Federal Court  Cour fédérale

Date: 20111007

Docket: IMM-7179-10

Citation: 2011 FC 1147

Ottawa, Ontario, October 7, 2011

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

KAMAL SAIDE ABU GANEM

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant is a 39 year old citizen of Israel. He is a Palestinian Arab who, together with his wife and four children, made a refugee claim upon arrival at Toronto in October, 2008. In a decision dated November 9, 2010 the Refugee Protection Division of the Immigration and Refugee Protection Board (RPD) the applicant was found to be excluded from refugee protection in Canada pursuant to Article 1 F(b) of the United Nations' *Convention Relating to the Status of Refugees*, [1969] Can TS No 6 (the *Convention*) for having committed a serious non-political crime. The

applicant's wife and four children were found to be persons in need of protection pursuant to section 97(1) of the *Immigration and Refugee Protection Act*, SC 2001 c 27 (*IRPA*).

[2] The applicant seeks to set aside the decision that he is, by reason of his past criminal conduct, excluded from the refugee determination process. For the reasons that follow, the application for judicial review of that decision is dismissed.

Background

[3] In 2001, the applicant's sister was murdered after she refused to marry Zayad Abu Ganem, one of the applicant's cousins. No one was convicted of her murder but a feud subsequently erupted between the families. In 2002, the applicant's brother sought revenge against his cousins for the murder of their sister. The applicant's brother intended to kill those who or when he thought murdered his sister but he did not succeed. During a confrontation with his cousins, the applicant's brother killed another cousin and the applicant's best friend, neither of whom were involved in the murder of the sister.

[4] The applicant claims he was not present when these murders took place. He says that his wife called him while he was at work and told him that there was a fight in the street outside their house. He immediately drove to the scene of the crime. He parked his car in a lane which could only fit one car. He states that by the time he arrived, the victims had already been killed and he fled to a neighbour's house where he called the police. When the police arrived, they accused him of purposefully blocking the road in order to assist his brother to flee from the crime. He was arrested and detained.

[5] The applicant was released on bail. While he was out on bail his cousins tried to kill him. The applicant was shot twice in the leg. The applicant subsequently pled guilty to the charges against him. The applicant claims that he pled guilty for the sole purpose of obtaining the protection of the Israeli police.

[6] As will be discussed in further detail later, there is some dispute as to the precise offence to which the applicant pled guilty. The applicant testified that he was convicted of *accessory to manslaughter*, but the RPD found that he was convicted of *manslaughter*. In any event, the applicant was sentenced by the Israeli court to six years in prison. His brother was convicted of murder and sentenced to 25 years in prison.

[7] The feud did not end, however. The applicant's cousins vowed to kill every member of the applicant's immediate family. The applicant testified that his father was subsequently murdered in a revenge attack by his cousins. In consequence, while the applicant was in prison, his wife and children were relocated and placed under the protection of the Israeli police.

[8] In 2008 the applicant was released from prison after serving approximately four years of his six year sentence. The applicant then flew to Romania with his wife and four children. They remained in Romania for one month then came to Canada and made a refugee claim.

The proceedings before the Immigration Division

[9] The applicant had a hearing before the Immigration Division of the Immigration and Refugee Board of Canada to determine his admissibility to Canada. At that hearing, counsel for the applicant and the Minister agreed that the applicant was convicted of *accessory to manslaughter*. The Immigration Division member accepted this characterization of the applicant's conviction and found that the Canadian equivalent of the Israeli conviction was sections 21(1)(b) (parties to offence) and 234 (manslaughter) of the *Criminal Code*, RSC 1985, c C-46 (Criminal Code). The applicant was thus found to be inadmissible to Canada pursuant to section 36(1)(b) of the *IRPA* for having been convicted of an offence outside Canada which, 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.

The proceedings before the Refugee Protection Division

[10] The RPD concluded that the applicant committed the offence of *manslaughter* in Israel. The RPD found that this offence was equivalent to s. 234 of the Criminal Code, and that under s. 236, the maximum sentence, if convicted in Canada, would be life imprisonment. The RPD then turned to consideration of Article 1 F(b) of the *Convention*, which is incorporated into Canadian law by section 98 of the *IRPA*. Section 98 provides:

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.

