Federal Court  Cour fédérale

Date: 20130925

Docket: IMM-252-13
IMM-546-13

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[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, the 25th day of September, 2013

PRESENT: The Honourable Mr. Justice Roy

Docket: IMM-252-13

BETWEEN:

Odney Richmond VICTOR

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

Docket: IMM-546-13

BETWEEN:

Odney Richmond VICTOR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, Odney Richmond Victor, filed two applications for judicial review of decisions in his regard.

[2] In the first (IMM-252-13), he is seeking judicial review of a decision by the Immigration Division (ID) of the Immigration and Refugee Board, dated December 18, 2012, which found that the applicant was inadmissible to Canada on the ground that he is a person described in paragraphs 36(1)(*c*) (serious criminality) and 36(2)(*c*) (criminality) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act).

[3] In the second (IMM-546-13), he is seeking judicial review of a decision by the Refugee Protection Division (RPD) of the Immigration and Refugee Board. That decision was issued on December 20, 2012 and determined that the applicant could not avail himself of sections 96 and 97 because he is a person described in Article 1 F(*b*) of the *United Nations Convention Relating to the Status of Refugees* (Convention). This exclusion derives from section 98 of the Act, which reads as follows:

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.

[4] The two applications for judicial review, although separate, were heard together. Both stem from the same set of facts. Some of the original arguments relating to the identification of the applicant were common to both proceedings. With respect to the application of sections 36 and 98 of the Act to the facts of the matter, there were also similarities.

[5] For the purpose of making everything as clear as possible, judgment will therefore be rendered in both matters, but I will attempt to distinguish between the two cases throughout these reasons for judgment.

Facts

[6] As I indicated earlier, both applications for judicial review stem from the same set of facts. I intend to set out the facts necessary to the disposition of each judicial review application.

[7] The applicant is a citizen of the Bahamas. He is not a permanent resident of Canada.

[8] Essentially, the facts relevant to both applications for judicial review originate from a police report from the Hamilton Township Police Department of New Jersey, in the United States. It chronicles the circumstances surrounding the arrest of someone called Jean René Delhomme.

[9] Mr. Delhomme was arrested by the police on March 13, 2007. The incidents leading to the arrest followed Mr. Delhomme's firing from an establishment owned by a certain Anthony

Spadaccini. The latter complained of receiving harassing telephone calls from Mr. Delhomme since his dismissal. Threats we made, including a threat to show up with a "gang from Camden."

[10] On March 13, 2007, officers from the Hamilton Township Police Department went to Mr. Spadaccini's establishment because he had complained of further intimidating calls. Mr. Delhomme had called earlier in the evening (around 7 p.m.) and allegedly threatened Mr. Spadaccini using the terms "I'm going to come over and get you."

[11] While the police were still on the premises, Mr. Delhomme arrived. The vehicle in which he was travelling crossed the parking lot of Mr. Spadaccini's establishment with its headlights turned off, and began to drive away from the police. Believing it to be Mr. Delhomme's vehicle, of which they had a description, the police gave chase.

[12] The chase was rather frantic. In fact, the police lost the vehicle they were pursuing; it was spotted by their colleagues who had come to provide back up. Mr. Delhomme got out of the vehicle and fled on foot. He was found under some bushes.

[13] When he was intercepted by police, Mr. Delhomme resisted arrest so doggedly that police used Cayenne pepper spray. He apparently rolled around on the ground in an attempt to resist police efforts to restrain him. He was finally brought under control.

[14] When the police returned to the vehicle that had been abandoned by Mr. Delhomme, they found a knife about 8 inches (20 cm) in length on the floor of the driver's side. Mr. Delhomme had consented to the search of his vehicle in which the knife was confiscated.

[15] Several charges were laid against Mr. Delhomme. For our purposes, it is sufficient to note that he was indicted by a Grand Jury of New Jersey under section 2C:39-5 of the *New Jersey Code of Criminal Justice*, which reads, in part, as follows:

> 2C:39-5. Unlawful possession of weapons.
>
> d. Other weapons. Any person who knowingly has in his possession any other weapon under circumstances not manifestly appropriate for such lawful uses as it may have is guilty of a crime of the fourth degree.

