Federal Court  Cour fédérale

Date: 20200226

Docket: IMM-4082-19

Citation: 2020 FC 309

Ottawa, Ontario, February 26, 2020

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

MOHAMED ABDI HASHI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision by the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada dated June 4, 2019 [Decision], which held that the Applicant was excluded from Canada's refugee protection pursuant to section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] and Article 1F(b) of the 1951

United Nations Convention Relating to the Status of Refugees, [1969] Can TS No 6 [*Refugee Convention*].

II. Facts

[2] The Applicant is a 41-year-old citizen of Somalia. His family fled Somalia in 1991 when he was 12 years old. They settled in the United States, where the Applicant acquired permanent resident status in 1995.

[3] In 2004, the Applicant was charged and convicted of uttering threats. The following year, he was convicted of evading police officers with reckless driving. In 2010, after he completed his sentence, US authorities issued a deportation order. However, due to a moratorium on deportations to Somalia, the Applicant was detained by US immigration. He was released shortly after and, in 2012, he came to Canada to seek refugee status. The Applicant claims that if he were returned to Somalia the terrorist group Al-Shabaab would kill him if it found out that he had lived in the US for twenty years.

[4] The Applicant's refugee claim was initially heard in June and July, 2014. The Minister intervened by way of an exclusion application pursuant to Article 1F(b) of the *Refugee Convention* [Exclusion Application]. The Notice of Intent to Intervene outlines the facts the Minister relied on:

> *The facts that the Minister is relying on*
>
> 5. The claimant was convicted in the United States of uttering threats. In a separate incident. he was convicted in relation to having initiated a drunken car-chase that ended in a car accident. He was imprisoned in both instances.

> 6. According to his probation report the claimant threatened the owner of the "Afrique Restaurant". The restaurant had been reportedly the victim of threats from the “Holy Blood Gang”.
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> 7. Authorities in San Diego, United States had the claimant listed as a documented member of the “Holy Blood” street gang. The Holy Blood Gang was known to have been involved in robbery, drug trafficking, prostitution, assault, and theft.
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> 8. The San Diego Police believe that the claimant was involved in an assault on 27 March, 1999 where a victim was attacked with bottles and rocks by nine Holy Blood Gang members. The claimant is alleged to have been the driver of the vehicle, and the first attacker to hit the victim. The victim suffered injuries to the head. neck and spine. The case was dropped due to “witness problems”.

[5] Following the hearing, the RPD determined the Applicant was not subject to exclusion from protection under Article 1F(b), but that the Applicant was neither a Convention refugee nor a person in need of protection [2014 Decision]. This decision was set aside on judicial review in *Mohammed Abdi Hashi v the Minister of Citizenship and Immigration*, judgment dated September 25, 2015 (IMM-6238-14). Justice O’Reilly allowed the application for judicial review and returned the matter back to the RPD for reconsideration with no direction concerning exclusion.

[6] The RPD held a new hearing on December 7, 2018. Prior to this hearing, the Minister withdrew the Exclusion Application. The Minister’s interest in the issue of credibility was not withdrawn and the Minister clarified that his decision not to intervene should not be interpreted as an opinion as to the merits of the refugee claim.

[7] At the hearing, the RPD questioned the Applicant in detail about his prior convictions. The hearing went into the merits of the refugee claim since the Exclusion request was no longer before it. As stated in the Decision:

> I questioned the Claimant in detail about his prior convictions and the dismissed assault charge and his gang involvement with the Holy Blood Gang. The degree and nature of examination and testimony was not predictable, and developed in the course of the hearing, with various considerations weighing on the panel as evidence, testimony and demeanor unfolded before him. These types of complex considerations are always before first level panels.

[8] After the hearing, on December 12, 2018, the RPD sought post-hearing submissions from the Applicant and requested that the Minister's counsel consult the audio recording of the hearing. I note the RPD must "without delay notify the Minister in writing" if it believes there is a possibility that section E or F of Article 1 of the *Refugee Convention* applies to the claim: see *Refugee Protection Division Rules*, SOR/2012-256, s 26(2).

[9] The Minister responded indicating that he had reviewed the audio of the hearing, reconsidered his position and retracted his withdrawal of intervention pursuant to Article 1F(b). In the same letter, the Minister provided submissions in support of the Exclusion Application.

[10] Counsel for the Applicant made no substantive submissions on why the Applicant should be excluded. Instead, the Applicant only relied on submissions that *res judicata* and issue estoppel should prevent a second decision on whether the Applicant is excluded by operation of Article 1F(b).