[11] Article 1 F(b) of the *Convention* is included in a Schedule to *IRPA*:

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 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;

[12] The RPD noted that most jurisdictions in the world would view manslaughter as a serious crime and that the six year sentence imposed on the applicant was reasonable. The RPD considered the severity of the offence, the maximum sentence in Israel, the applicant's term of imprisonment, the country in which the conviction and sentencing took place and the circumstances that led to the act. The RPD was not persuaded that there were any mitigating or aggravating circumstances underlying the conviction which would militate against a finding of exclusion.

[13] The RPD concluded that blood-feuds do not have a nexus to a *Convention* ground, but accepted that the applicant's wife and four children were persons in need of protection under section 97 of the *IRPA*.

The issues

[14] The issues in this application are:

a. Whether the RPD ignored evidence of mitigating circumstances underlying the conviction;
b. Whether the RPD erred in finding that the applicant was convicted of *manslaughter* rather than *accessory to manslaughter*;
c. Whether the RPD was estopped from finding that the applicant was convicted of manslaughter; and
d. Whether the reasons for decision are adequate.

[15] The first issue is to be reviewed on a reasonableness standard; the second is a mixed question of fact and law to be assessed again, on a reasonableness standard. Whether the RPD was estopped from finding that the applicant was convicted of manslaughter is a question of law reviewed on a correctness standard. Adequacy of reasons is a procedural fairness issue which is also reviewed on a standard of correctness.

Legal framework

[16] In this case, there is no challenge to the integrity of the decision of the Israeli courts. Nor does the applicant plead duress, provocation or self-defence. Rather, the applicant argues before this Court that the RPD erred by ignoring the applicant's evidence of the following mitigating factors:

- The applicant arrived at the scene of the crime after the killings occurred and was not directly involved in the killings;
- He pled guilty only to obtain police protection;
- He was convicted of *accessory to manslaughter* and not *manslaughter*;
- He served his sentence in Israel; and
- He was released early for good behaviour.

[17] The applicant relies on a number of academic articles discussing the purpose of Article 1 F(b) of the *Convention* in support of his argument that these factors should have militated against a finding of exclusion. In the *Law of Refugee Status* (Toronto, Ont: Butterworths, 1991), Professor James Hathaway expressed the opinion that the exclusion clause should not apply to cases where a person had served their sentence or otherwise met their obligations under criminal law. In *The Refugee in International Law*, 2nd ed (Toronto, Ont: Oxford University Press, 1996) Professor Guy Goodwin-Gill argues that completion of sentence, general good character, the isolated nature of the offence and whether the offender was merely an accomplice are factors that can rebut a presumption of serious criminality. Finally, the applicant points to the UN High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* (*UNHCR Handbook*), which confirms that mitigating and aggravating circumstances are relevant to the exclusion determination. As set out in paragraph 157 of the *UNHCR Handbook*, mitigating circumstances might include a completed sentence or a pardon, while aggravating circumstances might include a previous criminal record. The applicant acknowledges that the argument that completion of sentence negates a finding of exclusion has been rejected on two occasions by the Federal Court of Appeal.

[18] The applicant also relies on *Rihan v Canada (Minister of Citizenship and Immigration)*, 2010 FC 123, where Justice Leonard Mandamin found that it was a reviewable error for the RPD to ignore evidence suggesting that the applicant was innocent of the crimes for which he was convicted. In that case, the RPD relied on evidence from Interpol that the applicant had been convicted of fraud and other offences. In setting aside the decision, Justice Mandamin noted that the member ignored evidence that the charges were fabricated and used as leverage to force the repayment of an investment and that the complainant withdrew his complaint when the debt was re-

paid. Moreover, the member confused restitution (in consequence of a conviction) with repayment of a civil debt and, secondly, did not recognize that the use of the criminal process to enforce payment of a civil obligation is not permitted under Canadian law. Justice Mandamin held that the evidence of convictions was rebuttable and that evidence from the applicant, his wife and his lawyer showing that he was innocent, had to be considered.

[19] In *Hernandez v Canada (Citizenship and Immigration)*, 2010 FC 1323, Justice Michel Beaudry found that the member unreasonably dismissed the applicant's contention that she was a victim of a corrupt legal system. The member found that Colombia had taken steps to remedy corruption without dealing with the specific facts alleged by the applicant. The member was unwilling to consider the evidence presented by the applicant regarding the mitigating factors.

[20] In my view, both *Rihan* and *Hernandez* are distinguishable from the present case. Unlike *Hernandez*, there is no challenge to the integrity of the applicant's conviction or the Israeli judicial system. In *Rihan* the applicant's refugee hearing was disjointed (three different members presided at different times) and was plagued with translation problems. Furthermore, Justice Mandamin placed considerable weight on the fact that the member made erroneous findings of fact, together with the errors noted above.

