Federal Court  Cour fédérale

**Date: 2220328**

**Docket: IMM-3444-21**

**Citation: 2022 FC 421**

**Ottawa, Ontario, March 28, 2022**

**PRESENT: The Honourable Madam Justice Aylen**

**BETWEEN:**

**GORAN GARDIJAN**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada, dated May 3, 2021, wherein the RAD upheld the determination of the Refugee Protection Division [RPD] that the Applicant is excluded from refugee protection pursuant to Article 1F(b) of the *United Nations Convention Relating to the Status of Refugees,* July 28, 1951, [1969] Can TS No 6 [*Convention*] and section 98 of the

*Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], for having committed a serious non-political crime in Croatia when the Applicant was a minor.

[2] The Applicant submits that the RAD's decision is unreasonable as the RAD made unreasonable credibility findings in relation to the Applicant's testimony and failed to provide a full and robust review of the RPD's decision in light of the new evidence presented to the RAD, instead erroneously focusing on justifying the RPD's findings based on the imperfect evidentiary record that was before the RPD. Further, the Applicant asserts that the RAD's Article 1F(b) analysis was an unreasonable mechanistic application of the factors from *Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404, exhibiting the "mechanistic, decontextualized or unjust" approached warned against in *Febles v Canada (Minister of Citizenship and Immigration)*, 2014 SCC 68.

[3] For the following reasons, I find that the Applicant has not demonstrated that the decision of the RAD was unreasonable and accordingly, this application for judicial review shall be dismissed.

## I. Background

[4] The Applicant is a 30-year-old citizen of Croatia. The Applicant entered Canada in October 2017 and upon arrival, made a claim for refugee protection.

[5] In his Basis of Claim [BOC] form, the Applicant asserted that he was at risk in Croatia as a result of his Serbian ethnicity and Serbian Orthodox religion and had faced persecution at the

hands of state actors (police) and non-state actors. In his accompanying narrative, the Applicant disclosed a number of criminal charges, including a charge in 2008 for which the Applicant stated [2008 Offence]:

> I was accused of participating in the filming of a girl performing a sexual act on another boy, on my cellphone, at a city park. I did not do this, but it was attributed to me. My co-accused in that case was the son of a known organized criminal (who was killed this year). They made me a co-accused with him so that I would also get blamed for the crime. I was not with him when the alleged filming occurred.

[6] The only document produced by the Applicant in relation to the 2008 Offence was a summons issued to the Applicant and his parents to appear for a preliminary proceeding "for the committed criminal offence against sexual freedom and sexual chastity, namely exploitation of children and juveniles for pornography, as stated in Art. 196, p.1 of the Criminal Code, and criminal offense of attempted forced sexual act, as stated in Art. 190 and in connection with Art. 33 of the Criminal Code".

[7] As for the other charges, the Applicant claimed that they stemmed from the police targeting him based on his ethnicity and family background.

## A. Proceedings before the RPD and the RPD's Decision

[8] On January 10, 2020, the RPD notified the Minister (with a copy to the Applicant) that the RPD believed that Article 1F(b) may apply to exclude the Applicant from refugee protection and advised that the Minister's participation may be helpful in the full and proper hearing of the claim. However, the Minister chose not to participate in the proceeding.

[9] On March 3, 2020, the Applicant gave testimony before the RPD. The RPD summarized the Applicant's evidence regarding the trial in relation to the 2008 Offence as follows:

> [12] The claimant was asked if he had committed the act he was accused of in 2008. He testified no.
>
> [13] The claimant was asked if he was convicted, he stated he was not.
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> [14] The claimant was asked if charges were dismissed. He again indicated he was not convicted.
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> [15] The claimant was asked how long the trial lasted, in days. He indicated he did not want to give a wrong answer. When the claimant was asked to provide information as best as he could, he said it lasted one day.
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> [16] The panel again asked to confirm that both defendants were acquitted. The claimant indicated that he was not convicted, but was sentenced to labour activities.
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> [17] The claimant was asked whether this arrangement had been negotiated with prosecutors or ordered by a judge. The claimant could not recall. The claimant was asked if there were a specific amount of hours agreed to, he said it was determined but could not remember.
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> [18] The claimant was asked if the co-accused was involved in the sexual assault, he said yes. When first asked, he indicated that he believed that he was. When asked for clarification later in the hearing, the claimant indicated he was not sure.
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> [19] The claimant was asked if his co-accused received the same amount of hours, and he replied that the co-accused received no punishment. The claimant confirmed that he received a punishment and the co-accused did not.
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> [20] The claimant was asked why he had not mentioned he had received official punishment for the incident in his BOC narrative.
>
> [21] The claimant said there were many things that happened that he did not state in the BOC, and that the panel asking the claimant to elaborate brought this out.