III. Decision under review

[11] In the Decision dated June 4, 2019, the RPD determined the Applicant was excluded from Canada's refugee protection pursuant to Article 1F(b) of the *Refugee Convention*. The RPD rejected the Applicant's submissions on *res judicata* and *issue estoppel* concluding: "In my view, based on the above and on a plain, simple and disciplined reading of Justice O'Reilly's decision. issue estoppel and *res judicata* do not apply".

[12] I note that the Applicant advised the Court shortly before the hearing on judicial review that he was withdrawing the *res judicata* and issue estoppel submissions, which therefore are not considered further.

[13] On the Minister's Exclusion submissions, the RPD Decision stated:

> Violent and rage based conduct has been reflected in police and probation reports as a pattern of the Claimant's. Although the Claimant testified about his alcohol use and the rehabilitation programs he was directed to, there is no evidence that he was drunk or in any way intoxicated during the 1999 incident. He has demonstrated violent outbursts and serious dysregulation in other conduct leading to charges and convictions.
>
> The Claimant's conduct relating to the offence of assault with a weapon was non political in nature and took place in the USA before he came to Canada and claimed refugee protection.
>
> CONCLUSION
>
> Based on the foregoing I conclude that the Minister has met the burden of establishing that there are serious reasons for considering that the Claimant has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee.

> The Claimant is therefore excluded from Canada's refugee protection pursuant to Article lF(b) of the Convention.

IV. Issues

[14] The Applicant challenged the reasonableness of the Decision in terms of its consideration of the factors discussed, and its consideration of the evidence before it including the issues of the Applicant's gang membership and lack of remorse.

V. Standard of Review

[15] The Applicant submits the standard of review to apply in this case is correctness. The Applicant relies on *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40, reasons for judgment by Lebel and Fish JJ [*Ezokola*], and argues that in that case the Supreme Court of Canada, in effect, applied a correctness standard to the interpretation of Article 1F(b). He did not press this argument at the hearing. In any event and with respect, I disagree. In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 [*Canada Post*], the Supreme Court of Canada indicates that *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, majority reasons by Chief Justice Wagner [*Vavilov*] sets out a revised framework for determining the applicable standard of review for administrative decisions. Under this new regime, the starting point is a presumption that a standard of reasonableness applies. This presumption can be rebutted in certain situations, none of which apply here. Therefore, the Decision is reviewable on a standard of reasonableness.

[16] Reasonableness review is both robust and responsive to context: *Vavilov* at para 67. Applying the *Vavilov* framework in *Canada Post,* Justice Rowe explains what is required for a reasonable decision and what is required of a court reviewing on the reasonableness standard of review:

> [31] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
>
> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
>
> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on . . . are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100). In this case, that burden lies with the Union.

[17] Reasons must not be assessed against a standard of perfection, and as pre-*Vavilov*, a reasonableness review is not a "line-by-line treasure hunt for error": *Vavilov* paras 91 and 102.

[18] The Applicant indicated in his letter to the Court prior to the hearing that he would be relying on *Farrier c Canada (Attorney General)*, 2020 CAF 25, reasons for judgment by Gauthier JA, for the proposition that the Court may intervene under the guidance of *Vavilov* where it would not have done so under *Dunsmuir v New Brunswick*, 2008 SCC 9 [note: the English translation of this case is not yet available]:

> [12] Avant l'arrêt *Vavilov*, j'aurais probablement conclu, comme la Cour fédérale l'a fait, que compte tenu de la présomption que le décideur a considéré tous les arguments et la jurisprudence devant lui et à la lecture du dossier, que la décision était raisonnable. L'absence de motifs traitant des deux premières questions devant la Section d'appel n'était pas à l'époque suffisante pour casser la décision. En effet, il était implicite que la Section d'appel n'avait pas accepté que l'interprétation de la Loi par la Commission était erronée, particulièrement compte tenu du paragraphe 143(1) de la Loi. Dans les circonstances, le décideur administratif était présumé avoir rejeté les arguments de M. Farrier quant à un quelconque préjudice causé par l'absence d'enregistrement que la Loi prévoit ou non un tel enregistrement ou qu'il s'agisse simplement d'une violation du Manuel. Une telle conclusion était l'une des issues possibles compte tenu de la décision de la Cour suprême dans *CUPE*, même si cet arrêt n'est pas cité par la Section d'appel.
>
> [13] Dans *Vavilov*, la Cour suprême a clairement indiqué que lorsqu'un décideur administratif doit rendre une décision motivée par écrit (c'est le cas ici, voir l'alinéa 143(2)*a*) et le paragraphe 146(1) de la Loi), l'appréciation de la raisonnabilité de la décision doit inclure une appréciation de sa justification et de sa transparence. Comme le souligne la Cour Suprême, les motifs fournis par ce décideur administratif ne doivent pas être jugés au regard de la norme de perfection et on ne peut s'attendre à ce qu'il fasse référence à tous les arguments ou détails qu'un juge siégeant en révision aurait voulu y lire. La «justice administrative» ne ressemblera pas toujours à la «justice judiciaire» (*Vavilov* aux para 91-98).
>
> [14] La suffisance des motifs s'apprécie en tenant compte du contexte y inclus le dossier, les arguments présentés, les pratiques et la jurisprudence du décideur (*Vavilov* au para 94). Toutefois, la Cour suprême rappelle que le principe que l'exercice de son pouvoir par la Section d'appel devait être justifié, intelligible et

