Federal Court  Cour fédérale

Date: 20141202

Docket: IMM-2229-13

Citation: 2014 FC 1159

Ottawa, Ontario, December 2, 2014

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

SEBASTIAN MAGHANOY NOTARIO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Refugee Protection Division of the Immigration and Refugee Board of Canada (the Board) refused the applicant's request for protection because it found that he was excluded by section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act]. The applicant now seeks judicial review of that decision pursuant to subsection 72(1) of the Act. He asks for an order setting aside the Board's decision and returning the matter to another panel for redetermination.

I. Background

[2] Sebastian Maghanoy Notario (the applicant) is a citizen of the Philippines. He lived in the United Arab Emirates (UAE) for a time, but left after he lost his job. On June 20, 2008, he came to Canada under the live-in caregiver program, but allegedly discovered upon arrival that no employer was waiting for him.

[3] He eventually defaulted on a loan from a bank in the United Arab Emirates, which led to a criminal conviction in that country. On February 21, 2012, an inadmissibility report was issued against him and the Immigration Division of the Board ordered him deported on May 1, 2012, declaring that subsection 41(a) and paragraph 36(1)(b) of the Act both rendered him inadmissible to Canada. This Court denied the applicant leave to apply for judicial review of that decision on September 13, 2012 (see *Notario v Canada (Minister of Citizenship and Immigration)* (13 September 2012), File IMM-4842-12 (FC)).

[4] Meanwhile, he had applied for Canada's protection on March 2, 2012, claiming that he feared that corrupt officials in the Philippines would send him to torture or death in the United Arab Emirates. The Minister intervened, arguing that the applicant should be excluded from protection for serious non-political criminality pursuant to section 98 of the Act.

II. Decision Under Review

[5] The applicant's claim was refused by decision dated March 12, 2013. The Board agreed with the Minister that section 98 of the Act and Article 1F(b) of the *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150 (the *Convention*), excluded the applicant.

[6] The Board found that the relevant facts were these:

> The claimant obtained a bank loan from the Emirates Bank and used the proceeds to pay off another loan at a different bank and then used the balance to build a house in the Philippines. He made seven or eight monthly payments as required. He then lost his job and, as his visa was related to his work, he had to leave the UAE. From this point on, he did not make any payments or contact the bank. The bank sent numerous emails asking what he was planning to do about missing payments, warning him they would finally realize the security cheque. When the cheque was dishonoured, they again warned him to pay the balance or they would take legal action and inform authorities, as well as sending the amount owing out for collection. He failed to respond and actions were taken including charges in the court resulting in his conviction in *absentia*.

[7] The cheque to which the Board referred was a blank one given as security for the loan. The applicant was convicted for "uttering in bad faith a dud cheque". The Board accepted a warrant as proof of that crime, so the question was whether it was serious enough to meet the test set out in *Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404, [2009] 4 FCR 164 [*Jayasekara*].

[8] The Board decided that it was. The Board held that the offence was sufficiently similar to the offence of fraud that it could be prosecuted in Canada under paragraph 380(1)(a) of the

Criminal Code, RSC 1985, c C-46. The maximum penalty for that is 14 years, so the Board held that it was serious. The Board said that this was reinforced by the evidence submitted to the Immigration Division for his admissibility hearing.

[9] The applicant had not challenged the facts sustaining the conviction, so the Board assigned little weight to the fact that he was convicted without being present. As well, the Board said that a sentence of 18 months' imprisonment was within acceptable international standards. The Board also considered the applicant's avoidance of the bank's correspondence an aggravating factor.

[10] The Board apparently accepted the applicant's submission that this could have been a civil matter in Canada, but said that a substantial loan would have been secured differently here. It was a crime in Abu Dhabi and the Board found that was enough.

[11] Consequently, there were serious reasons to consider that the applicant had committed a serious non-political crime, so the Board decided that he was excluded from protection by section 98 of the Act.