[10] The RPD rejected the Applicant's explanation for not disclosing the punishment in his BOC form and drew a negative inference with regard to his credibility. Given the clear and detailed descriptions of the process and outcome of other criminal incidents the Applicant was accused of in Croatia that he included in his narrative, the RPD found it unlikely that he would not do the same regarding the 2008 Offence.

[11] With respect to the details of the Applicant's punishment for the 2008 Offence, the RPD summarized the Applicant's evidence as follows:

> [24] The claimant was asked what kind of work he performed as part of the punishment, and he could not recall what kind of service he was ordered to perform, only that it was charity work.
>
> [25] The claimant was asked if he had received any sort of criminal record for this incident. He indicated yes, that this helped destroy his life in Croatia and lead to his further harassment by police.
>
> [26] The claimant was asked if he had more documentation regarding this matter, and he indicated he did not. When asked why he had not have more documentation, he only indicated that he had gathered what he could when he left.

[12] The RPD found that it was unreasonable that the Applicant would be able to obtain a large amount of documents relating to his other arrests and interactions with Croatian authorities and not have more specific documents related to the 2008 Incident. The RPD rejected the Applicant's explanation for his lack of documentation and drew a negative inference with regard to his credibility.

[13] The RPD noted in its decision that later in the hearing, the RPD "implored the claimant to provide more information regarding the sexual assault, and clearly indicated to the claimant that it

was incredibly important to inform the panel of any other details he could recall regarding the incident". The RPD noted that this prompted the Applicant to then describe his initial treatment after being arrested for the 2008 Offence and refusing to cooperate. The Applicant indicated that he was "placed in a four-metre cell for 3 days, not fed, and not given legal counsel, and then asked if his mind changed, and then asked if he wanted the treatment to continue, and he signed something to simply end the ordeal".

[14] The RPD noted that none of this police treatment, including a forced confession, was mentioned in the Applicant's BOC narrative. The Applicant replied that he was not sure why it was not included and that he had told the CBSA about it. The RPD rejected the Applicant's explanation, given the minute detail that the Applicant was able to recite regarding his other interactions with the police in his BOC form, and drew a further negative inference regarding the Applicant's credibility. The RPD concluded that the Applicant had not been forced to sign a confession.

[15] Turning to the application of Article 1F(b), the RPD found that there were serious reasons to believe that the Applicant committed the offence and that the crime was serious within the definition of the *Convention*. The RPD's finding was based on the following:

A. Recording a minor being sexually assaulted is equivalent to making child pornography, which is a non-hybrid indictable offence that carries a maximum fourteen-year sentence under the *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*].

B. The Applicant attempted to circumvent any analysis as to the real punishment he received and that, on a balance of probabilities, the Applicant received a higher sentence than what he described to the RPD.

C. While the Applicant was 17 years old at the time of the offence, given his more advanced age and the seriousness of the event, his status as a minor was not a mitigating circumstance and no other mitigating circumstance existed.

D. The age of the victim and the fact that the event took place while she was being sexually assaulted and that the Applicant filmed the sexual assault were all serious and aggravating circumstances.

E. While not provided with any argument relating to the sentencing range of the offence by counsel, the RPD found that the sentencing range would more likely than not be on the higher end of the sentencing range if committed in Canada, given the seriousness of the offence, the aggravating factors and the penalty prescribed.

F. Given the severity of the offence under the *Criminal Code*, the fact that the victim was a minor, the fact that the offence involved a sexual assault, the fact that the Applicant was accused of willingly participating in and recording the event, and that the Applicant's lack of clarity and honesty regarding the circumstances of the event outweighed any other mitigating circumstances, the RPD concluded that the offence was a serious one.