transparent, non pas dans l'abstrait, mais pour l'individu qui en fait l'objet (*Vavilov* au para 95).

VI. Relevant legislation and jurisprudence

[19] Section 98 of the *IRPA* provides:

Exclusion-Refugee Convention	**Exclusion par application de la Convention sur les réfugiés**
98 A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection	**98** La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.

[20] Article 1F(b) of the *Refugee Convention* provides:

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;
[Emphasis added]	[Nos soulignés]

[21] In *Abbas v Canada (Citizenship and Immigration)*, 2019 FC 12, I summarized jurisprudence on judicial review respecting an exclusion pursuant to section 98 of the *IRPA* and

Article 1F(b) of the *Refugee Convention*. This included a review of the relevant principles from the case cited by the RPD in the present case, *Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FC 238, per Strayer DJ, aff'd 2008 FCA 404, per Létourneau JA [*Jayasekara*]. As held in *Abbas* at paras 18-20:

> [18] The Federal Court of Appeal confirms that the Minister merely has to show, on a burden less than the civil standard of balance of probabilities, that there are serious reasons to consider the applicant committed the alleged acts. In *Zrig v Canada (Minister of Citizenship and Immigration)*, 2003 FCA 178 [*Zrig*] Nadon JA confirms the following principle at para 56:
>
> > [56] The Minister does not have to prove the respondent's guilt. He merely has to show - and the burden of proof resting on him is "less than the balance of probabilities"-that there are serious reasons for considering that the respondent is guilty.
> >
> > [Emphasis added.]
>
> [19] As to what constitutes a "serious" crime, the Supreme Court of Canada in *Febles v Canada (Minister of Citizenship and Immigration)*, 2014 SCC 68, per McLachlin CJ [*Febles*], instructs at para 62:
>
> > [62] The Federal Court of Appeal in *Chan v. Canada (Minister of Citizenship and Immigration)*, [2000] 4 F.C. 390 (C.A.), and *Jayasekara* has taken the view that where a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada, the crime will generally be considered serious. I agree. However, this generalization should not be understood as a rigid presumption that is impossible to rebut. Where a provision of the Canadian Criminal Code, R.S.C. 1985, c. C-46, has a large sentencing range, the upper end being ten years or more and the lower end being quite low, a claimant whose crime would fall at the less serious end of the range in Canada should not be presumptively excluded Article 1F(b) is designed to exclude only those whose crimes are serious. The UNHCR has suggested that a presumption of serious crime might be raised by evidence of commission of any of the following

> offences: homicide, rape, child molesting, wounding, arson, drugs trafficking, and armed robbery (Goodwin-Gill, at p. 179). These are good examples of crimes that are sufficiently serious to presumptively warrant exclusion from refugee protection. However, as indicated, the presumption may be rebutted in a particular case. While consideration of whether a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada is a useful guideline, and crimes attracting a maximum sentence of ten years or more in Canada will generally be sufficiently serious to warrant exclusion, the ten-year rule should not be applied in a mechanistic, decontextualized, or unjust manner.
>
> [Emphasis added.]

[20] The Federal Court of Appeal's decision of *Jayasekara* identifies factors to evaluate whether a crime is "serious" for the purposes of Article 1F(b), at para 44:

> [44] 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: see *S v. Refugee Status Appeals Authority, (N.Z. C.A.)*, supra; *S and Others v. Secretary of State for the Home Department*, [2006] EWCA Civ 1157 (Royal Courts of Justice, England); Miguel-Miguel v. Gonzales, no. 05-15900, (U.S. Ct of Appeal, 9th circuit), August 29, 2007, at pages 10856 and 10858. 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.
>
> [Emphasis added.]