III. Issues

[12] This case raises the following issues:

A. What is the standard of review?

B. Was the process unfair?

C. Did the Board misunderstand the test?

D. Did the Board err with respect to the lawyer's letter?

E. Was the Board's decision unreasonable?

F. Does this case raise any serious question of general importance?

IV. Applicant's Written Submissions

[13] The applicant initially wrote his own memorandum of fact and law. His criticisms boiled down to two: (1) the Board ignored a letter from a lawyer saying that the applicant's conduct would not be a crime in Canada because the element of intention was absent; and (2) the Board's assessment of the seriousness of the offence was "truly minimal" and it failed to consider things like the applicant's lack of dangerousness and the brevity of the sentence actually imposed. The applicant also implied that these errors gave rise to a reasonable apprehension of bias by citing *Janjua v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1521 at paragraph 8, 51 Imm LR (3d) 239.

[14] The applicant's further memorandum was drafted by counsel. In it, he fleshes out those arguments and adds a few more.

[15] First, he criticizes the Board for simply stating, without any analysis, that subsection 380(1) of the *Criminal Code* was "sufficiently similar to the crime that it could be used to prosecute for the same offence in Canada". The applicant says this violated the Board's duty to provide reasons.

[16] Second, the applicant says the Board applied the wrong test. Either a crime is equivalent or it is not; there is no such thing as "sufficiently equivalent". The Board here fails to even identify the crime in the United Arab Emirates, let alone assess why it is equivalent to any offence in Canada. The statute under which the applicant was convicted was about issuing a cheque in bad faith without a sufficient balance, which has no analogue in subsection 380(1) of the *Criminal Code*.

[17] Third, this was a loan transaction and the bank knew he did not have the money. It asked for a blank cheque to secure it, so he never represented that he did. There is no fraud that could support a conviction under section 380 of the *Criminal Code* and the applicant says the Board erred by ignoring that. At the hearing, the applicant also argued that a cheque issued in these circumstances would not even be considered a bill of exchange in Canada under subsection 16(1) of the *Bills of Exchange Act*, RSC 1985, c B-4.

[18] Fourth, the applicant is critical of the Board's assessment of seriousness. In his view, the Board: (1) never analyzed the mode of prosecution or acknowledged that it was tried in *absentia*; (2) stated that a sentence of 18 months did not violate "international standards" but never explained what those standards were; (3) simply recited the facts without analyzing them; and (4) acknowledged that default on a loan was a civil matter in Canada but still treated it as a crime. The applicant also says that this last issue makes the reasons incomprehensible and self-contradictory.

[19] Fifth, the applicant again criticizes the Board for ignoring the lawyer's letter opining that the applicant's conduct would not be criminal in Canada.

V. Respondent's Written Submissions

[20] In its original memorandum, the respondent says that the Board's interpretation of section 98 of the Act and Article 1F of the *Convention* were questions of law attracting a standard of correctness. However, reasonableness was the standard for how the Board applied that law to the facts. In its further memorandum and at the hearing, the respondent maintains that this case only raises the latter type of issue and the reasonableness standard should be applied.

[21] First, it says that the applicant does not require international protection. He fears mistreatment in the United Arab Emirates, but he would only be removed to the Philippines. There is no evidence that anyone there would send him to the United Arab Emirates, so the respondent submits that the applicant has not established any fear in his country of origin.

[22] Second, the respondent submits that the Board did not ignore the letter from the lawyer. The applicant made only passing reference to it in his submissions, so the Board cannot be faulted for treating it the same way. According to the respondent, the Board fully considered the submission that this would be a civil matter in Canada but found that the fact it was a crime in Abu Dhabi required the treatment of a similar offence here.

[23] The respondent also argues that the letter was irrelevant anyway for three reasons: (1) it dealt with whether the applicant's actions could have supported a charge under section 362 of the

Criminal Code, while the Board's task was to consider whether the applicant was excluded by section 98 of the Act; (2) it assumed the absence of *mens rea* and the circumstances of the offence, which were matters for the Board to assess as the trier of fact; and (3) the general rule that expert evidence on Canadian law is inadmissible should be extended to the Board (see *Eco-Zone Engineering Ltd v Grand Falls – Windsor (Town)*, 2000 NFCA 21 at paragraphs 15 and 16, 5 CLR (3d) 55 [*Eco-Zone*]).