[16] Mr. Delhomme was scheduled to appear before the Superior Court of New Jersey, Mercer Criminal Division, on August 27, 2007. He was instead deported on August 22, 2007. An arrest warrant, issued on August 27, is therefore pending against him.

[17] The Crown claims that Mr. Victor, the applicant, is in fact Mr. Delhomme. The applicant was notified of this identity by representatives of Minister of Public Safety and Emergency Preparedness of Canada on April 24, 2012.

[18] A number of the facts in dispute in both cases at bar had to do with the matching identities of Mr. Victor and Mr. Delhomme. Simply put, Mr. Victor is arguing that this is a case of mistaken identity: that he is not the Jean René Delhomme facing charges in New Jersey. Needless to say the respondents challenge these assertions.

[19] There has been a considerable amount of to and fro on this question. Yet, on the morning of the hearing before this Court, counsel for the applicant declared that she was no longer challenging the findings of the ID and RPD that Mr. Victor is the person wanted in New Jersey. Faced with the evidence before those bodies, the applicant concedes that he could not succeed before this Court in a review based on a reasonableness standard.

[20] It should be recognized that the applicant has not admitted that he is Jean René Delhomme. At the same time, it should of course be recognized that the evidence presented before those bodies was such that it was reasonable for them to make the findings they did. This was conceded by the applicant.

[21] We can now examine the applications for judicial review one after the other.

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[22] The ID considered whether the applicant was inadmissible to Canada, pursuant to section 36 of the Act. The Minister of Public Safety and Emergency Preparedness was relying on the two charges laid in New Jersey.

[23] The first involves serious criminality in that it relates to the charge of possession of a weapon for which the maximum term of imprisonment is ten years. The other is based on criminality, as it consists of the charge in New Jersey of resisting arrest, which is an indictable offence.

[24] This second charge, which gave rise to the ID determining that the applicant was inadmissible by application of paragraph 36(2)(*c*) of the Act, is no longer in dispute before this Court. The paragraph reads as follows:

36. (2) A foreign national is inadmissible on grounds of criminality for	**36.** (2) Emportent, sauf pour le résident permanent, interdiction de territoire pour criminalité les faits suivants :
(...)	(...)
(*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 indictable offence under an Act of Parliament; or	*c*) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation;

[25] As a result, the inadmissibility determination based on the resisting arrest charge stands. It had been challenged before the ID, but is no longer being challenged.

[26] Such is not the case for the other inadmissibility finding. The relevant paragraph reads as follows:

36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	**36.** (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :
(...)	(...)
(*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	*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

Parliament punishable by a maximum term of imprisonment of at least 10 years.	d'au moins dix ans.

[27] The ID concluded that it was satisfied that there was sufficient evidence that the applicant had committed the offence described in section 2C:39-5d of the *New Jersey Code of Criminal Justice*. I note that section 33 of the Act requires only that there be reasonable grounds to believe:

33. The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.	**33.** Les faits — actes ou omissions — mentionnés aux articles 34 à 37 sont, sauf disposition contraire, appréciés sur la base de motifs raisonnables de croire qu'ils sont survenus, surviennent ou peuvent survenir.

[28] With respect to the part of paragraph 36(1)(*c*) that sets out behaviour outside Canada that constitutes an offence, which in Canada would constitute an offence punishable be a term of imprisonment of at least ten years, the ID concluded that the Canadian offence could be subsection 88(1) of the *Criminal Code*, RSC 1985, c C-46, which describes an offence punishable by a term of imprisonment of ten years if proceeded against by way of indictment (it is a hybrid offence). The sucsection reads as follows:

88. (1) Every person commits an offence who carries or possesses a weapon, an imitation of a weapon, a prohibited device or any ammunition or prohibited ammunition for a purpose dangerous to the public peace or for the purpose of committing an offence.	**88.** (1) Commet une infraction quiconque porte ou a en sa possession une arme, une imitation d'arme, un dispositif prohibé, des munitions ou des munitions prohibées dans un dessein dangereux pour la paix publique ou en vue de commettre une infraction.