## II. Decision at Issue

[16] The Applicant appealed the RPD's decision to the RAD. In support of his appeal, the Applicant submitted new evidence, which was accepted by the RAD. The new evidence included a translation of the court decision and reasons regarding the 2008 Offence [Croatian Decision]. While the RAD admitted the Croatian Decision, the RAD did not accept the Applicant's explanation for failing to produce the Croatian Decision before the RPD. The RAD held:

> [13] …the court decision cannot be "reasonabl[y] seen to be peripheral". Two months prior to the hearing the Appellant was informed that 1Fb exclusion was an issued based on the Appellant's description of the offences he was accused of committing. Furthermore, at his hearing, he was asked whether he had any additional documentation related to the 2008 offence as the only document he had produced was a summons; the Appellant clearly replied "no".
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> [14] In his affidavit dated September 8, 2020, the Appellant's only explanation for answering "no" is that he was mistaken. He states: "The RPD member also asked me if I had any other documents in relation to the above-mentioned charge and conviction, and I answered "no". I was mistaken in my answer because I later discovered that I did have an additional document in relation to the matter, but that this document was not translated and submitted to the RPD".
>
> [15] I do not accept this explanation. The Appellant had notice that a 1Fb exclusion was an issue two months before his hearing, he also had a period of several months between the hearing and the rejection of his claim in which to search for and translate this key document. In other words, he had ample time to review the documents in his possession and ample notice that the court decision could have been determinative of his claim. On a balance of probabilities, I find that the Appellant deliberatively mislead the RPD as to the fact that he had highly pertinent documents in his possession which he concealed as they were not favorable to his case.

[17] The Croatian Decision revealed that:

A. The Applicant was tried by the Juvenile Trial Chamber.

B. The Applicant admitted to the Croatian court that he was present when his co-accused had voluntary sexual intercourse with the minor victim, which the Applicant filmed. The Applicant testified that his co-accused was not aware that the Applicant was making a film.

C. The victim admitted that the sexual act was consensual, but that she did not know that she was being filmed.

D. The Court found that the Applicant and his co-accused had a previous agreement to film the sexual encounter.

E. The Applicant was charged and convicted of an additional offence, described as follows – "on 4 March 2008, after committing the criminal offense stated in point 1, in Sibenik, together and by agreement, in order to sexually satisfy themselves, they threatened the victim, the minor [victim] that they would post the video on the Internet if she did not come to them in Zaboric and sexually satisfy them, which she did not agree to despite the fact that she was justifiably afraid they would do so, they, therefore, with an initiated intent but not completed, the act of forcing another person to engage in a sexual act, namely an equally sexual act under serious threat of severe harm".

F. The Applicant denied having committed the second offence. The Court rejected the Applicant's defense, relying on the evidence of the victim and numerous witnesses.

G. The Court noted that the Applicant admitted that he did not think of the consequences of his actions and that he apologized to the victim.

H. The Applicant was sentenced to "educational measures of special obligation" by engaging in individual or group work in youth counselling, with "an aim of developing moral values, personal responsibility for the choice of behaviour as well as developing positive standpoints and responsibilities in the sphere of sexuality".

[18] Before the RAD, the Applicant submitted that he had not committed the offences for which he was charged and found guilty, but rather maintained that the prosecution he was subjected to was maliciously motivated because he was an ethnic Serb. The RAD rejected this argument. The RAD reviewed the various credibility findings made by the RPD and the submissions made by the Applicant in relation thereto. The RAD rejected the Applicant's explanation of key omissions from his BOC narrative and noted that the Croatian Decision contradicted the Applicant's assertion that he made a forced confession. The Croatian Decision also contradicted evidence given by the Applicant before the RPD regarding his participation in the Croatian proceeding and whether his co-accused was convicted. The RAD found that, overall, the Applicant's oral testimony about the 2008 Offence was misleading and inaccurate.

[19] The RAD found that the Minister's lack of intervention did not militate against a finding of exclusion, as urged by the Applicant. Rather, the RPD remained charged with determining whether the Applicant should be excluded pursuant to Article 1F(b).

[20] The RAD then turned to consider the various arguments made by the Applicant regarding the application of Article 1F(b), which were summarized in paragraph 37 of the RAD's decision.

