact and mixed fact and law is reasonableness: *Dunsmuir* at paras 50 and 53.

[32] The Minister submits that the interpretation of Article 1F(b) and IRPA section 98 is a pure question of law to which the standard of correctness applies, while application of the provision to the facts is a mixed question of fact and law attracting the standard of reasonableness: *Pineda v Canada (Minister of Citizenship and Immigration)*, 2010 FC 454 at para 18.

[33] The Respondent argues that the issues relate to questions of mixed fact and law and therefore should be reviewed on the standard of reasonableness, with deference paid to the RPD: *Rihan v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 123 at para 57. The Minister argues that not all of the issues pertain to mixed fact and law.

[34] I conclude that the standard of review for the interpretation of Article 1F(b) is a pure question of law to which the standard of correctness applies. The standard of review for the determination of the applicable law and facts in the Respondent's case is a question of mixed fact and law, which attracts a standard of reasonableness.

Analysis

[35] The Federal Court of Appeal has held that one of the purposes of Article 1 F(b) of the *Refugee Convention* is to ensure "that the country of refuge can protect its own people by closing its borders to criminals whom it regards as undesirable because of the seriousness of the ordinary crimes which it suspects such criminals of having committed": *Jayasekara* at para 28 citing *Zrig v. Canada (Minister of Citizenship and Immigration)*, 3 FC 761 at *paras* 118 and 119.

[36] In *Jayasekara* at para 48, the Federal Court of Appeal approved of the UNHCR's view that evidence of the commission of certain offences, including child molesting, raises the presumption of a serious crime. The Court set out factors to be considered in determining the seriousness of crime for the purposes of Article 1F(b):

a. evaluation of the elements of the crime,
b. the mode of prosecution,
c. the penalty prescribed,
d. the facts, and
e. the mitigating and aggravating circumstances underlying the conviction.

The Federal Court of Appeal went on to state: "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": *Jayasekara* at para 44.

Jayasekara

[37] The Minister submits the RPD misconstrued *Jayasekara* in relying heavily on paragraph 46 of *Jayasekara* which stipulated that in countries with hybrid offences, "the choice of prosecution is relevant to the assessment of the seriousness of a crime if there are substantial differences between the penalty prescribed for a summary conviction offence and that provided for an indictable offence." The Minister points out that this passage refers to the mode of prosecution actually chosen in the *foreign* prosecution, whereas the RPD looked at the equivalent Canadian offence of sexual interference, which was a hybrid offence. The California offence was not a hybrid offence; instead the American prosecutors had to choose between two different and separate offences.

[38] The Minister submits the RPD misinterpreted *Jayasekara* by combining the misdemeanour offence of which the Respondent was convicted with the felony of which he was originally charged, treating them as if they were one hybrid offence, and then making an analogy to the Canadian section 151 hybrid offence to conclude that the Respondent would have been prosecuted in summarily in Canada.

[39] The Minister submits that it is not up to the RPD to speculate as to how the case might have been prosecuted in Canada. Under Canadian immigration law, it has long been held that where the equivalent Canadian offence is hybrid, the maximum punishment on indictment is used to determine criminal inadmissibility. The Minister stated that if an offence committed outside of Canada equated to a hybrid offence in Canada, the maximum sentence for the indictable offence is to be used to determine admissibility which, according to section 151 of the Canadian *Criminal Code* in 1992, is ten years: *Kai Lee v Canada (Minister of Employment and Immigration)*, [1980] 1 F.C. 374 (FCA) (*Kai Lee*), *Potter v Canada (Minister of Employment and Immigration),* [1980] 1 F.C. 604 (FCA) (*Potter).*

[40] I note that *Kai Lee* and *Potter* are 1980 decisions concerning immigrant admissibility, while *Jayasekara*, a recent 2009 Federal Court of Appeal decision, involves the exclusion of a refugee claimant. In this regard, the latter provides the relevant guidance for the RPD's decision in this case.

[41] The issue is whether the RPD may consider the hybrid character of the equivalent Canadian section 151 offence of sexual interference as a relevant consideration, where the California charges

were reduced from a felony of a "lewd act upon a child" to a misdemeanour of "annoying or molesting children".