[24] Third, the respondent says that no reasonable apprehension of bias arises. The applicant relies on mere conjecture to argue the opposite.

[25] Fourth, the respondent argues that the Board reasonably assessed the factors in *Jayasekara*. The Board was not required to consider the applicant's current dangerousness or his "non-criminal character" since only the circumstances surrounding the commission of the offence are relevant. Beyond that, the applicant only takes issue with how the Board weighed the evidence, but that was a task for the Board which it conducted reasonably. Further, the respondent argues that adequacy of reasons is not a stand alone basis for review and that the reasons in this case meet the standard set out in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraph 16, [2011] 3 SCR 708 [*Newfoundland Nurses*].

VI. Analysis and Decision

A. *Issue 1 - What is the standard of review?*

[26] Where the jurisprudence has satisfactorily resolved the standard of review, that analysis need not be repeated (see *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 62, [2008] 1 SCR 190 [*Dunsmuir*]).

[27] Issues of procedural fairness are nominally reviewed on the correctness standard (see *Mission Institution v Khela*, 2014 SCC 24 at paragraph 79, 455 NR 279). It is for the court to determine whether the process was fair in the circumstances, though relief may be withheld if any error is "purely technical and occasions no substantial wrong or miscarriage of justice" (see *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 43, [2009] 1 SCR 339 [Khosa]; *Federal Courts Act*, RSC 1985, c F-7, paragraph 18.1(5)(a)).

[28] Section 98 of the Act incorporates into it Articles 1E and 1F of the *Convention*. In *Febles v Canada (Minister of Citizenship and Immigration)*, 2012 FCA 324 at paragraphs 24 and 25, 357 DLR (4th) 343 [*Febles*], the Federal Court of Appeal held that correctness should be the standard of review for interpreting those articles since international conventions should be applied as uniformly as possible.

[29] However, I agree with the respondent that deciding whether the facts satisfy the legal test is a question of mixed fact and law. Consequently, it should attract the reasonableness standard of review (see *Feimi v Canada (Minister of Citizenship and Immigration)*, 2012 FCA 325 at

paragraph 16, 353 DLR (4th) 536 [*Feimi*]; *Dunsmuir* at paragraph 53). That means that I should not intervene on these issues if the Board's decision is transparent, justifiable, intelligible and within the range of acceptable outcomes (*Dunsmuir* at paragraph 47). Put another way, I will set aside the Board's decision only if I cannot understand why it reached its conclusions or how the facts and applicable law support the outcome (*Newfoundland Nurses* at paragraph 16). As the Supreme Court held in *Khosa* at paragraphs 59 and 61, a court reviewing for reasonableness cannot substitute its own view of a preferable outcome, nor can it reweigh the evidence.

B. *Issue 2 - Was the process unfair?*

[30] The applicant alleges three violations of procedural fairness. Originally, he implied that the Board appeared to be biased because it ignored evidence. In his further memorandum, he argues that the Board failed to provide reasons because its reasons were opaque and hard to understand. He also argues that the Board "denied the Applicant the right to counsel, by failing to consider the evidence coupled with the argument that if it is a civil matter in Canada, there is no crime" (applicant's further memorandum at paragraph 46).

[31] None of these arguments have merit.

[32] First, administrative decisions can be set aside for a reasonable apprehension of bias (see *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraphs 46 and 47, 174 DLR (4th) 193), but it requires more than mere suspicion (see *R v RDS*, [1997] 3 SCR 484 at paragraph 112, 151 DLR (4th) 193). Even if the applicant's complaints about the content of the decision are justified, that hardly proves that the Board was biased.

[33] Second, a duty to give reasons is discharged once any reasons are given. The quality of those reasons is not a question of procedural fairness (*Newfoundland Nurses* at paragraphs 20 and 21). To the extent that *Guerrero v Canada (Minister of Citizenship and Immigration)*, 2010 FC 384 at paragraph 33, 88 Imm LR (3d) 258, says otherwise, it is no longer good law.