[21] The RAD noted the *Jayasekara* factors and held that, while the Applicant's age was relevant in terms of the actual penalty he received and was evaluated by the Croatian judge as a mitigating circumstance, the RAD rejected the Applicant's argument that the Applicant's age at the time of the offence precludes the offence he committed from being considered a serious offence. The RAD stated that "simply because a person under 18 years old in Canada cannot be sentenced to 10 years in prison for any offence other than murder, does not mean that the only serious non-political crime any under-18-year-old could commit would be murder". However, the RAD ultimately concluded that the Applicant's age at the time of the 2008 Offence and the fact that he had no prior convictions were mitigating factors.

[22] The RAD held that the RPD was correct that the offence of making child pornography under section 163.1(2) of the *Criminal Code* is punishable by way of indictment and that the maximum term of imprisonment is 14 years. Moreover, the RAD noted that there is also a minimum term of imprisonment of one year, which speaks volumes as to how seriously Canadians view the making of child pornography. The RAD concluded that this offence is presumptively a serious one.

[23] The RAD also noted that the Croatian Decision revealed that the Applicant was also found guilty of attempting to extort sexual favours from the victim by threatening to post the video on the internet, which conduct amounts to extortion. Pursuant to section 346(1) of the *Criminal Code*,

extortion is also an indictable offence punishable by a maximum sentence of imprisonment for life and thus is also presumptively serious.

[24] The RAD rejected the Applicant's argument that the offences lacked the hallmarks of a serious crime, noting that the offences involved the intentional exploitation and humiliation of the victim and involved threatening the victim and violating her legitimate expectation of privacy at such a vulnerable moment, which negatively impacted the victim. The RAD held that it was reasonable to assume that the young victim suffered serious harm from the event and was subject to the further stress and humiliation of a trial, as the Applicant did not initially accept responsibility for his conduct. The RAD found this to be an aggravating factor.

[25] The RAD rejected the Applicant's argument that the RPD should have taken into consideration that there was no evidence of any profit motive for producing the pornography, noting that this was not a particularly relevant consideration but that in any event, the Applicant had hoped to gain something from his actions, even if not money.

[26] With respect to the nature of the act filmed, the RAD noted that the summons that was before the RPD suggested that the act was non-consensual. However, the RAD noted that the Croatian Decision confirmed that while the victim was "persuaded" to perform the sexual act, there was no evidence of a sexual assault. The RAD held that there was no evidence before the RPD to indicate that the offence did not involve a sexual assault. Therefore, while it is true that the Applicant was convicted of filming a consensual sex act rather than a sexual assault (as found by the RPD), the RPD was not aware of this evidence, just as the RPD was not aware of the second

conviction for extortion. The RAD found that while the Croatian Decision clarified the offences, it does not, overall, diminish the severity of the Applicant's offences.

[27] As to the sentencing range in Canada, the RAD noted that the RPD's reasoning on this consideration was sound based on the evidence then before it and rejected the Applicant's assertion that the RPD made errors in its consideration of the evidence before it. The RAD noted that the Applicant had not provided evidence of what sentence a 17-year-old in Canada would be sentenced to in similar circumstances, but rather relied on the fact that the *Youth Criminal Justice Act*, SC 2002 c1, precludes the possibility of a sentence longer than two years. The RAD found this to be unhelpful, as the presumptive standard of a 10-year sentence relates to the offence itself and does not involve the personal circumstances of the offender. The RAD held that there was nothing before it that would indicate that a custodial sentence would be unlikely in this type of case in Canada.

[28] Moreover, the RAD noted the fact that the Applicant did not mention any counselling or special education but rather informed the RPD that he did charity work but that he could not remember what kind of charity work, did not inspire confidence that the sentence the Applicant received was ever properly completed. The RAD found that the absence of proof of completion of his sentence was an aggravating factor, as were the following: (a) the absence of evidence that the Applicant did not commit further offences of this nature or other serious crimes; (b) the fact that the Applicant disclosed several other offences that he was accused of committing but denied having committed; (c) the Applicant's attempts to minimize his responsibility for having committed the 2008 Offence at the time; and (d) the fact that the Applicant (based on his evidence

before the RPD) still did not accept responsibility for the crime and instead deliberately misled the RPD and claimed not to have participated at all in the events of that day.