[42] I note that in comparing the California felony and misdemeanour charges to the Canadian section 151 hybrid offence, the RPD was responding to the Minister's submissions on hybrid offences. The RPD makes that clear when quoting the Minister's submission in its decision at para 47:

> In the result, the Minister submits that:
>
> … the fact that the offence [in the case before me] is a hybrid offence is irrelevant to the analysis of what constitutes a "serious" crime. As stated in *Jayasekara* and reiterated in *Noha*; if the crime happens to be a hybrid offence in the foreign jurisdiction, the RPD should look at all the facts underlying the conviction, including any mitigating and aggravating factors. The Minister submits that it is not up to the RPD to engage in an analysis as to how the crime if committed in Canada (and it happens to be a hybrid offence) would be prosecuted in the Canadian courts.

[43] Having noted the Minister's submission, the RPD then went on to explain why it disagreed with the Minister's proposition that the hybrid nature of the crime was irrelevant, noting at para 48 that to do so would be to ignore a factor among others, which the Court of Appeal stated should be part of the determination. It quoted "[i]n countries where a choice is possible, the choice of the mode of prosecution is relevant to the assessment of the seriousness of the crime if there is a substantial difference between the penalty prescribed for the summary offence and that provided for an indictable offence." (underlining is the RPD's)

[44] The Federal Court of Appeal set out a principled approach to determining whether an offence committed by a refugee claimant committed is a serious crime as addressed in Article 1 F(b) of the *Convention*. This approach required assessment of the specific offence by considering pertinent factors. The offence under consideration in *Jayasekara* was trafficking in drugs, which is not a hybrid offence in Canada. Nevertheless, Appeal Justice Letourneau stated at para 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 which, depending on the mitigating or aggravating circumstances surrounding their commission, can be prosecuting either summarily or more severely as an indictable offence. In countries where the choice is possible, the choice of the mode of prosecution is relevant to the assessment of the seriousness of a crime if there is substantial difference between the penalty prescribe for a summary conviction offence and that provided for an indictable offence.

Justice Letourneau also noted at para 43 that while one should have regard to the international standard the perspective of the receiving state cannot be ignored in determining the seriousness of the crime.

[45] It seems to me that when Justice Letourneau spoke of "the choice of the mode of prosecution" he was referring to the choice made in prosecuting a hybrid offence in a jurisdiction other than Canada. The RPD would appear to have misapplied the quote. However, I find that the RPD did not err in deciding the California prosecutor made an analogous choice in electing to proceed by accepting a plea to a misdemeanour offence rather than proceeding by way of a felony charge. The underlying principle is the same: the California felony and misdemeanour offences together cover an equivalent spectrum of criminal seriousness as does the Canadian section 151 hybrid offence.

[46] Nor do I consider that the RPD erred in canvassing the range of penalty in section 151 of the *Criminal Code,* given that Justice Letourneau also spoke of keeping in mind the perspective of the receiving state. The RPD was entitled to consider the hybrid nature of section 151 of the *Criminal Code*. In so doing, the RPD focused on the Court's qualification "if there is substantial difference between the penalty prescribed for a summary conviction offence and that provided for an indictable offence."

[47] The RPD noted the substantial difference in sentencing between the maximum of a six month sentence for a summary conviction and the ten year maximum sentence for an indictable conviction. The RPD found that the six month sentence was nowhere near the ten year sentence noted by the Federal Court of Appeal in *Chan v Canada (Minister of Citizenship and Immigration)*, [2004] 4 FC 390, which had been found to be an indicator of "seriousness". The RPD concluded that Parliament set out a range of culpability for sexually motivated crimes against children and that some such offences may not be "serious" for the purposes of an exclusion determination.

[48] In my view the RPD properly limited its examination to assessing the Canadian perspective on the seriousness of offences embodied in section 151 of the *Criminal Code*. I find the RPD did not decide that the Respondent's crime would be prosecuted by way of summary conviction in Canada but rather that section 151 of the *Code* indicated that the relevant Canadian perspective on the seriousness of the offence in question included a range from "serious" (indictable) to "less serious" (summary) offense.