[29] The question that must be answered in this case is whether the offence described at subsection 88(1) of the *Criminal Code* meets the conditions of paragraph 36(1)(*c*) of the Act. The applicant claims that it does not and disputes any claims to the contrary.

[30] The ID, for its part, disposed of the matter by analyzing the facts in evidence (which were not in dispute) in order to satisfy itself that these were sufficient to have reasonable grounds to believe that, had the acts been committed in Canada, they would constitute the offence described at subsection 88(1). In the words of the ID, it matters little whether the interpretation of "for a purpose dangerous to the public peace or for the purpose of committing an offence," which constitutes the specific intent required for the commission of this offence, is based on Justice Bastarache's opinion in *R. v Kerr*, [2004] 2 SCR 371, (*Kerr*) or on Justice Lebel's opinion in the same case. *Kerr* examined the essential elements of the offence found at section 88 of the *Criminal Code*. For the ID, it was possible to infer from the evidence that "Delhomme's purpose was to carry out his previous threats of causing a problem or "getting" Mr. Spadaccini" (at paragraph 32). Thus, no matter how the test is applied on the basis of *Kerr*, it is met.

Argument

[31] As I understand it, according to the applicant's argument, which I must admit is rather creative, the U.S. and Canadian offences should be equivalent or of equal proportion. It is further argued that this equivalence should go so far that there would be perfect symmetry between the essential elements of each offence.

[32] Thus, such equivalence supposedly cannot exist because the Canadian offence contains an additional essential element, namely, that the possession of the weapon be for a purpose dangerous

to the public peace, an element that is not found in the wording of the offence in the *New Jersey Code of Criminal Justice*.

[33] When asked to explain the case law on section 36 of the Act, he argues that the method of analysis would have the ID first be satisfied as to the equivalence of the offences. At the hearing, counsel for the applicant suggested that other equivalencies may be possible in cases where the other legal system is too different from Canada's system, which we presume is not the case with New Jersey's. She refused to accept that a court could select an "equivalency" that did not involve identical essential ingredients in both offences. We can only proceed with the other methods found in *Hill v Canada (Minister of Employment and Immigration)* (1987), 73 NR 315 (*Hill*), in which different types of equivalency are set out, by explaining why. The other methods are only available where the other legal system bears little resemblance to common law-based systems. The applicant's counsel conceded that there was no line of authority to support her argument. At best, she believed that decisions such as *Abid v The Minister of Citizenship and Immigration*, 2011 FC 164 (*Abid*); *Tomchin v The Minister of Citizenship and Immigration*, 2011 FC 231 and *Patel v The Minister of Citizenship and Immigration*, 2013 FC 804 (*Patel*) had been animated by the proposed approach whereby one must pass from one method to the other.

Analysis

[34] At the outset, the parties agreed that the applicable standard of review in this case is reasonableness. I share this view (*Abid*, above; *Lu v The Minister of Citizenship and Immigration*, 2011 FC 1476; *Patel*, above).

[35] The debate before this Court centred on what constitutes "equivalency." The applicant insisted that it meant that the essential ingredients of the foreign offence and the Canadian offence were identical.

[36] I am not convinced that the case law cited by the parties is entirely applicable to this case. Indeed, this case law deals with paragraph 36(1)(*b*) of the Act, or its past equivalent. The paragraph refers to a foreign conviction that could correspond to a conviction in Canada. It states as follows:

36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	**36.** (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :
(...)	(...)
(*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	*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 ;

[37] In our case, the provision is different. In its English version, paragraph 36(1)(*c*) establishes that a person is inadmissible to Canada if they have committed "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". Thus, it is focused on the conduct ("an act") of the person and not so much on the offences themselves. If this conduct constitutes an offence in the place where it was committed and it constitutes an offence in Canada, there would be double criminality, to the extent, of course, that the Canadian offence has the objective gravity that carries with it the maximum term of imprisonment provided by Parliament. A possible term of imprisonment of ten years is the threshold required by

Parliament under paragraphs 36(1)(*b*) and 36(1)(*c*) of the Act. The examination of the essential ingredients of the offences under the case law in relation to paragraph 36(1)(*b*) is perhaps not as relevant under paragraph 36(1)(*c*). In one case, the focus is on the offences infractions while in the other it is on the conduct.