VII. Analysis

A. *Reasonable approach to assessing the seriousness of the offence*

[22] The Applicant submitted RPD erred because it merely listed the factors set out *Jayasekara*, arguing this was an unreasonable approach to assessing the seriousness of the offence, citing *Poggio Guerrero v Canada (Citizenship and Immigration)*, 2010 FC 384, per Russell J at paras 30 and following [*Poggio*], and *Vucaj v Canada (Citizenship and Immigration)*, 2013 FC 381, per Justice Noël, at para 40. With respect, there is no merit in the submission that the RPD provided only "a mere listing of the factors." This allegation utterly mischaracterizes the RPD reasons, which in addition to listing the factors considered as set out in *Jayasekara*, assessed each having regard to the record and submissions made before the RPD.

[23] Specifically, the RPD reviewed the factors set out in the following paragraph. It discussed each as set out below. I note that the Applicant's then counsel (different from counsel before me) chose to make no submissions on these factors. Parenthetically, and in my respectful view, this Court should not encourage counsel to complain of findings where counsel below chose to make no submissions on them in the tribunal below. A party should not be encouraged to lie in the weeds at the tribunal level and seek judicial review on new arguments it could and should have but did not make.

[24] Even though the Applicant made no submissions, the RPD reviewed the *Jayasekara* factors:

> Similarly I accept the approach of the Minister in setting out the factors to be evaluated in determining whether a crime committed, in this case assault with a weapon or causing bodily harm, is serious in the context of Article lF(b). These factors were provided by the Federal Court of Appeal in the *Jayasekara* case:
>
> *Elements of the Crime:*
>
> The Claimant committed assault on the victim. The victim was a member of a rival gang. The Claimant and eight others suspected of being part of the Holy Blood Gang assaulted the victim using objects and kicks and the victim sustained injuries to his head, neck and spine.
>
> *Mode of Prosecution:*
>
> The Claimant was charged but not further prosecuted. There is no evidence that the charge and the investigative process leading to the laying of the charge itself was erroneous, nor was it withdrawn by the District Attorney for such reasons or any other. Evidence reflects that “the DA records show that this case was dismissed 'IOE Corpus'. DDA Janice Deleon indicated that was because of witness problems” (Minister's intervention evidence. August 20, 2018, page 45).
>
> At the refugee hearing the Claimant testified that he was arrested in 2002 and spent three days in jail before appearing in court. There being insufficient evidence he was released.
>
> *Penalty Prescribed*:
>
> The Claimant was not convicted under a section 67 equivalent and there is no evidence that a penalty was prescribed. He spent six days in jail in 2002 on a warrant relating to the alleged offence. However, if the Claimant were convicted in Canada he could be liable to a term of` imprisonment of up to 10 years.
>
> *The Facts Surrounding the Offence:*
>
> In 1999 the Claimant and eight other alleged gang members chased down the victim in a vehicle being driven by the Claimant. They assaulted the victim with weapons including bottles and rocks, and meted out kicks against the victim. The Claimant struck the victim with a chair.

Mitigating and Aggravating Circumstances Underlying the Offence:

No submissions were provided relating to mitigating circumstances. No mitigating factors were set out in response to the application.

The Claimant has denied assaulting a member of a rival gang. The Claimant showed no remorse over the incident and his demeanor in testifying about the Division's concerns as to the alleged assault and other offences was similarly unremorseful on balance.

The Claimant blamed his violent conduct on his alcohol use and takes no responsibility for actions.

Based on the analysis herein I find the Claimant to be an untrustworthy witness in the proceeding. I accept the Minister's submission that on balance the police and probation reports are reliable documentary evidence contradicting the Claimant’s position that he had no involvement in gangs or in the 1999 assault against the rival gang member. In particular, the Claimant denied knowing about the Holy Blood Gang, this is significant.

Evidence reflects that the location where the Claimant is alleged to have uttered death threats is the epicenter of the Holy Blood Gang's territory.

I accept the Minister's submission that it defies rationality and common sense that the Claimant would be permitted free reign in a gang controlled area. He was found wearing a red shirt, the gang color of the Holy Blood Gang. Wearing the gang colour of the gang would lead one to serious if not fatal attack in such territory.

The Claimant appeared as a documented member of the Holy Blood Gang when a search was conducted in the Cal-Gangs database. The designation by the San Diego Police Department, which I agree demonstrates on balance that the police department was satisfied that the Claimant met the criteria for inclusion in the gang database. in combination with the other considerations herein, provide in my view reliable basis to find that more likely than not the designation was reasonably founded.