[34] Third, the Board did not violate the applicant's right to counsel by rejecting his counsel's arguments. If the Board ignored evidence or erred in law, those are separate grounds for review under subsection 18.1(4) of the *Federal Courts Act*.

C. *Issue 3 - Did the Board misunderstand the test?*

[35] At the hearing, the applicant submitted that a finding that the conduct was criminal in Canada is a condition precedent to exclusion under section 98 and so the Board erred by saying that the warrant and conviction were "more than sufficient proof that [the applicant] committed a non-political crime".

[36] I disagree. Section 98 of the Act says that "[a] person referred to in section E or F of Article 1 of the Refugee is not a Convention refugee or a person in need of protection." Article 1F(b) is the relevant paragraph in this case and it says the following:

Article 1	Article premier
F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:	F. Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser :
…	…

(b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;	b) Qu'elles ont commis un crime grave de droit commun en dehors du pays d'accueil avant d'y être admises comme réfugiés;

[37] In *Zrig v Canada (Minister of Citizenship and Immgration)*, 2003 FCA 178 at paragraph 118, [2003] 3 FC 761, Mr. Justice Robert Décary identified the objectives of this provision:

> …the purpose of this section is to reconcile various objectives which I would summarize as follows: ensuring that the perpetrators of international crimes or acts contrary to certain international standards will be unable to claim the right of asylum; ensuring that the perpetrators of ordinary crimes committed for fundamentally political purposes can find refuge in a foreign country; ensuring that the right of asylum is not used by the perpetrators of serious ordinary crimes in order to escape the ordinary course of local justice; and ensuring 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.
>
> [Emphasis added]

[38] Elaborating on that third objective, Justice Décary went on to say at paragraph 119 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."

[39] That objective is not advanced by a strict requirement that the country of refuge must have criminalized the conduct of which the claimant was convicted. Rather, as acknowledged by the Federal Court of Appeal in *Jayasekara* at paragraph 37, the gravity of a crime must be judged against international standards. Although there may be some foreign laws that are so unjust as to

be intolerable, there are also some social issues that different countries could legitimately tackle in different ways. In the interests of international comity, Article 1F may at times require a potential country of refuge to deny asylum to ordinary criminals who wilfully broke another country's laws, even if the country of refuge does not prosecute its own citizens for the same conduct.

[40] Therefore, there is no hard and fast rule that the conduct must be criminal in the potential country of refuge. However, "the perspective of the receiving state or nation cannot be ignored in determining the seriousness of the crime" (*Jayasekara* at paragraph 43 (emphasis added)). That is where the Board conducted its equivalency analysis and that was no error.

[41] The applicant also takes issue with the Board's comparison between the laws in the United Arab Emirates and Canada. He says the Board's finding that the relevant provisions were "sufficiently equivalent" was meaningless since this is a contradiction in terms.

[42] In fact, the Board never said that anything was "sufficiently equivalent." Rather, it said that paragraph 380(1)(a) of the *Criminal Code* was sufficiently similar to the offence for which the applicant was convicted that it could be used to prosecute the same conduct in Canada. Although I will assess the reasonableness of that later, this does not suggest an error regarding the test.

[43] However, another passage causes me to doubt whether the Board correctly understood the test under section 98 of the Act.

[44] In essence, that test requires the Minister to prove that there are serious reasons for considering that a claimant committed a serious non-political crime (see *Lai v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 125 at paragraphs 23 and 34, 253 DLR (4th) 606). In doing so, the Minister can benefit from a presumption that a particular crime is serious if the conduct underlying it is an offence in Canada punishable by a maximum term of imprisonment of at least ten years (*Feimi* at paragraph 31; *Jayasekara* at paragraphs 40 and 44). However, that presumption can be rebutted after examining the circumstances of the offence, including the following four factors: (1) the elements of the crime; (2) the mode of prosecution; (3) the penalty prescribed; and (4) the facts and the mitigating and aggravating circumstances underlying the conviction (*Jayasekara* at paragraph 44).