[38] In any event, as we shall see later, the case law on paragraph 36(1)(*b*) has since evolved so as to allow this so-called equivalency to mean something other than having the essential ingredients of the offences correspond perfectly. If we look at this case law, I do not see how the applicant's argument can succeed, whether it is paragraph 36(1)(*b*) or paragraph 36(1)(*c*) that is relied on here.

[39] The applicant tries to convince us that the decision cited repeatedly on the means of establishing so-called equivalency (within the framework of paragraph 36(1)(*b*)) does not support the methods set out therein, but instead establishes an analysis grid that requires the trier of fact to justify his or her choice among several ways of determining equivalency.

[40] That decision is obviously *Hill*, *supra*, in which Justice Urie of the Federal Court of Appeal, with Justice MacGuigan concurring, wrote:

> [15] This Court in the Brannson case did not limit the determination of so-called "equivalency" of the paragraph of the Code, there in issue, to the essential ingredients of any offence specifically spelled out in the statute being compared therewith. Nor is it necessary in this case. It seems to me that because of the presence of the words "would constitute an offence ... in Canada", the equivalency can be determined in three ways: - first, by a comparison of the precise wording in each statute both through documents and, if available, through the evidence of an expert or experts in the foreign law and determining therefrom the essential ingredients of the respective offences. Two, by examining the evidence adduced before the adjudicator, both oral and documentary,

> to ascertain whether or not that evidence was sufficient to establish that the essential ingredients of the offence in Canada had been proven in the foreign proceedings, whether precisely described in the initiating documents or in the statutory provisions in the same words or not. Third, by a combination of one and two.
>
> (Emphasis added.)

[41] Without trying to read too much into this paragraph, it is perhaps worthwhile to note that Justice Urie, in *Brannson v The Minister of Employment and Immigration*, [1981] 2 FC 141, (*Brannson*) had already expressed his unease with a rigid approach to determining equivalency:

> [3] The question then arises to what extent the Adjudicator is entitled to flesh out the evidence relating to the United States offence by ascertaining how the offence was committed by the applicant in order to ascertain whether the offence committed would constitute an offence in Canada. To bring the applicant within the scope of section 19(2)(*a*) the Adjudicator must be satisfied solely on evidence adduced before, and admitted by her, that the acts which are the ingredients of which proof was essential to bring about a conviction for the offence committed outside Canada would, if committed in Canada, "constitute an offence that may be punishable by way of indictment under any other Act of Parliament and for which a maximum term of imprisonment of less than ten years may be imposed".
>
> [4] It is not sufficient, in my view, for the Adjudicator simply to look at the documentary evidence relating to a conviction for an offence under the foreign law. There must be some evidence to show firstly that the essential ingredients constituting the offence in Canada include the essential ingredients constituting the offence in the United States. Secondly, there should be evidence that the circumstances resulting in the charge, count, indictment or other document of a similar nature, used in initiating the criminal proceeding in the United States, had they arisen in Canada, would constitute an offence that might be punishable by way of indictment in Canada. Thus, it would seem that such a document would constitute the best, but not the only, evidence upon which the Adjudicator might base her decision.
>
> …