I find that the police information in evidence is reliable on the balance of probabilities for the purpose of the Exclusion application.

I also accept that membership in a criminal gang is an aggravating factor. In this case evidence shows that a Police Gang Unit

> reported that the Holy Blood Gang is a criminal street gang having numerous characteristics and identifiers as a common group engaged in criminal acts.
>
> Violent and rage based conduct has been reflected in police and probation reports as a pattern of the Claimant's. Although the Claimant testified about his alcohol use and the rehabilitation programs he was directed to, there is no evidence that he was drunk or in any way intoxicated during the 1999 incident. He has demonstrated violent outbursts and serious dysregulation in other conduct leading to charges and convictions.
>
> The Claimant's conduct relating to the offence of assault with a weapon was non political in nature and took place in the USA before he came to Canada and claimed refugee protection.

[25] The Applicant submitted no reasonable tribunal could find serious reasons to consider that a person committed a crime for which they were charged, where the charge was dismissed by an American court. He submitted that the dismissal of the charges should be treated as "*prima facie* evidence that those crimes were not committed by the Applicant." He submitted that a dismissal based on the withdrawal of the charge is almost determinative. In these submissions he relied on *Arevalo Pineda v Canada (Citizenship and Immigration)*, 2010 FC 454 [*Pineda*], where Justice Gauthier (as she was) stated at para 31:

> [31] But, by the same token, it also means that the value of the charges laid in a country like the United States is greatly diminished when such charges are dismissed. In fact, I would think that in such a case, the dismissal of the charges is *prima facie* evidence that those crimes were not committed by the refugee claimant and that the Minister cannot simply rely on the laying of charges to meet his burden of proof. The Minister must either bring credible and trustworthy evidence of the commission of the crime *per se* or show that in the particular circumstances of the case, the dismissal should not be conclusive because it does not affect the basic foundation on which the charges were laid. Again, for example, this could be achieved by establishing that crucial evidence on the basis of which the charges were laid was excluded for a reason that does not bind the RPD and does not totally destroy its probative value.

[26] *Pineda* was decided in 2010. The Respondent responds by quoting Justice Near (as he then was) in *Radi v Canada (Citizenship and Immigration)*: 2012 FC 16 where the Court summarized the law, including *Pineda*:

> [18] The Federal Court of Appeal has recognized that an Article 1F(b) finding is possible even in instances where the claimant has not been convicted (*Zrig v Canada (Minister of Citizenship and Immigration)*, 2003 FCA 178, [2003] FCJ no 565). Paragraph 129 states:
>
> > [129] [...] it is possible to exclude both the perpetrators of serious non-political crimes seeking to use the Convention to elude local justice and the perpetrators of serious non-political crimes that a States feels should not be allowed to enter its territory, whether or not they are fleeing local justice, whether or not they have been prosecuted for their crimes, whether or not they have been convicted of those crimes and whether or not they have served the sentences imposed on them in respect of those crimes.
>
> [19] In *Pineda v Canada (Minister of Citizenship and Immigration)*, 2010 FC 454, [2010] FCJ no 538 at para 25, Justice Johanne Gauthier commented:
>
> > [25] This makes good sense given that charges can be dismissed for a variety of reasons including procedural issues, rejection of crucial evidence for technical reasons, or simply because the accused raised a reasonable doubt. The Convention does not adopt the stringent standard applicable in criminal proceedings and the RPD may indeed be satisfied that evidence produced by the Minister, which may not be admissible in a court of law, is sufficient to raise a serious possibility that the applicant has indeed committed a serious crime.
>
> [20] More recently, Justice Russel Zinn acknowledged that dismissed charges can be relied on to make this finding, albeit with greater caution. He accepted the argument that "there is nothing improper in considering and relying on charges laid; even where those charges do not subsequently result in a conviction and particularly where there is a plea agreement entered into by the accused which results in the initial charges not being further

> pursued" (*Naranjo v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1127, 2011 CarswellNat 3941 at para 15).
>
> [21] In *Ganem v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1147, [2011] FCJ no 1404 at para 24, Justice Donald Rennie asserted that "[n]either the fact of conviction nor the service of the sentence can be determinative of the exclusion analysis."
>
> [22] These conclusions suggest that the Board has sufficient latitude in the assessment of the evidence presented by the Minister and ascertaining whether a particular charge or conviction would constitute a serious non-political crime for the purposes of Article 1F(b), provided it considers the factors identified in *Jayasekara*, above. It is not constrained by the exact characterization of the conviction, or whether there was any conviction at all. There must simply be "serious reasons for considering" that this type of crime was committed.