[29] The RAD conducted a balancing of the mitigating factors against the aggravating factors and held:

> …I acknowledge that a 17-year-old's perspective and life experience is limited and generally it is reasonable to assume that teenagers are less able to think through the consequences of their actions. However, 17 is also very close to the age considered to be adult in Canada in terms of criminal responsibility – which is 18. Thus, given the fact that there are several aggravating factors in this case, I do not find that the Appellant's age and the fact that he had no prior convictions, excuses his behaviour. Nor does it signify that the crime he committed was not serious. On balance, I believe the crime was serious.

[30] The RAD concluded that the Applicant did commit a serious non-political crime as defined in Article 1F(b) and as a result, denied his appeal.

## III. Issue and Standard of Review

[31] The sole issue for determination is whether the RAD's determination that the Applicant is excluded from refugee protection pursuant to Article 1F(b) of the *Convention* is reasonable.

[32] The parties submit, and I agree, that the presumptive standard of review is reasonableness. No exceptions to that presumption have been raised nor apply [see *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 at paras 23, 25].

[33] According to the standard of reasonableness, a reviewing Court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified. 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 [see *Vavilov*, *supra* at paras 15, 85].

## IV. Analysis

[34] Subsection 107(1) of the *IRPA* requires the RPD to accept a claim for refugee protection "if it determines that the claimant is a Convention refugee or person in need of protection". Otherwise, the claim shall be rejected. A Convention refugee is defined at section 96 of the *IRPA* and a person in need of protection is defined at section 97 of the *IRPA*.

[35] However, the *IRPA* explicitly identifies certain classes of persons who are excluded from these definitions. Section 98 of the *IRPA* states that a person referred to in Article 1E or Article 1F of the *Convention* is not a Convention refugee or a person in need of protection. With this provision, Parliament incorporated the exclusion clauses of the *Convention* and, at the refugee status determination stage, specifically extended the exclusion clauses to a "person in need of protection" as defined in section 97 of the *IRPA*. The relevant exclusion clause in the case at bar is Article 1F(b) of the *Convention*, which reads as follows:

| | |
|---|---|
| 1F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: | 1F. 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… |

[36] The Federal Court of Appeal has confirmed that, for an Article 1F(b) exclusion to apply, 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 that the applicant committed the alleged acts. In *Zrig v Canada (Minister of Citizenship and Immigration)*, 2003 FCA 178 at para 56, Nadon JA confirms the following principle:

> [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.]

[37] As to what constitutes a "serious" crime, the Supreme Court of Canada in *Febles* instructs at para 62:

> [62] The Federal Court of Appeal in *Chan v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 17150 (FCA), [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.]

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

> 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]

[39] Therefore, as recently summarized by Justice Strickland in *Okolo v Canada (Minister of Citizenship and Immigration)*, 2021 FC 1100 at para 27, a non-political crime is presumptively serious where a maximum sentence of ten years or more could have been imposed had the act been committed in Canada. However, this presumption is rebuttable. When assessing the seriousness of

an offence, the RPD must consider the elements of the offence, the mode of prosecution, the penalty prescribed, the facts of the offence and the mitigating and aggravating circumstances underlying the conviction.

[40] The Applicant asserts that the RAD had a duty to independently and fully consider the new evidence and reassess the seriousness of the offence in relation to Article 1F(b) unencumbered by the RPD's findings, which were made without the benefit of the Croatian Decision. The Applicant asserts that the RAD's decision is unreasonable as the RAD failed to conduct such a review, but rather engaged in a judicial review-type function in which it strived to justify the RPD's findings. In doing so, the Applicant asserts that the RAD never engaged with the new evidence with an open mind, but rather tried to minimize what the Croatian Decision revealed by making "micro findings" about inconsistencies in the Applicant's evidence. While the Applicant may have been mistaken about his sentence details, the Applicant asserts that does not detract from the fact that the Croatian Decision clearly shows that the Applicant received a minimal remedial sentence.