> [7] I believe that my view as to the necessity of permitting evidence to be adduced of the nature which I have discussed, is reinforced by the possibility that where there have been convictions in countries other than common law countries, the methods whereby prosecutions are instituted may be substantially different from those generally prevailing in common law countries. In such countries documentary disclosure of the particulars of the offence charged or of the ingredients thereof required to be proved may not be necessary, or at least as stringently disclosed, as in common law jurisdictions. Therefore, different requirements for establishing that the offences in the two countries have parallel constituents may be necessary and quite obviously may necessitate that evidence be adduced viva voce.[2]
>
> [8] In summary, the necessity for the Adjudicator to determine whether the offence for which the applicant was convicted would constitute an offence if committed in Canada, requires, at least in circumstances where the scope of the offence is narrower in compass than that in the foreign jurisdiction, ascertainment of particulars of the offence for which the person concerned was convicted. It is neither possible nor desirable to lay down in general terms the requirements applicable in every case. Suffice it to say that the validity or the merits of the conviction is not an issue and the Adjudicator correctly refused to consider representations in regard thereto. However, she did have the obligation to ensure that the conviction in issue arose from acts which were encompassed by the provisions of section 19(2)(*a*). This she failed to do.

[42] What the Federal Court of Appeal set out in *Brannson* becomes more clearly articulated in *Hill*. The Court simply ensures that when a foreign offence is compared to what would be required to obtain a conviction in Canada, one does not only seek matching text in both statutes. This is why evidence is possible.

[43] With respect, I find nothing in either *Brannson* or *Hill* that would allow one to conclude that the Federal Court of Appeal sought to establish a sort of hierarchy of methods for determining whether a conviction for a foreign offence would constitute an offence in Canada. In my view, the

opposite is true. In *Brannson*, Justice Urie noted that it is relatively simple to establish whether a foreign conviction would also lead to a conviction in Canada for certain offences:

> [6] I recognize, of course, that there are some offences such as murder, which may be compendiously described as crimes *malum in se*, where the extent of the proof required to satisfy the duty imposed on the Adjudicator is not so great. A conviction for such a crime would usually arise from circumstances which would constitute offences in Canada. It is in the sphere of statutory offences which may be described as offences *malum prohibitum* in contradistinction to offences *malum in se*, that the comments which I have previously made have particular applicability.

This is the first method proposed in the famous passage cited from *Hill*. But it is a far cry from suggesting that we must be satisfied that there are matching essential ingredients.

[44] Therefore, in my opinion, there is nothing to lead us to doubt that the Federal Court of Appeal, in *Hill*, made available alternative methods of determining so-called "equivalency." In addition, I would add that the internal logic of the three methods is inconsistent with the conclusion sought by the applicant. Indeed, it is difficult to understand how a method described as being hybrid, the third, would be inferior to the second method that was based on the evidence adduced to determine the essential ingredients of the offence in Canada.

[45] Just recently, my colleague Justice Judith Snider, who has ruled on a number of cases under paragraph 36(1)(*b*) of the Act, confirmed that in her view, there was no error in choosing one of the three methods (*Ulybin v The Minister of Citizenship and Immigration*, 2013 FC 629). I share this view. I would add that, insofar as the methods set out in *Hill* may be necessary under paragraph 36(1)(*c*), which is what confronts us in this case, the second method strikes me as being particularly advisable.

[46] All that remains is to examine whether the conduct that led to the offence Mr. Delhomme was accused of in New Jersey corresponds to the Canadian offence at section 88. The applicant complained that the ID had inferred from the facts before it that the possession was for a purpose dangerous to the public peace or for the purpose of committing an offence.

[47] With all due respect, the facts in this matter as they are presented require little effort to lead to this conclusion. Serious threats, leading to complaints to police, are made repeatedly; Mr. Delhomme arrives at the place where he can find the owner of the establishment on the very evening such threats had been made, his headlights turned off; the high-speed car chase that culminates with Mr. Delhomme fleeing on foot and hiding under some brush; he doggedly attempts to resist arrest. When you add the eight-inch blade found on the driver's side within easy reach, it appears to me that the guilty conscience of the fugitive thus revealed leads to the conclusion that the possession of the weapon was for a dangerous purpose. It should be recalled that the facts were required to have been based on facts for which there were reasonable grounds to believe and that the intervention of this Court is permitted only where the inference is unreasonable. In my opinion, the dichotomy between the views of Justices Bastarache and Lebel in *Kerr*, above, had no effect on the inference that was drawn. The conditions of section 88 of the *Criminal Code* had been met.