Distinguishing Noha

[49] The Minister submits that the RPD erred by distinguishing *Noha* on the basis that the Applicant in that case had admitted that he was inadmissible for serious criminality under s. 36(1). The Minister submits that the outcome of the *Noha* case did not turn on this admission, as the Court found the applicant inadmissible under Article 1F(b).

[50] In *Noha*, Justice Shore considered the applicant's admission of serious criminality under section 36(1) to be significant before going on to considering *Jayasekara* factors. This alone could serve as a basis for distinguishing that decision. However the *Noha* decision also did not discuss the equivalent Canadian hybrid offence. I find the RPD made no error in distinguishing *Noha* in its analysis of Canada's perspective on the seriousness of the offences for which the Respondent was convicted in California.

Intentions of Parliament

[51] The Minister submitted the RPD erred in failing to consider the intentions of Parliament as expressed in the *IRPA* provisions regarding serious criminality for offences committed outside of Canada. In making this submission, the Minister refers to the Adjudicator's finding of the Respondent's inadmissibility under s.36(1) of *IRPA*. The Minister pointed out that under the criminal admissibility under s.36(1), the maximum length of sentence for the Canadian hybrid equivalent is considered which can be taken to reflect Parliament's intentions.

[52] The Minister agreed that a finding of an immigrant's inadmissibility for serious criminality under section 36(1) of *IRPA* was not binding on the RPD when deciding a refugee claimant is excluded under Article 1F(b) for having committed a serious non-political crime. Since Parliament did not choose to automatically exclude persons found inadmissible under section 36(1) from refugee protection, it was open for the RPD to proceed as it did with its analysis of serious criminality in accordance with the direction in *Jasayekara*.

Aggravating Circumstances

[53] The Minister submits that the RPD did not consider all the aggravating circumstances of the Respondent's offences. My review of the RPD's decision shows that the RPD set out the Minister's evidence in detail in its recitation of the evidence at paragraphs 10 and 11, revisited the aggravating factors in analysis at paragraph 40, and validated them in paragraph 57. In addition, the RPD weighed the mitigating factors concerning the Respondent's crimes. The RPD was also alive to the varying factors that could have come into play in the California prosecutor's decision to proceed with misdemeanour charges much as considered in the discussion of Canadian hybrid offences in *Jayasekara* at para 42.

[54] The RPD is due deference in its decisions concerning facts and mixed fact and law. I find the RPD reasonably considered both the aggravating and mitigating nature of the Respondent's offences in coming to its decision.

Conclusion

[55] The Federal Court of Appeal's teaching in *Jayasekara* is that the interpretation of the exclusion clause in Article 1F(b) of the *Refugee 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. A presumption that a crime is serious may be rebutted by the assessment of those factors.

[56] Further, the Court of Appeal was mindful of hybrid offences in Canada and elsewhere and the relevance of the choice in the mode of prosecution if there was a substantial difference between the penalty prescribed for a summary conviction offence and that for an indictable offence.

[57] I conclude that, the RPD correctly considered the standards applicable in the United States and Canada concerning the Respondent's non-political crimes. It also considered the particulars of the offences including aggravating and mitigating factors. It followed the direction in *Jayasekara* and reasonably decided that the presumption of seriousness was rebutted.

[58] In result, I find the RPD did not err in coming to its decision. The application for judicial review is dismissed.

[59] The parties have not posed a question of general importance for certification and I make none.

[60] I make no order for costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is dismissed.

2. I make no order for costs.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3423-10
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION and JOSE VICELIO LOPEZ VELASCO
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	DECEMBER 9, 2010
REASONS FOR JUDGMENT:	MANDAMIN J.
DATED:	MAY 30, 2011

APPEARANCES:

Ms. Caroline Christiaens	FOR THE APPLICANT
Mr. Peter Edelmann	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Myles J. Kirvan Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE APPLICANT
Peter Edelmann Vancouver, British Columbia	FOR THE RESPONDENT