[41] I reject this assertion. The passages cited by the Applicant in support of this assertion contained the RAD's determinations in relation to the specific issues raised by the Applicant in his appeal to the RAD. I am satisfied that a review of the RAD's decision as a whole reveals that the RAD conducted an independent review of the evidence (including the summons, the Croatian Decision, the BOC form and narrative and the Applicant's testimony) before concluding that the Applicant was properly excluded pursuant to Article 1F(b).

[42] Moreover, I find that the RAD's negative credibility findings were reasonable. The fact that the RAD accepted the Croatian Decision as new evidence does not shelter the Applicant from the possibility of negative credibility findings being made based, in part, on that new evidence. While the Croatian Decision provided the required clarity regarding the actual sentence received by the Applicant and clarified that the Croatian court found the sexual act at issue to be consensual, the Croatian Decision revealed for the first time a conviction for extortion arising from the 2008 Offence (which the Applicant had failed to disclose) and was inconsistent with the Applicant's claim that the charges stemmed from harassment by the police based on his ethnicity and that his conviction was based on a confession extracted through mistreatment.

[43] Moreover, leaving aside the Croatian Decision, there remained a sufficient basis for the RAD's negative credibility findings based on the evidence as it existed before the RPD. For example, the Applicant asserts at paragraph 30 of his further memorandum of argument that he was "always honest" about having committed the offences. However, his BOC form narrative states that he was falsely accused and in his testimony before the RPD, he was evasive regarding his conviction and initially denied having been convicted. Moreover, the Applicant submitted in his written submissions before the RAD that "he never in fact committed any of the offences for which he was charged and found guilty".

[44] I find that the basis for the RAD's negative credibility findings were clearly articulated in its decision and justified in light of the evidence before it.

[45] Further, the Applicant asserts that the RAD's Article 1F(b) analysis was an unreasonable mechanistic application of the *Jayasekara* factors, exhibiting the "mechanistic, decontextualized or unjust" approached warned against in *Febles*. The Applicant raises a number of alleged errors made by the RAD, which I will address in turn.

[46] The Applicant asserts that the RAD completely failed to engage with the fact that the Applicant was prosecuted as a minor and gave no analysis of how his lenient sentence informed the RAD's determination. The Applicant asserts that the RAD failed to properly consider the sentence that the Applicant would likely have received for the offences in Canada and erred in not addressing the approach taken by the RPD in other cases (such as VA7-01983), which involved a consideration of the *Youth Criminal Justice Act*. In other cases, the RPD has considered the sentencing provisions of the *Youth Criminal Justice Act* and determined that a sentence of 10 years was not a real possibility and then ultimately determined that the claimant could not be excluded for having committed a serious non-political crime. The Applicant asserts that had the offence been committed in Canada, the maximum potential sentence could only have been two years and the actual sentence very likely far less considering that it was the Applicant's first offence.

[47] I reject these assertions. The RAD expressly addressed the fact that the Applicant was a minor and was prosecuted as such and addressed the nature of the actual sentence received. The RAD found that the Applicant was evasive about his actual sentence and that there was no evidence that he completed his sentence. The RAD weighed the sentence actually received against the numerous other factors in the *Jayasekara* analysis and ultimately determined that the actual sentence received did not diminish the seriousness of his actions. Moreover, the RAD

acknowledged the Canadian sentencing limitations imposed by the *Youth Criminal Justice Act* but noted that the Applicant did not provide any evidence of what sentence a 17-year-old in Canada would be sentenced to in similar circumstances and that there was nothing to indicate that a custodial sentence would be unlikely for such offences in Canada. I agree with the Respondent that the RAD's finding that the statutory cap on custodial sentences for minors does not rebut the presumption that the crime itself is serious is reasonable, given that, while age may be relevant to sentencing, it is not relevant to the determination of the seriousness of the offence itself [see *Canada (Citizenship and Immigration), Pulido Diaz*, 2011 FC 738 at para 14].

[48] The Applicant asserts that the RAD ignored that the fact that the Applicant showed remorse for his actions before the Croatian court. The Applicant asserts that having shown such contrition is a significant mitigating factor in favour of the Applicant. While the Croatian Decision provides that the Applicant admitted that he did not think of the consequences of his actions and that he apologized to the victim, the Applicant took a starkly different position in his BOC narrative, before the RPD and before the RAD, denying having committed the offences. It is baffling to the Court that the Applicant expects to be able to advance the position before the RAD that he did not commit the offence, but then be permitted to critique the RAD for not giving favourable weight to his apology for having committed the same offence before a different body. This critique advanced by the Applicant is entirely without merit.