[27] In *Radi*, the claimant was convicted of a misdemeanor offence after an American court declined to pursue more serious domestic violence charges, and the application for judicial review was dismissed. In *Pineda*, the claimant's charges were withdrawn by an American court after the victim recanted, and the application for judicial review was allowed. In *Naranjo v Canada (Citizenship and Immigration)*, 2011 FC 1127 per Zinn J (also cited in *Radi*), the claimant's initial charge of money laundering was pleaded down in an American court to less serious charges, and the application for judicial review was dismissed.

[28] In the case at bar, the charges were dismissed a few days after they were laid, the evidence being that this was done on account of "witness problems". The Applicant takes issue with the RPD's failure to treat this as a mitigating circumstance. The Applicant argues the phrase "witness problems" is too ambiguous to include a negative connotation and could include witnesses who are lying, have criminal convictions themselves, or are not cooperative for

whatever reason. The Applicant appears to suggest the RPD should have given more weight to the fact that the District Attorney, privy to all the evidence, decided not to proceed. I disagree. As the Respondent points out, the case law demonstrates charges being dismissed or withdrawn does not in itself undermine the applicability of an exclusion finding.

[29] I accept the conclusions of Justice Near as set out in para 22 of *Radi* to the effect that the RPD has sufficient latitude in the assessment of the evidence presented by the Minister and in ascertaining whether a particular charge or conviction would constitute a serious non-political crime for the purposes of Article 1F(b), provided it considers the factors identified in *Jayasekara*, above. The RPD is not constrained by the exact characterization of the conviction, or whether there was a conviction at all. There must simply be "serious reasons for considering" that this type of crime was committed. This is the task assigned to this decision-maker by Parliament.

[30] Therefore, I do not agree the dismissal of the charges in this particular case should have been almost determinative as to whether or not the Applicant committed the non-political crime alleged. That is not what *Pineda* says, nor does that submission accord with the summary of the jurisprudence set out in *Radi*. It was up to the RPD to determine if the Applicant committed the crime in question, which it did.

[31] The Applicant also took issue with the RPD not giving more weight to the fact that no penalty was prescribed for the crime. The Applicant submits this is a very significant mitigating factor that should have rendered the finding of exclusion unreasonable. There is no merit in the

argument. The RPD considered it and found: “However, if the Claimant were convicted in Canada he could be liable to a term of` imprisonment of up to 10 years.” There is no unreasonableness in the finding. If the complaint is that no sentence was imposed, I am unable to see the relevance of this complaint, because there was no conviction in respect of which to impose a sentence.

B. *Reasonable consideration of the Applicant’s lack of remorse and demeanor*

[32] The Applicant further submits the RPD was unreasonable in rejecting the evidence of the Applicant due to his lack of remorse and demeanor. The Applicant argues it is unreasonable to use demeanor as a badge of lack of credibility. The Applicant also submits it was unreasonable and illogical for the RPD to find the Applicant would be remorseful for something he did not do, a proposition with which I agree, but is not applicable to what transpired in this case.

[33] On the issue of demeanour, the Applicant relies on *Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 per Muldoon J:

> *The Applicant's Demeanour*
>
> [23] The tribunal evaluated the applicant's demeanour while testifying at page 10 of the decision:
>
> > The panel found the witness to be **verbose** and often **overly assertive** in manner. He tended to **shout to emphasize** points; often **rambled,** had to be frequently cautioned about **"out-running"the interpreter**, and much of his oral testimony consisted of **wooden, declamatory** rhetoric displaying a **rehearsed** and **unspontaneous** character. At times his answers were **prolix** in the extreme, **off-centre,** and **evasive.** In fairness to the claimant, the panel also sensed that he did seem to have a festering sense of anger that may have had

> its origins in some form of injustice or what the claimant perceived to be injustice. Given the claimant's **voluble** and **bombastic** testimony, the panel found it necessary to discriminate closely between the claimant's perceptions of reality and objective reality when evaluating and weighing his evidence.
>
> [Emphasis added]

That it is solely for the tribunal to assess the claimant's testimony is a principle which is sometimes stated with almost religious zeal

> [24] In assessing the credibility of the evidence, a tribunal can evaluate the general demeanour of the applicant as he or she is testifying. This involves assessing the manner in which the witness replies to questions, his or her facial expressions, tone of voice, physical movements, general integrity and intelligence, and powers of recollection. However, problems may arise in interpreting the demeanour of refugee claimants from different cultural backgrounds. Moreover, persons who have suffered persecution may experience problems in relating their testimony.
>
> [Emphasis in original]

[34] With respect, I am not persuaded the RPD acted unreasonably in considering the Applicant's lack of remorse and demeanor. I agree with the Respondent's submission that the RPD's findings were more nuanced than implied by the Applicant. The RPD noted not only that the Applicant showed no remorse for the assault, but his testimony about "other offences was similarly unremorseful on balance". With respect to the Applicant's other offences, the RPD found the Applicant "blamed his violent conduct on his alcohol use and takes no responsibility for his actions"; with respect, this is a fair assessment of the record.