[21] In *Jayasekera v Canada (MCI)*, 2008 FCA 404, the Federal Court of Appeal held that Article 1F(b) of the *Convention* 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". The inquiry is focused on the nature of the criminal act itself, and does

not engage "… a balancing of factors extraneous to the facts and circumstances underlying the conviction, as for example, the risk of persecution in the state of origin…" (per Letourneau J.A., para 44).

[22] In consequence, the RPD is not required to go behind the guilty plea and conviction to determine whether the applicant committed the crime, nor does Article 1F(b) of the *Convention* require the Minister to prove guilt beyond a reasonable doubt. The Minister bears the burden of establishing the seriousness of the crime, but the seriousness, once established, can be rebutted by establishing mitigating factors or circumstances. Consistent with its earlier decision in *Zrig v Canada (Minister of Citizenship and Immigration)*, 2003 FCA 178, the Court of Appeal also held that a person may be excluded even when they have completed their sentence, although completion of a sentence remains a relevant factor in the exclusion analysis. Just as the constituent element of the offence need not be established, so too can constraints or exculpatory factors such as duress or self-defence be plead in mitigation, although they may fall short of the standard required in criminal law or otherwise be inapplicable in a criminal trial.

[23] Much of the argument before this Court focused on the purpose of Article 1 F(b) of the *Convention*. It was contended that the purpose of Article 1 F(b) was to prevent fugitives from justice sheltering under the *Convention*. In consequence, exclusion under 1 F(b) is unreasonable where, in circumstances such as these, the applicant has served his sentence. In *Arevalo Pineda v Canada (Citizenship and Immigration)*, 2010 FC 454 at paras 24 and 25, Justice Johanne Gauthier reviewed the object and purpose of Article 1 F(b) of the *Convention* and concluded:

> Finally, it is worth citing the following passage of Justice Décary's reasons in *Zrig* at paragraph 129:
>
> > [...] It follows that under Article 1F(b) 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 State 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. [Emphasis added]
>
> 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.

[24] Justice Gauthier's analysis is compelling. There is no sound reason, either rooted in the text of Article 1 F(b) or in the jurisprudence which would support an interpretation confining Article 1 F(b) to a single purpose as argued. Neither the fact of conviction nor the service of the sentence can be determinative of the exclusion analysis.

[25] The applicant, it is said, has paid his debt to society and hence the conclusion reached is, in light of the purpose of Article 1 F(b), unreasonable. The error in the argument before this Court is that it confines Article 1 F(b) to the singular purpose of ensuring that right of asylum is not used by perpetrators of serious ordinary crimes in order to escape justice. Article 1 F(b) serves several objectives, all of which much be kept in mind when assessing the reasonableness of a decision to

exclude a claimant from the refugee determination process. In *Jayasekera*, the Court of Appeal adopted Décary J.A.'s analysis of the purposes of Article 1 F(b) in *Zrig*, para 28:

> The purpose stated in *Chan* is neither the only nor, as contended by the appellant, necessarily the primary purpose sought by the exclusion contained in Article 1F(b) of the Convention. This is made clear by the subsequent decision of our Court in *Zrig*. In this respect, our colleague Décary J.A. wrote, at paragraphs 118 and 119 of that decision:
>
> > Purposes of Article 1F of the Convention in general, and Article 1F(b) in particular
> >
> > My reading of precedent, academic commentary and of course, though it has often been neglected, the actual wording of Article 1F of the Convention, leads me to conclude that 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. It is this fourth purpose which is really at issue in this case.
> >
> > These purposes are complementary. The first indicates that the international community did not wish persons responsible for persecution to profit from a convention designed to protect the victims of their crimes. The second indicates that the signatories of the Convention accepted the fundamental rule of international law that the perpetrator of a political crime, even one of extreme seriousness, is entitled to elude the authorities of the State in which he committed his crime, the premise being that such a person would not be tried fairly in that State and would be persecuted. The third indicates 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. The fourth indicates that while the signatories were prepared to sacrifice their sovereignty, even their security, in the case of the perpetrators of political crimes, they wished on the contrary to preserve them for reasons of security and social peace in the case of the perpetrators of serious ordinary crimes. This fourth purpose also indicates that the signatories wanted to ensure that the Convention would be accepted by the people of the country of refuge, who might be in danger of having to live with especially dangerous individuals under the cover of a right of asylum. [Emphasis added.]