[45] When applying the test in this case though, the Board spoke as if it did not appreciate that the presumption created by an equivalent offence in Canada could be rebutted. Before ever addressing the factors upon which the test truly rests, the Board stated the following:

> I find that this provision [paragraph 380(1)(a)] of the Criminal Code is sufficiently similar to the crime that it could be used to prosecute for the same offence in Canada, and <u>therefore I find the crime committed is serious</u> within the meaning of Article 1F(b).
>
> [Emphasis added]

[46] That said, the Board correctly assigned primary importance to the factors at paragraph 9 of its decision and did go on to consider them. If it had actually made the mistake implied by the emphasized statement above, then it would not have bothered. Therefore, I accept that this was simply a misstatement and not a misunderstanding. Moreover, it did not conclude that any of the

factors favoured the applicant, so its analysis would not have disturbed the presumption anyway. It is therefore necessary to go on to consider the reasonableness of the decision.

D. *Issue 4 - Did the Board err with respect to the lawyer's letter?*

[47] Before getting to the substance of the decision, there are a few issues surrounding a letter by Mr. Rovan opining that the applicant's conduct would not have attracted criminal sanctions in Canada.

[48] The respondent argues that this letter should not have been admitted by the Board because it purported to be expert evidence on domestic law. Therefore, the respondent submits that the Board's failure to mention it could not be problematic.

[49] I disagree. Expert evidence on domestic law in court is inadmissible because a court has the expertise and the responsibility to answer those legal questions (*Eco-Zone* at paragraph 15; *Brandon (City) v Canada*, 2010 FCA 244 at paragraph 27, 411 NR 189). The Refugee Protection Division on the other hand, is not generally responsible for deciding what the elements of any particular crime are and expert evidence could be useful. Further, paragraphs 170(g) and 170(h) of the Act relax the rules of evidence for the Refugee Protection Division, with paragraph 170(g) saying that it "is not bound by any legal or technical rules of evidence". It should not be saddled with an obligation to exclude evidence that it may well want to see.

[50] Therefore, in the absence of any decision by the Board to exclude this evidence, I see no reason to infer that it was dismissed for the reasons proposed by the respondent.

[51] The applicant complains that the Board made a different error with respect to Mr. Rovan's letter. He argues that it was the only evidence on whether his conduct would be criminal in Canada, which made it an error for the Board not to mention it.

[52] Although the Board is presumed to have considered all the evidence before it, a court can sometimes infer that important evidence was overlooked if it squarely contradicts the Board's findings of fact and yet was never mentioned in the reasons (see *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2010 FCA 177 at paragraph 38, [2012] 1 FCR 257, citing *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 (QL) at paragraph 17, 157 FTR 35; *Federal Courts Act*, RSC 1985, c F-7, paraagraph 18.1(4)(d)).

[53] I do not make that inference here. The letter from Mr. Rovan assessed only whether the applicant's conduct would be an offence under section 362 of the *Criminal Code*. The provision that really mattered was paragraph 380(1)(a). For that reason, the letter was not important enough to infer that it was overlooked.

E. *Issue 5 - Was the Board's decision unreasonable?*

[54] The Board found that the provision under which the applicant was convicted was similar enough to paragraph 380(1)(a) of the *Criminal Code* to engage the presumption that it was a serious crime.

[55] As mentioned earlier, this presumption was described by the Federal Court of Appeal in *Jayasekara* by analogy to inadmissibility for serious criminality (*Jayasekara* at paragraph 40).

That typically requires an assessment of whether the conduct for which the applicant was convicted could have been prosecuted in Canada and potentially attract a sentence of more than 10 years (see *Brannson v Canada (Minister of Employment and Immigration)* (1980), [1981] 2 FC 141 at paragraph 4, 34 NR 411 (FCA); *Vlad v Canada (Minister of Citizenship and Immigration)*, 2007 FC 172 at paragraph 22).