[48] Lastly, the applicant made much of the fact that an offence under the *New Jersey Code of Criminal Justice*, objectively more serious that the one with which Mr. Delhomme was charged, had been considered by the U.S. authorities, who apparently decided to proceed with the lesser charge. Using a form of reverse logic, the applicant seems to argue that the identical nature of the New

Jersey and Canadian offences would have been more clearly asserted if the U.S. authorities had brought the more serious charge, which would ostensibly have shown that the offences were not identical.

[49] The ID refused to admit this other offence as evidence. In my opinion, this new offence is not helpful to the applicant. As I tried to explain, it suffices that a U.S. offence is committed for the second element of paragraph 36(1)(*c*) to become engaged, namely, that the facts give rise to a conviction in Canada for an offence punishable by a term of ten years' imprisonment. Upon reading paragraph 36(1)(*c*), the objective seriousness, represented by the maximum term of imprisonment, only has significance for the Canadian offence.

[50] It follows that the judicial review of the decision of the Immigration Division is dismissed.

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[51] The same offence allegedly committed by Mr. Delhomme resulted in the application of section 98 of the Act by the Refugee Protection Division. Its text is reproduced at paragraph [3] of these reasons. In this case, the applicant was excluded on the basis of Article 1 F(*b*) of the said Convention, which reads:

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	**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

refugee;	réfugiés;

[52] Obviously, the issue before the RPD was to determine whether the conduct in New Jersey constituted a serious non-political crime.

[53] Here again, the appropriate standard for the RPD to have used was lower than the civil standard of proof, namely, the balance of probabilities, and instead should simply have been "serious reasons for considering". There is no need to prove on a balance of probabilities that a serious non-political crime had been committed. Serious reasons for considering are sufficient.

[54] It is not in dispute that the standard of proof shall be reasonableness. The Court concurs (*Flores v The Minister of Citizenship and Immigration*, 2010 FC 1147; *Sanchez v The Minister of Citizenship and Immigration*, 2012 FC 1130 (*Sanchez*)).

Argument

[55] Once again, the argument as to the identification of the applicant as being the Jean René Delhomme facing charges in New Jersey was abandoned. Without admitting that Mr. Victor and Mr. Delhomme are one and the same person, the applicant concedes that he would be unable to successfully challenge this identification given the evidence in this case and the burden that rests on him.

[56] The applicant complains to this Court that the RPD broadly interpreted the exclusion clause and that this constitutes a reviewable error on the alleged ground that it is an unreasonable interpretation.

[57] Applying the analysis grid set out in *Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404, [2009] 4 FCR 164, (*Jayasekara*) the applicant argues that a more appropriate analysis ought to have led to a finding that the equivalent offence under Canadian law would not be punishable by a term of imprisonment of ten years, and calls for a narrow interpretation of the exclusion clause.

[58] The argument is in fact the same one that was made with regard to paragraph 36(1)(*c*); specific intent for the Canadian offence should not have been inferred. The fact that the Canadian offence is a hybrid one should also have been preferred over the conclusion that it was a serious non-political crime. Lastly, the possible sentence in New Jersey, namely, a maximum term of imprisonment of 18 months, was not given due consideration.

Analysis

[59] The applicant's argument as to the so-called equivalency, due to the specific intent of the Canadian offence, is no more valid with regard to Article 1F of the Convention than it was with regard to section 36 of the Act. It should be recalled that the applicant's inadmissibility to Canada is pursuant to paragraph 36(1)(*c*) of the Act: it is not subject to a conviction in New Jersey.

[60] Actually, in this case, I prefer to avoid a mixing of genres.

[61] So-called equivalency, a term used with regard to paragraph 36(1)(*b*) of the Act, lends itself to a certain amount of confusion, in my view, if one tries to read it to mean symmetry. Furthermore, I fail to see how it applies here (*Minister of Citizenship and Immigration v. P.A.P.D.*, 2011 FC 738; *Sanchez*, above).

[62] Here, the issue to determine is the meaning to be given to the expression "serious non-political crime outside the country of refuge prior to his admission to that country as a refugee". The guide that is offered to us for proceeding with this determination is *Jayasekara*, above. For my part, I prefer to stick with this analysis grid. Thus, we look for the criteria to be applied and the role of domestic law in determining what is "serious" (*Vlad v The Minister of Citizenship and Immigration*, 2007 FC 172). Speaking of equivalency does not sit well with me.