[26] The Court of Appeal emphasized that these purposes are complementary and of equal rank. Hence, the fact that the applicant has, in this case, served his sentence and was "only" an accessory does not negate the fourth principle, by which Canada, a signatory to the *Convention*, through section 98 of the *IRPA*, retained the right to refuse entry to those who are undesirable because of their prior criminal conduct.

[27] In sum, Article 1 F(b) of the *Convention* only requires the existence of "serious reasons for considering" that the applicant has committed a serious non-political crime. This standard has been found to be equivalent to "reasonable grounds", or the existence of credible evidence which would objectively support a reasonable basis for believing that the person has committed the crime: *Rihan*, above, at para 76. As noted, the Minister is not required to establish the constituent elements of the crime on a balance of probabilities.

[28] In my view, the guilty plea and conviction in Israel surpass the evidentiary standard required to establish that these were serious reasons for considering that the applicant committed a serious non-political crime: *Sing v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 125, at

para 25. This is true regardless of whether the offence was *manslaughter*, *accessory to manslaughter* or *accessory to murder*, as any one of these offences are serious enough to trigger the application of section 98 of the *IRPA* and Article 1 F(b) of the *Convention*.

The RPD did not ignore evidence

[29] The above analysis is the legal framework in which the RPD's decision that there were insufficient mitigating circumstances must be reviewed by this Court. I am not persuaded that the RPD failed to consider the mitigating factors in this case. While the RPD did not specifically address all the mitigating factors in its reasons, the reasons indicate that "the circumstances that led to the act and the factors" were considered but concluded that these mitigating factors did not point away from an exclusion finding. The transcript also indicates that the RPD member fully canvassed all of the mitigating factors at the hearing and explored and understood the relevant circumstances surrounding the offence. When the reasons are read in conjunction with the transcript of the hearing, I am satisfied that the RPD member understood correctly all of the facts relating to the commission of the offence and fully considered the mitigating factors, as required by the jurisprudence.

[30] Given the very serious nature of the crime, the RPD's finding was reasonable. The RPD member was free to give the evidence regarding the applicant's motive for pleading guilty the weight that he did in determining whether the applicant should be excluded. Moreover, it is important to be precise about the factors and circumstances that were said to mitigate the seriousness of the crime. The five factors advanced before this Court as being compelling, such that the RPD's decision was unreasonable, do not withstand scrutiny. To repeat, the mitigating circumstances were:

- The applicant arrived at the scene of the crime after the killings occurred and was not directly involved in the killings;
- He pled guilty only to obtain police protection;
- He was convicted of *accessory to manslaughter* and not *manslaughter*;
- He served his sentence in Israel; and
- He was released early for good behaviour.

[31] The first (that he was not directly involved in the killing) and third (convicted of being an accessory) are in essence the same consideration. The first is the factual foundation of the third. The second, that he pled guilty only to obtain protection goes to motive, and was free to be considered and weighed by the RPD member. The member was free to give it little weight, as there was evidence from the applicant that he pled guilty as part of a plea arrangement. Finally, the fourth factor, that he had served his sentence is, consistent with the Court of Appeal decision in *Zrig* above, a relevant but not a determinative factor. Viewed in this light, there were scant mitigating considerations that weighed in the applicant's favour, and the RPD's decision falls well-within the parameters of reasonableness.

No error in finding that the applicant was convicted of *manslaughter* rather than *accessory to manslaughter*

[32] The applicant contends that the RPD erred in concluding that the applicant was convicted of *manslaughter*.

[33] The applicant's testimony before the RPD regarding his conviction was inconsistent. At first, he testified that he was convicted of manslaughter:

> MEMBER: Okay, Mr. Saide, is it true that you were convicted in Israel of manslaughter pursuant to their *Criminal Code*?
>
> CLAIMANT (Mr. K. Saide): Yes.

[34] Later, the applicant testified that he was offered a plea arrangement by the Israeli prosecutors. If he pled guilty to *accessory to manslaughter*, he would have his sentence reduced:

> MEMBER: All right. So, they presented – the police or the prosecutor present – evidence to the court that you were involved in the killing?
>
> CLAIMANT (MR. K. SAIDE): The lawyer and the general prosecutor, police – the police's role finished at that stage.
>
> MEMBER: So, it is – it's yes? They presented evidence that you were involved?
>
> CLAIMANT (MR. K. SAIDE): They agreed among each other that I would be convicted in abetting or being an accessory to that manslaughter and, consequently, have a commuted sentence. There was a lot of accentuating – or factors – there were a lot of factors involved – … -- affecting that. One of the factor – is that I remain alive. The lawyer, because of that, advised me to accept that deal. And second, that by the lapse of time, people would forget and we would be away from the matter.
>
> MEMBER: Now, I –
>
> CLAIMANT (Mr. K. SAIDE): And at the same time, it would be an attempt for reconciliation.

[35] When questioned by his own counsel as to the exact charge to which he pled the applicant testified:

> COUNSEL FOR THE PERSON CONCERNED: ---seems to indicate that it was accessory to murder. So, was it actually manslaughter or was it accessory to manslaughter or was it accessory to murder?
>
> CLAIMANT: Abetting or accessory. Aiding in manslaughter.
>
> COUNSEL FOR THE PERSON CONCERNED: Okay. Alright.
>
> MEMBER: So, aiding to manslaughter?

CLAIMANT: Yes.

MEMBER: Okay.

CLAIMANT: Aiding in manslaughter.

MEMBER: I can only go with what the documents say and nothing more, unfortunately.

COUNSEL FOR THE PERSON CONCERNED: The –

MEMBER: It does say you have been convicted of felony accessory to murder. But the Minister's document on page – on the second page of the Minister's letter, it shows that you were convicted of manslaughter in Ramla.

[36] The parties reviewed the various exhibits, and then continued:

COUNSEL FOR THE PERSON CONCERNED: Okay. But page – if you look at page 1 of M-2 –

MEMBER: Yeah.

COUNSEL FOR THE PERSON CONCERNED: -- this is where that comes from.

MEMBER: Okay.

COUNSEL FOR THE PERSON CONCERNED: That's the – the embassy contacted –

MEMBER: Yes.

COUNSEL FOR THE PERSON CONCERNED: -- INTERPOL Israel. So, the actual document, court document, says accessory.

MEMBER: Yeah, I see it. And you know, I can only go – there's reference to the material, but I can only – the documents from the State of Israel is more concrete.

Now, sir, you did say that you were convicted of aiding to manslaughter. The – in M-2, page 3, it's from the State of Israel. It says you have been convicted of felony accessory to murder. Now, then, I have to go to the Israeli *Penal Code* to determine the sentence

> or what that includes. All right. But I'm going to let your lawyer continue with his questions.

[37] In the reasons for decision, the RPD noted that there was conflicting evidence regarding the nature of the offence on the record. This arises, in part, from lack of precision in the applicant's testimony and the documentary evidence indicating the offence with which he was charged and to the offence to which he pled guilty. The Israeli Release Committee, the Israeli equivalent of the National Parole Board in Canada, referred to the conviction as *accessory to murder*. There was also an email from the Canadian Embassy in Tel Aviv stating "I received [sic] following information from Interpol Israel: Subject has been convicted of manslaughter (and not 'assistant [sic] to manslaughter')". There was thus conflicting evidence before the RPD, in both the applicant's testimony and the documentary evidence.

[38] The applicant's testimony was not the determinative factor in the RPD's analysis of the precise offence, however. The RPD member placed considerable emphasis on the documentary evidence. The RPD considered and weighed all of this evidence and found that the applicant had been convicted of *manslaughter*, and not *accessory to murder*. Given the inconsistent evidence on the record and the evidence of Interpol Israel, it was reasonably open to the RPD to find that the applicant was convicted of *manslaughter*.

[39] In any event, the distinction between the various offences is immaterial, both legally and factually. Whether the applicant was convicted of accessory to manslaughter or manslaughter, he could still be excluded under section 98 and Article 1 F and *prima facie* inadmissible under section 36(1)(b) of the *IRPA* for having been convicted of an offence outside Canada which, 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. Whether the applicant was convicted of *manslaughter* (Interpol Israel and his testimony); *accessory to murder* (Israeli Release Committee); or *accessory to manslaughter* (Immigration Division and his testimony) is therefore not determinative of whether the RPD's exercise of discretion was reasonable.

[40] As noted above, by virtue of section 463 of the Criminal Code, the offence of accessory tracks the substantive offence. The RPD need only find "reasonable grounds" to believe the applicant committed a serious crime. Regardless of the precise characterization of the offence, the RPD member understood all of the facts relating to the commission of the offence and the applicant's role in its commission. The RPD noted that two people were killed, and that the applicant pled guilty and was sentenced to six years imprisonment. On these facts it was reasonably open to the RPD to conclude that there were serious reasons for considering that the applicant committed a serious non-political crime, which is the controlling legal test.

The RPD is not estopped from finding that the applicant was convicted of manslaughter

[41] As noted, the applicant was the subject of an inadmissibility hearing before the Immigration Division. The Immigration Division found the applicant, as an accessory to manslaughter, to be inadmissible to Canada pursuant to section 36(1) of *IRPA*.

[42] The applicant contends that *res judicata* or *issue estoppel* applies in the present case. The applicant argues that the RPD was estopped from finding that the applicant was convicted of *manslaughter* because the Immigration Division had already found that that the applicant was

convicted of *accessory to manslaughter*. In other words, the applicant contends that the RPD cannot revisit the Immigration Division's finding that the applicant was an accessory. I note that at one point in its decision the Immigration Division held that the applicant was convicted of 'accessory to murder', but the applicant suggests the word 'murder' is a typographical error, as the remainder of the decision, including the equivalency analysis, addresses manslaughter, and not murder.

[43] The Court of Appeal held that statutory decision makers must exercise their independent discretion and judgment, even on closely related issues and come to their own conclusions: *Canada (Minister of Citizenship and Immigration) v Zazai*, 2004 FCA 89. The fact that the sequence of determinations is reversed in this case (the Immigration Division decision preceded the RPD decision) is not a valid basis for distinguishing *Zazai*, or departing from the guidance of the Court of Appeal. Finally, admissibility and exclusion cases involve different legal tests and require separate legal analysis. In that sense, although their respective findings constitute evidence which can be considered, the RPD and the Immigration Division cannot bind one another. In any event, the point is of no consequence as either offence falls within the scope of the exclusion.

The reasons are sufficient

[44] The applicant contends that the reasons provided by the RPD are, in light of the issues under its consideration, insufficient to meet the required legal standard. I do not agree.

[45] The Federal Court of Appeal framed the criteria for assessing the sufficiency of reasons in *Via Rail Canada Inc v Lemonde*, [2001] 2 FC 25, at paras 21 and 22. The assessment of the adequacy of reasons depends on the particular circumstances of each case. Decision makers cannot

simply recite the submissions and evidence of the parties and then state a conclusion. Decision makers must state their findings of fact, the evidence on which those findings were based, address the major points at issue, and describe the reasoning process the decision maker followed.

[46] Reasons serve several purposes: to let the parties know the issues have been considered, to allow the parties to effect any right of appeal or judicial review; and to inform the losing party that they have lost. The Supreme Court of Canada has emphasized that the requirement of reasons is not a free standing right, rather the adequacy of reason is to be assessed in light of their function and purpose: *R v Sheppard*, [2002] 1 SCR 869 at paras 18-19 and 24.

[47] Assessing the reasons in light of these principles, as a matter of law, I find that the reasons meet the requisite standard. They inform the applicant of the reasons the RPD came to the conclusion that it did, and the applicant's ability to seek and fully argue judicial review was not been prejudiced. The RPD's reasons are detailed, make clear findings of fact, address the major points at issue, and describe the RPD member's reasoning process. While the reasons do not discuss the mitigating and aggravating factors in detail, and more would have been desirable, the RPD is not required to discuss each mitigating factor in detail in order for the reasons to serve the purpose and function for which they are required. I also reiterate that what are advanced as a number of mitigating factors, are, on closer analysis, duplicative and hence need not be re-addressed.

Conclusion

[48] The applicant has failed to establish that the RPD made a reviewable error. It was reasonable for the RPD to conclude that the applicant committed a serious non-political crime. I can find no error in the RPD's conclusion that the applicant was convicted of *manslaughter*, and I am satisfied that the RPD member understood and considered all of the relevant mitigating factors.

[49] The application for judicial review is dismissed.

[50] The parties requested an opportunity to consider whether a certified question arose upon receipt of a decision in this case. I will allow the applicant five days from the date of this decision to consider and propose a certified question. The respondent shall then have five days within which to respond. Neither submission should exceed five pages in length.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be and is hereby dismissed. The applicant is allowed five days from the date of this decision to consider and propose a certified question. The respondent shall then have five days within which to respond. Neither submission should exceed five pages in length.

"Donald J. Rennie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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