[56] In *Hill v Canada (Minister of Employment and Immigration)* (1987), 73 NR 315, 1 Imm LR (2d) 1 (FCA), the Court of Appeal explained the ways in which this could be shown:

> [E]quivalency 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.

[57] Although such an equivalency analysis need not always be conducted to exclude someone under section 98, the presumption cannot be engaged unless it is applied correctly (see *Sanchez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1130 at paragraphs 39, 40 and 49, [2012] FCJ No 1215 [*Sanchez*]; *Raina v Canada (Minister of Citizenship and Immigration)*, 2011 FC 19 at paragraph 7, 382 FTR 135).

[58] Here, the Board did rely on the presumption, but did not explain very well why it did so. Rather, the Board went no further than citing the *Criminal Code* provision and incorrectly

identifying the relevant provision in the United Arab Emirates as Article 104/1. It then said that they are "sufficiently similar" and that the crime was therefore serious.

[59] This is a problem. The Board did not analyze either provision or explain how they share the same essential elements. Article 401 of the Penal Code in the United Arab Emirates provides the following:

> Detention or a fine shall be imposed upon anyone who, in bad faith, gives a draft (cheque) without a sufficient and drawable balance or who, after giving a cheque, withdraws all or part of the balance, making the balance insufficient for settlement of the cheque, or if he orders a drawee not to cash a cheque or makes or signs the cheque in a manner that prevents it from being cashed.
>
> The same penalty shall apply to any one who endorses a cheque in favor of another or gives him a bearer draft, knowing that there is no sufficient balance to honor the cheque or that it is not drawable.

[60] Paragraph 380(1)(a) of the *Criminal Code* says the following:

380. (1) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service,	380. (1) Quiconque, par supercherie, mensonge ou autre moyen dolosif, constituant ou non un faux semblant au sens de la présente loi, frustre le public ou toute personne, déterminée ou non, de quelque bien, service, argent ou valeur :
(a) is guilty of an indictable offence and liable to a term of imprisonment not exceeding fourteen years, where the subject-matter of the offence is a testamentary instrument or the value of the subject-matter of the offence exceeds five	a) est coupable d'un acte criminel et passible d'un emprisonnement maximal de quatorze ans, si l'objet de l'infraction est un titre testamentaire ou si la valeur de l'objet de l'infraction dépasse cinq mille dollars;

thousand dollars; or

[61] To seize on just one of many obvious differences, it is unclear to me what "bad faith" might mean in the United Arab Emirates or whether it is analogous to "deceit, falsehood or other fraudulent means".

[62] Moreover, foreign law should typically be established by expert evidence (see *Allen v Hay (1922)*, 64 SCR 76 at 80 and 81, 69 DLR 193, per Duff J). Although that requirement does not always apply in an administrative context (see *Qi v Canada (Citizenship and Immigration)*, 2009 FC 195 at paragraphs 24 to 26, [2009] 4 FCR 510), such evidence was recommended for an equivalency analysis by the Federal Court of Appeal in *Hill*. None was provided in this case, so nothing in the record could bolster the Board's finding that these two provisions capture the same conduct.

[63] As such, the Board could only rely on the applicant's actual conduct to assess whether he could have been convicted under paragraph 380(1)(a), but that analysis does not appear to have been conducted at all.

[64] That said, the respondent argued at the hearing that the applicant could not really challenge the Board's equivalency analysis since that was already the subject of the applicant's hearing before the Immigration Division. There, the Immigration Division conducted an extensive equivalency analysis at paragraphs 30 to 56 and the applicant was denied leave to apply for judicial review. The respondent says that decision should be treated as final and dispositive of the equivalency issue.

[65] However, the Board never expressly adopted the reasons given by the Immigration Division. Rather, the Board said that its finding of similarity was merely "reinforced by the evidence the Minister submitted in the decision of the Immigration Division of May 1, 2012" (emphasis added). The Board did not consider the issue resolved by the admissibility hearing, so it is unnecessary to consider whether the Board could have applied issue estoppel had it wanted to.