[63] My reading of decisions such as *Jayasekara*, above, *Chan v Canada (MCI)*, [2000] 4 FC 390 (CA) (*Chan*) and *Zrig v Canada (MCI)*, [2003] 3 FC 761 (CA) (*Zrig*) lead me to believe that the determination of what constitutes a serious non-political crime cannot proceed from one formula. Therefore, paragraph 44 of *Jayasekara* was cited as setting out the factors to consider. I do not see in it a simple formula to be applied in rote fashion:

> I believe there is a consensus among the courts that the interpretation of the exclusion clause in Article 1F (b) of the Convention, as regards the seriousness of a crime, requires an evaluation of the elements of the crime, the mode of prosecution, the penalty prescribed, the facts and the mitigating and aggravating circumstances underlying the conviction. 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. There is no balancing, however, with factors extraneous to the facts and circumstances

> underlying the conviction such as, for example, the risk of persecution in the state of origin.
>
> [The citations are omitted.]

[64] The fact that the crime committed outside Canada is punishable by a term of imprisonment of ten years in Canada constitutes, in the opinion of the Federal Court of Appeal in *Jayasekara*, "a strong indication from Parliament that Canada, as a receiving state, considers crimes for which this kind of penalty is prescribed as serious crimes". Without deciding, and having satisfied itself that the presumption would be useful in proving its case, the Federal Court of Appeal in *Chan*, above, stated "that a serious non-political crime is to be equated with one in which a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada" (at paragraph 9). The line drawn at ten years' imprisonment seems useful, although it is not a luminous or magical line. I hesitate using the term "presumption" due to all of the baggage that accompanies this notion. I prefer to consider this line as a starting point, as a basis for analysis. The current nomenclature of criminal offences has traditionally found its parameters, for criminal acts, using maximum terms of imprisonment of two, five, ten, fourteen years, and life. We have also seen the emergence of maximum terms of seven years: there is nothing preventing other sentences from being established and the analysis grid in *Jayasekara* would, in my opinion, allow for the consideration of offences that are punishable by a maximum sentence of less than ten years.

[65] As I have already concluded in Docket IMM-252-12 involving the same applicant, the facts in that matter are more than sufficient to satisfy oneself that a conviction for the offence at section 88 of the *Criminal Code* would be possible because the essential elements could be demonstrated,

including the purpose dangerous to the public peace or for the commission of an offence, it follows that there is a strong indication that a serious non-political crime may have been committed.

[66] Furthermore, I am of the view that a foreign conviction is not required, as it suffices to have serious reasons to believe that a serious crime was committed, which in my opinion would exclude any need for a foreign conviction in order for section 98 of the Act to come into play (*Jawad v The Minister of Citizenship and Immigration*, 2012 FC 232, at paragraph 27).

[67] The other factors set out in *Jayasekara*, above, are therefore also important; the sole fact that someone's behaviour outside Canada would constitute a crime punishable by ten years' imprisonment in Canada clearly does not suffice. However, I do believe that the RPD proceeded with an appropriate examination of the factors. It was up to the applicant to challenge its reasonableness. It is a burden he failed to discharge, having regard to the standard of review that the parties identified as reasonableness, by pleading his case on that basis.

[68] In addition, the applicant relied considerably on his argument regarding so-called equivalency. His challenge with respect to the other factors in this Court was based on the mode of prosecution. Except that there does not appear to be a mode of prosecution that is unique to New Jersey and the Canadian offence is a hybrid one. Under Canadian law, such an offence is treated as a criminal act (section 34, *Interpretation Act*, RSC 1985, c I-21). As for any mitigating circumstances, none was raised and it must therefore be concluded that none exist. All in all, the RPD's analysis is eminently reasonable.