[35] In any event the RPD did not come to is conclusion that the Applicant committed the crime in question simply based on a lack of remorse. It also relied on the report of the Probation

Officer dated October 28, 2004 [Probation Report], which noted that the San Diego Police Department reported on the non political crime as follows:

> According [San Diego Police Department] report #99-020274, on March 27, 1999, the defendant was involved in an assault. The victim reported that was member of a rival gang and that nine members of the HBG, including the defendant and two of his brothers, attacked him. The defendant was driving the car that chased the victim down. He also was the first to hit the victim with a chair. The other assailants threw bottles and rocks and kicked the victim. The victim suffered injuries to his head, neck, and spine. Sheriff's records show the defendant spent six days in jail after his arrest on a warrant in this matter in November of 2002. The DA records show this case was dismissed "IOE Corpus." DDA Janice Deleon indicated that was because of witness problems.

[36] The RPD repeated this police report summary almost word for word in its Decision:

> *Elements of the Crime:*
>
> The Claimant committed assault on the victim. The victim was a member of a rival gang. The Claimant and eight others suspected of being part of the Holy Blood Gang assaulted the victim using objects and kicks and the victim sustained injuries to his head, neck and spine.

[37] In my view, there is no unreasonableness in the RPD accepting and relying on police and probation reports in preference to the direct testimony of the Applicant. The RPD had already found the Applicant to be an untrustworthy witness, and accepted on balance the police and probation reports as reliable documentary evidence contradicting the Applicant's position that he had no involvement in gangs or in the 1999 assault against the rival gang member. In addition, it is well established that weighing and assessing evidence lies at the heartland of the special expertise of the RPD: as stated in *Farah v Canada (Citizenship and Immigration)*, 2019 FC 27 at para 9 citing *Khakimov v Canada,* 2017 FC 18 at paras 23-24:

[23] ...To begin with, the RPD has broad discretion to prefer certain evidence over other evidence and to determine the weight to be assigned to the evidence it accepts: *Medarovik v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 61 at para 16; *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 867 at para 68. The Federal Court of Appeal has stated that findings of fact and determinations of credibility fall within the heartland of the expertise of the RPD: *Giron v Canada (Minister of Employment and Immigration)*(1992), 143 NR 238 (FCA) [*Giron*]. The RPD is recognized to have expertise in assessing refugee claims and is authorized by statute to apply its specialized knowledge: *Chen v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 805 at para 10. And see *Siad v Canada (Secretary of State)*, [1997] 1 FC 608 at para 24 (FCA), where the Federal Court of Appeal said that the RPD:

> ...is uniquely situated to assess the credibility of a refugee claimant; credibility determinations, which lie within "the heartland of the discretion of triers of fact", are entitled to considerable deference upon judicial review and cannot be overturned unless they are perverse, capricious or made without regard to the evidence.

[24] The RPD may make credibility findings based on implausibility, common sense and rationality, although adverse credibility findings "should not be based on a microscopic evaluation of issues peripheral or irrelevant to the case": *Haramichael v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1197 at para 15, citing *Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at paras 10-11 [*Lubana*]; *Attakora v Canada (Minister of Employment and Immigration)*, [1989] FCJ No 444. The RPD may reject uncontradicted evidence if it "is not consistent with the probabilities affecting the case as a whole, or where inconsistencies are found in the evidence": *Lubana*, above at para 10. The RPD is also entitled to conclude that an applicant is not credible "because of implausibilities in his or her evidence as long as its inferences are not unreasonable and its reasons are set out in 'clear and unmistakable terms'": *Lubana*, above at para 9.

[38] In addition, it is also noteworthy that the RPD is entrusted to make findings without being "bound by any legal or technical rules of evidence" including, of course, those applicable in a criminal case. Subsection 170(g) of *IRPA* provides:

Proceedings	**Fonctionnement**
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;
…	…

C. *Reasonable consideration of the Applicant's past gang membership*

[39] The Applicant also takes issue with the RPD's finding that the Applicant was designated as a gang member. The Applicant also suggested there is an inconsistency in the objective police and probation evidence that the RPD failed to consider.