[66] Moreover, even when the pre-conditions for issue estoppel are met, courts can choose whether or not to apply it (see *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 at paragraph 33, [2001] 2 SCR 460). The Board would have the same discretion and its choice to conduct an independent analysis should therefore be respected.

[67] Even if I accepted that the Board implicitly endorsed the reasons given by the Immigration Division, its decision was unreasonable.

[68] The Board found as a fact that the basis for the conviction was a loan transaction. The applicant originally made payments faithfully, but lost his job and had to leave the United Arab Emirates. After that, he could not find any other employment and so defaulted on the loan.

[69] The Board accepted that this would not be a criminal offence in Canada. It said the following at paragraph 20 of its decision:

> Counsel submitted that the default should be seen as a civil not a criminal matter and that in Canada it would be treated that way, and is therefore a mitigating factor. While that may be the case in

> Canada, I find a substantial loan would have been secured differently.
>
> [Emphasis added]

[70] However, the loan could not have been secured in a way that would make innocent default fraudulent under paragraph 380(1)(a) of the *Criminal Code*. Therefore, this contradicted the Board's earlier finding that the applicant could have been prosecuted for his impugned conduct in Canada.

[71] The Board's decision is therefore unintelligible. Having found that the applicant could not have been convicted for his conduct in Canada, the Board could not simultaneously presume that the offence was serious because he could have been convicted. Yet it did.

[72] The entire decision is thereby tainted since the Board had already applied the presumption of seriousness when assessing the other factors. By doing so, it had put the burden on the applicant to prove that the "offence" was not serious. With that in mind, many of its other findings also become unreasonable.

[73] For instance, the Board said that the penalty of 18 months' incarceration was "not in violation of accepted international standards." However, there was no evidence that defaulting on a loan is a crime in any other countries, let alone what penalties might be imposed for it. Since the burden of proof should have still been on the Minister if subsection 380(1)(a) of the *Criminal Code* was not an equivalent offence, this finding was made without any evidence to support it. Further, while the length of the sentence actually imposed is not always pertinent (*Jayasekara* at

paragraph 41), it is strange that the Board only assessed whether the sentence was severe by international norms and not whether 18 months was a long enough sentence to indicate that the applicant's actual conduct was serious.

[74] For all those reasons, the Board's decision was unreasonable.

[75] Of course, the respondent also argues that the Board could have reasonably found that the applicant did not fear persecution in his country of origin. However, the Board never actually assessed the merits of the applicant's claim since its finding on exclusion was determinative. Ultimately, Parliament gave to the Board the power to decide the applicant's claim and I cannot usurp that power merely because the Board made a mistake on some other issue. As such, the decision cannot be upheld simply because the outcome might have been reasonable if it was arrived at by a different path (see *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paragraph 54, [2011] 3 SCR 654; *JMSL v Canada (Citizenship and Immigration)*, 2014 FCA 114 at paragraph 37, [2014] FCJ No 439).

F. *Issue 6 - Does this case raise any serious question of general importance?*

[76] In *Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168 at paragraph 9, 446 NR 382, the Federal Court of Appeal said that a question cannot be certified unless it would be (1) "dispositive of the appeal and (2) transcend the interests of the immediate parties to the litigation, as well as contemplate issues of broad significance or general importance."

[77] After the hearing in this case, the applicant proposed the following question for certification:

> If the Immigration Division made an earlier decision regarding the Applicant and the IRB has to deal with the same issue, is the IRB bound by the Immigration Division's findings and decision, particularly if the federal court has denied leave on the Immigration Division's matter?

[78] The respondent opposed certification, arguing that this question was neither dispositive nor important.

[79] I agree that it is not dispositive of this case. The Refugee Protection Division conducted its own equivalency analysis. At most, it approved of the Immigration Division's reasons, but there is no indication that it considered itself bound by them. Consequently, this question does not arise on the facts of this case and I will not certify the proposed question.

[80] I would therefore allow the application for judicial review and return the matter to another panel of the Board for redetermination.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed and the matter is referred to a different panel of the Board for redetermination.