[69] I would like to make an additional observation. As in the related file, the applicant makes much of the fact that the offence he was charged with in New Jersey carries with it a term of imprisonment of 18 months, while another offence, this one punishable by a term of five years' imprisonment, was one with which he could have been charged. This argument feeds into his argument on equivalency to demonstrate a more perfect symmetry between offences originating from different systems. The applicant complains that the U.S. offence is objectively less serious than the Canadian offence, and sees this as grounds for a grievance, especially in light of the fact that U.S. authorities could have brought more serious changes against him. To my mind, this illustrates the relevance of the warning in *Jayasekara*, above:

> [41] I agree with counsel for the respondent that, if under Article 1F(*b*) of the Convention the length or completion of a sentence imposed is to be considered, it should not be considered in isolation. There are many reasons why a lenient sentence may actually be imposed even for a serious crime. That sentence, however, would not diminish the seriousness of the crime committed. On the other hand, a person may be subjected in some countries to substantial prison terms for behaviour that is not considered criminal in Canada.
>
> [42] Further, in many countries, sentencing for criminal offences takes into account factors other than the seriousness of the crime. For example, a player in a prostitution ring may, out of self-interest, assist the prosecuting authorities in the dismantling of the ring in return for a light sentence. Or an offender may seek and obtain a more lenient sentence in exchange for a guilty plea that relieves the victim of the ordeal of testifying about a traumatic sexual assault. Costly and time-consuming mega-trials involving numerous accused can be avoided in the public interest through the negotiation of guilty pleas and lighter sentences. The negotiations relating to sentences may involve undertakings of confidentiality, protection of persons and solicitor-client privileges. Access to the confidential, secured and privileged information may not be permitted, so that a look at the lenient sentence in isolation by a reviewing authority would provide a distorted picture of the seriousness of the crime of which the offender was convicted.
>
> [43] While regard should be had to international standards, the perspective of the receiving state or nation cannot be ignored in

> determining the seriousness of the crime. After all, as previously alluded to, the protection conferred by Article 1F(*b*) of the Convention is given to the receiving state or nation. The UNHCR Guidelines acknowledges as much: see paragraph 36 above.

The reasons for sentencing, as well as the charges laid abroad, can vary considerably. The point of view of the receiving country carries weight.

[70] In my view, this is further proof that one cannot arrive at a conclusion as to what constitutes a "serious non-political crime" by simply applying a formula. An argument that is based on a form of equivalency between offences does not seem consistent with the factors set out in *Jayasekara*. What needs to be demonstrated is the seriousness of the crime within the meaning of Article 1F(*b*), in which the perspective of the receiving state is important, because Article 1F(*b*) of the Convention is also for the benefit of the receiving state. And in this regard, it seems to me that there is no longer any doubt that an important consideration is the ability of the State to close its borders to undesirables (*Zrig*, above, at paragraphs 118 and 119, cited with approval in *Jayasekara*, paragraph 28). The importance of what can constitute a serious crime in the receiving state is explained in part by this consideration. That the U.S. authorities opted to lay a charge that would be easier to prosecute is entirely within their discretion. If Canadian authorities have serious grounds to believe that a serious non-political crime was committed, the *Jayasekara* grid allows for the application of section 98 of the Act.

[71] As a result, the application for judicial review must fail.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review (IMM-252-13) in relation to the Immigration Division's inadmissibility decision, dated December 18, 2012, under paragraphs 36(1)(*c*) and 36(2)(*c*) of the *Immigration and Refugee Protection Act* is dismissed. No serious question of general importance was proposed, and none will be certified.
2. The application for judicial review (IMM-546-13) in relation to the Refugee Protection Division's decision, dated December 20, 2012, regarding the determination that the applicant was neither a refugee nor a person in need of protection pursuant to section 98 of the *Immigration and Refugee Protection Act* is dismissed. No question of general importance was proposed and none will be certified.

"Yvan Roy"
Judge

Certified true translation
Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	IMM-252-13 and IMM-546-05
STYLE OF CAUSE:	Odney Richmond VICTOR and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS Odney Richmond VICTOR and THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	August 28, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	ROY J.
DATED:	September 25, 2013

APPEARANCES:

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