[49] The Applicant asserts that the RAD erred in ignoring the fact that the victim and the Applicant were of similar age, somehow suggesting that the 2008 Offence was equivalent to an adult exploiting a child. I reject this assertion. The RAD correctly noted the age of both the

Applicant and the victim and appropriately considered the fact that, unlike a situation involving two consensual minors exchanging pornographic images, the Applicant filmed the victim without her consent and thereafter attempted to extort her.

[50] Although not advanced before the RAD, the Applicant asserted that Article 1F(b) should not be applied to exclude individuals who committed crimes as minors. The Applicant points to section 36(3)(e)(iii) of the *IRPA* which exempts young offenders from inadmissibility and the related operational guidance document, to assert that it was not Parliament's intent to allow someone of the Applicant's profile to apply to and be admitted to Canada as a student or economic immigrant, but at the same time preclude them from having a risk to their life assessed under Canada's refugee determination system.

[51] However, the Applicant has cited no authority in support of his assertion that Article 1F(b) should not apply in relation to serious non-political crimes committed by minors. Moreover, I agree with the Respondent that neither section 98 of the *IRPA* nor Article 1F(b) of the *Convention* provide for a blanket exemption for crimes committed as a minor. Had Parliament intended for such an exemption to apply, it could have included such an exemption, as it has in section 36 of the *IRPA*.

## V. Certified Question

[52] At the hearing of the application, counsel for the Applicant advised for the first time that he sought to make submissions regarding a proposed certified question related to the issue of whether Article 1F(b) excludes individuals who committed serious non-political crimes as minors

or otherwise how the age of the claimant at the time of the offence should be considered in an Article 1F(b) analysis.

[53] The Practice Guidelines for Citizenship, Immigration, and Refugee Law Proceedings dated November 5, 2018 provide that parties are expected to make submissions regarding any proposed certified questions in their written submissions and/or orally at the hearing. Where a party intends to propose a certified question, opposing counsel must be notified at least five days prior to the hearing, with a view to reaching a consensus regarding the language of the proposed question.

[54] Notwithstanding that the Applicant provided a further memorandum of argument in the weeks before the hearing, the Applicant's proposed question was not addressed by the Applicant therein. Moreover, counsel for the Applicant did not raise the proposed question with opposing counsel at least five days before the hearing or at any point before the hearing. Counsel for the Applicant indicated that his failure to do so was solely as a result of inadvertence.

[55] As the proposed question arose from a matter that had been raised by the Applicant in his initial memorandum of argument (as opposed to something raised by the Respondent in the weeks leading up to the hearing) and in light of the Applicant's failure to comply with the Practice Guideline and failure to make any attempt to address the proposed certified question with opposing counsel in advance of the hearing, I advised the Applicant at the hearing that, in the circumstances, the Court was not prepared to permit the Applicant to raise the proposed certified question.

## VI. Conclusion

[56] I am satisfied that the RAD's decision was reasonable. It was based on an internally coherent and rational chain of analysis and was justified in relation to the relevant facts and legal constraints. Accordingly, the application for judicial review shall be dismissed.

**JUDGMENT in IMM-3444-21**

**THIS COURT'S JUDGMENT is that**:

1. The application for judicial review is dismissed.

2. There is no question for certification.

"Mandy Aylen"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-3444-21 |
| **STYLE OF CAUSE:** | GORAN GARDIJAN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | HEARD BY VIDEOCONFERENCE |
| **DATE OF HEARING:** | MARCH 17, 2022 |
| **JUDGMENT AND REASONS:** | AYLEN J. |
| **DATED:** | MARCH 28, 2022 |

**APPEARANCES:**

| | |
|---|---|
| Aleksandar Jeremic | FOR THE APPLICANT |
| Rachel Hepburn Craig | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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| Aleksandar Jeremic<br>Barrister and Solicitor<br>Toronto, Ontario | FOR THE APPLICANT |
| Attorney General of Canada<br>Toronto, Ontario | FOR THE RESPONDENT |