2. The question proposed for certification will not be certified.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

***Immigration and Refugee Protection Act*, sc 2001, C 27**

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;
…	…
41. A person is inadmissible for failing to comply with this Act	41. S'agissant de l'étranger, emportent interdiction de territoire pour manquement à la présente loi tout fait — acte ou omission — commis directement ou indirectement en contravention avec la présente loi et, s'agissant du résident permanent, le manquement à l'obligation de résidence et aux conditions imposées.
(a) in the case of a foreign national, through an act or omission which contravenes, directly or indirectly, a provision of this Act; and	
…	…
72. (1) Judicial review by the Federal Court with respect to any matter — a decision,	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision,

determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
…	…
74. Judicial review is subject to the following provisions:	74. Les règles suivantes s'appliquent à la demande de contrôle judiciaire :
…	…
(d) an appeal to the Federal Court of Appeal may be made only if, in rendering judgment, the judge certifies that a serious question of general importance is involved and states the question.	d) le jugement consécutif au contrôle judiciaire n'est susceptible d'appel en Cour d'appel fédérale que si le juge certifie que l'affaire soulève une question grave de portée générale et énonce celle-ci.
…	…
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.
…	…
170. The Refugee Protection Division, in any proceeding before it,	170. Dans toute affaire dont elle est saisie, la Section de la protection des réfugiés :
…	…
(g) is not bound by any legal or technical rules of evidence;	g) n'est pas liée par les règles légales ou techniques de présentation de la preuve;
(h) may receive and base a decision on evidence that is adduced in the proceedings and considered credible or	h) peut recevoir les éléments qu'elle juge crédibles ou dignes de foi en l'occurrence et

trustworthy in the circumstances; and …	fonder sur eux sa décision; …

***Criminal Code*, RSC 1985, c C-46**

380. (1) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service,	380. (1) Quiconque, par supercherie, mensonge ou autre moyen dolosif, constituant ou non un faux semblant au sens de la présente loi, frustre le public ou toute personne, déterminée ou non, de quelque bien, service, argent ou valeur :
(a) is guilty of an indictable offence and liable to a term of imprisonment not exceeding fourteen years, where the subject-matter of the offence is a testamentary instrument or the value of the subject-matter of the offence exceeds five thousand dollars; or	a) est coupable d'un acte criminel et passible d'un emprisonnement maximal de quatorze ans, si l'objet de l'infraction est un titre testamentaire ou si la valeur de l'objet de l'infraction dépasse cinq mille dollars;

***Bills of Exchange Act*, RSC 1985, c B-4**

16. (1) A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay, on demand or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person or to bearer.	16. (1) La lettre de change est un écrit signé de sa main par lequel une personne ordonne à une autre de payer, sans condition, une somme d'argent précise, sur demande ou à une échéance déterminée ou susceptible de l'être, soit à une troisième personne désignée — ou à son ordre — , soit au porteur.

***Federal Courts Act*, RSC 1985, c F-7**

18.1 (3) On an application for judicial review, the Federal Court may	18.1(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :
(a) order a federal board, commission or other tribunal	a) ordonner à l'office fédéral en cause d'accomplir tout acte

to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or	qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;
(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.	b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.
(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal	(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :
…	…
(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;	b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;
(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;	c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;
(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;	d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;
…	…
(5) If the sole ground for relief established on an application for judicial review is a defect	(5) La Cour fédérale peut rejeter toute demande de contrôle judiciaire fondée

in form or a technical irregularity, the Federal Court may	uniquement sur un vice de forme si elle estime qu'en l'occurrence le vice n'entraîne aucun dommage important ni déni de justice et, le cas échéant, valider la décision ou l'ordonnance entachée du vice et donner effet à celle-ci selon les modalités de temps et autres qu'elle estime indiquées.
(a) refuse the relief if it finds that no substantial wrong or miscarriage of justice has occurred; and	

***Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150**

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

FEDERAL COURT

SOLICITORS OF RECORD

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