[40] With respect, there is no merit to this submission. The evidence of gang membership in the Probation Report came from two sources. The first was the Cal-Gang database and a San Diego Police Department detective to whom the probation officer spoke. The evidence in this connection is that while the Applicant was not on the Cal-Gang list when it was searched for the probation officer, the Applicant's name had been on the list but was purged a month earlier because he had no gang contacts since his arrest and assault (for the non political crime) approximately five years ago. The second source was a different police officer who in fact was

part of the investigative team assigned to the non political crime in 1999. Her evidence was that the Applicant was a documented member of the Holy Blood Gang when she ran his name through a Cal-Gang search. There is no inconsistency, and no error in the RPD finding that the Applicant – I note the past tense – "appeared as a documented member of the Holy Blood Gang when a search was conducted in the Cal-Gangs database".

[41] The Respondent correctly notes there was additional evidence in the record before the RPD that the RPD was entitled to rely on in making its findings. In addition to the Probation Report, the Applicant was questioned in detail at the hearing about the non political crime charge. The Applicant denied being part of a gang and denied involvement in the assault on a rival gang member. Of particular significance to the RPD, the Applicant denied even knowing about the Holy Blood Gang.

[42] However, as noted, the RPD found the Applicant untrustworthy. The RPD determined his sweeping denial of gang involvement and even knowledge of the gang was implausible:

> I accept the Minister's submission that it defies rationality and common sense that the Claimant would be permitted free reign in a gang controlled area. He was found wearing a red shirt, the gang color of the Holy Blood Gang. Wearing the gang colour of the gang would lead one to serious if not fatal attack in such territory.
>
> The Claimant appeared as a documented member of the Holy Blood Gang when a search was conducted in the Cal-Gangs database. The designation by the San Diego Police Department, which I agree demonstrates on balance that the police department was satisfied that the Claimant met the criteria for inclusion in the gang database. in combination with the other considerations herein, provide in my view reliable basis to find that more likely than not the designation was reasonably founded.

> I find that the police information in evidence is reliable on the balance of probabilities for the purpose of the Exclusion application.
>
> I also accept that membership in a criminal gang is an aggravating factor. In this case evidence shows that a Police Gang Unit reported that the Holy Blood Gang is a criminal street gang having numerous characteristics and identifiers as a common group engaged in criminal acts.
>
> Violent and rage based conduct has been reflected in police and probation reports as a pattern of the Claimant's. Although the Claimant testified about his alcohol use and the rehabilitation programs he was directed to, there is no evidence that he was drunk or in any way intoxicated during the 1999 incident. He has demonstrated violent outbursts and serious dysregulation in other conduct leading to charges and convictions.

[43] It was in the context of this testimony that the RPD relied on police and probation reports as "reliable documentary evidence contradicting the Claimant's position that he had no involvement in gangs or in the 1999 assault against a rival gang member". In my view, the RPD did not unreasonably rely on the police and probation reports as establishing allegations of fact; the RPD relied on the reports because they contradicted the Applicant's own implausible testimony that he did not even know about the Holy Blood Gang. In these circumstances it was reasonable for the RPD to find the reports undermined the Applicant's credibility, rendering him an "unreliable witness". In my view, the RPD did not place undue reliance on the reports to establish allegations of fact.

[44] Finally, the Applicant argues that *Vavilov* has changed administrative law such that tribunals have a higher burden to ensure their reasons are justified, intelligible and transparent not in the abstract but for the individual. He notes however that this change did not assist the applicant in *Farrier*. I agree that *Vavilov* emphasizes this Court must look at the reasoning

process in addition to the outcome of the reasons in relation to relevant factual and legal constraints. I am not persuaded this changes the result in this case.

VIII. Conclusion

[45] In my respectful opinion, the reasons of the RPD display an internally coherent and rational chain of analysis that is justified in relation to the facts and law that constrain the decision-maker. I see no fatal flaws in the reasoning process. As may be seen from the foregoing, I am not persuaded the reasons are non-compliant with the restraining facts and applicable legal principles. Considering the Decision holistically and not as a treasure hunt for errors, and paying ‘respectful attention’ to the reasoning process and its outcome, I find the Decision is justified, transparent, and intelligible. It adds up. Therefore, this application for judicial review will be dismissed.

IX. Certified Question

[46] Neither party proposed a question of general importance, and none arises.

JUDGMENT in IMM-4082-19

THIS COURT'S JUDGMENT is that judicial review is dismissed without costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Micheal Crane	FOR THE APPLICANT
Nicole Rahaman	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Micheal Crane Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT