Federal Court  Cour fédérale

**Date: 20150825**

**Docket: IMM-5379-14**

**Citation: 2015 FC 1006**

**Ottawa, Ontario, August 25, 2015**

**PRESENT: The Honourable Mr. Justice Annis**

**BETWEEN:**

**ROSHAN AKTHAR JIBREEL MOHAMED**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. Introduction

[1] This is an application for judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA or the Act] of a June 18, 2014 decision by the Refugee Protection Division [RPD, Board] concluding that the Applicant was excluded from refugee protection.

[2] On the basis of the recent decision of the Supreme Court of Canada in *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68 (CanLII) [*Febles SCC*], which post-dated the Board's decision in this matter, I conclude that the application must be allowed.

## II. Background Facts

[3] The Applicant, a citizen of Sri Lanka of Tamil ethnicity and Muslim faith, arrived in Canada and sought refugee protection on August 14, 2011.

[4] The Applicant was skilled in repairing computers and performing engineering functions with computers, hardware and networks and he was known to be a knowledgeable computer technician.

[5] The Applicant lived in an area controlled by the Sri Lankan government with a heavy Liberation Tigers of Tamil Eelam [LTTE] presence. As a Muslim, the Applicant was neutral in the conflict and was able to travel without restrictions.

[6] In December 2007, the Applicant was approached by men who asked him to work on their computers. He suspected they were members of the LTTE but they did not openly identify themselves as such.

[7] He claimed that he initially refused to work for them, but agreed to do so after they threatened to kill him and his family. He learned that the men were LTTE a year and a half after

he started working for them. He claims that because of the threats of the LTTE, he had no choice but to carry on his work for them.

[8] After the LTTE were defeated in May 2009, he claims that he was approached and threatened by an individual LTTE member who had evaded capture. He continued working for the LTTE until he was arrested by the Sri Lankan authorities in 2010. After he was released he was able to flee to Colombo.

## III. The Impugned decision

[9] The RPD conducted a three-step analysis to determine whether the Applicant had committed a serious crime as prescribed by section 83.03 of the *Criminal Code of Canada*, RSC 1985, C-46. It had first to consider whether the Minister had established that there were serious reasons to believe that the Applicant had committed a non-political crime before entering Canada. The Board determined that the Applicant, as a member of the Muslim community not involved in the war in Sri Lanka, was not politically motivated in his actions providing services to the LTTE.

[10] It further found that the Applicant had committed a crime as prescribed by section 83.03 of the *Criminal Code*. The Applicant provided services to persons whom he knew were members of the LTTE, including after the war ended in 2009 and during periods when he could have fled or sought state protection. The Panel also examined country condition documents to conclude that the LTTE is a terrorist organization.

[11] The second step of its analysis involved an examination of whether the Applicant committed a "serious crime". It adopted the test from *Chan v. Canada (MCI)*, [2000] 4 FC 390 (FCA) [*Chan*] that "a crime is a serious non-political crime if a maximum sentence of 10 years or more could have been imposed if the crime had been committed in Canada". In light of the sentence attached to section 83.03 of "imprisonment for a term of not more than 10 years", the RPD found the Applicant had committed a serious crime where the punishment could attain a maximum of 10 years.

[12] The third leg of the RPD's decision was for the purpose of evaluating any mitigating and aggravating circumstances in accordance with the decision of *Jayasekara v. Canada (MCI)*, [2009] 4 FCR 164, 2008 FCA 404 [*Jayasekara*]. None were found. In this regard, the Board rejected the Applicant's justification that he continued to repair computers because of threats against him and his family, noting that the claimant was compensated for the work he performed for the LTTE and could have left or sought protection at any time given his freedom of movement.

[13] The panel similarly did not accept the mitigating circumstance that the Applicant only repaired the hardware in the computers or installed software, and that he did not have access to any data. The panel concluded that the Applicant was fully aware of the LTTE operations and that it was reasonable to expect that he understood what the computers were being used for. In this regard, the claimant testified that he assumed the computers were being used for Google maps and to store data. The panel also gave no weight to his contention that the Sri Lankan

authorities would not have let him go after being arrested, if they had serious reasons to believe he had helped the LTTE.

[14] Based on the foregoing, the RPD found that the claimant had committed the crime as outlined in section 83 of the *Criminal Code*, and that the crime committed is considered a serious non-political crime with a maximum sentence of 10 years.

## IV. The Legislation

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| 83.03 Every one who, directly or indirectly, collects property, provides or invites a person to provide, or makes available property or financial or other related services | 83.03 Est coupable d'un acte criminel passible d'un emprisonnement maximal de dix ans quiconque, directement ou non, réunit des biens ou fournit — ou invite une autre personne à le faire — ou rend disponibles des biens ou des services financiers ou connexes : |
| (a) intending that they be used, or knowing that they will be used, in whole or in part, for the purpose of facilitating or carrying out any terrorist activity, or for the purpose of benefiting any person who is facilitating or carrying out such an activity, or | a) soit dans l'intention de les voir utiliser — ou en sachant qu'ils seront utilisés — , en tout ou en partie, pour une activité terroriste, pour faciliter une telle activité ou pour en faire bénéficier une personne qui se livre à une telle activité ou la facilite; |
| (b) knowing that, in whole or part, they will be used by or will benefit a terrorist group, is guilty of an indictable offence and is liable to imprisonment for a term of not more than 10 years. 2001, c. 41, s. 4. | b) soit en sachant qu'ils seront utilisés, en tout ou en partie, par un groupe terroriste ou qu'ils bénéficieront, en tout ou en partie, à celui-ci. |

## V. Issue and Standard of Review

[15] The only issue for consideration is whether the Board's exclusion analysis is reasonable in light of the recent Supreme Court of Canada decision in *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68 [*Febles*] which commented on how a crime's seriousness should be assessed under section 83.03.

## VI. Analysis

[16] At paragraph 62 of the *Febles* decision, in what it acknowledged was an *obiter* comment, the Supreme Court offered some guidance on how to determine when a crime will generally be considered serious for the purposes of Article 1F(b):

> [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]

[17] The Respondent argues that *Febles* has limited application to cases involving fugitives from prosecution; given that it is factual foundation was based upon a claimant who had been convicted of a crime in another country. Besides being made in *obiter*, the Minister argues that the relevance of the decision in this matter was further diminished by the fact that the factors referred to taken from a foreign court such as the "elements of the crime, the motive, the penalty prescribed, the facts and the mitigating and aggravating circumstances" are not well applied to crimes of individuals fleeing justice.

[18] I disagree. The Supreme Court in *Febles* clearly concluded that Article 1F(b) applies to anyone who has ever committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee. Its comments were intended to apply all crimes falling under Article 1F(b), whether involving convictions or flights from justice.

[19] The Respondent further argues that the Supreme Court did not intend to introduce a substantial change to the law as to the rebuttable presumption arising in the case of offences punishable by a maximum of at least 10 years, as it would have done so more explicitly and not in *obiter*. I would also disagree with that interpretation of the case. Given that the Court went out of its way to expound upon the application of the presumption described in the Federal Court of Appeal decision in *Jayasekara*, I think the better interpretation is that the Court felt it was

appropriate to do so in order to avoid incorrect characterizations of what constitutes a serious crime.

[20] I interpret the comments of the Supreme Court as providing further guidance on how to apply the ten-year presumption rule. The first comment has to do with proper application of the presumption of seriousness when the sentence falls towards the low end of a broad sentencing range. In such a case, the individual should not be presumptively excluded, thereby leaving the onus with the Minister to persuade the Board that the crime was serious.

[21] Second, it stated the 10-year presumptive rule should not be applied in a mechanistic, decontextualized, or unjust manner. Particularly with reference to an unjust manner, the Court appears to be introducing the issue of blameworthiness, as a factor which should be considered in characterizing the crime as serious. This is congruent with general sentencing principles as previously described by the Court in *R. v. C.A.M.*, [1996] 1 S.C.R. 500, at para. 82:

> In the final analysis, the overarching duty of the sentencing judge is to draw upon all the legitimate principles of sentencing to determine a "just and appropriate" sentence which reflects the gravity of the offence committed and the moral blameworthiness of the offender.
>
> [Emphasis added]

[22] The Respondent argues that when dealing with a claimant who is in flight from justice, the exercise becomes entirely hypothetical and outside the expertise and mandate of the administrative tribunal which is obviously not a criminal tribunal. It may well be that the parties may be called upon to introduce opinion evidence from criminal lawyers to assist the Board. But

frankly, I do not see much difference where the situation involves someone convicted in another jurisdiction.

[23] The Respondent points out the concerns voiced in *Jayasekara* that an apparently lenient foreign sentence may be the result of a myriad of factors which do not lessen the seriousness of the offence. This suggests that foreign convictions are equally "hypothetical".

[24] I do not see how giving consideration to a range of possible sentences entails the tribunal in what the respondent describes as "a rigid, formalistic principal of law that the domestic tribunal must assess the Canadian range of sentences before determining whether a crime is 'serious'". Certainly some of this assessment appears to be common sense.

[25] In this matter, it is apparent that the Applicant is less culpable than others who would play a more direct or more significant role in abetting a terrorist organization. As I understand the evidence, he provides the same services to members of LTTE as he does to the general public, somewhat comparable to selling an essential commodity like fuel to run their trucks, although obviously more specialized and less available by his professional training and expertise. He did not have the intention to support the LTTE, but is forced into it and finds out a year and a half later who he is dealing with. I think a sentencing court would tend to be somewhat sympathetic about his situation in a war zone, with a family and dealing with a terrorist organization fighting an ethnic war where, by providing a service offered to the public, he must flee giving up a business he has tried to build, or face putting his life and that of his family at

risk. Without making the Board's decision, it would appear to be a case where the presumption of serious crime is far from clear.

[26] Also if the Board must consider where the Applicant falls on the range of Canadian sentences for this crime, the matter of *R. v. Thambaithurai*, 2011 BCCA 137 [*Thambaithurai*] would come into play. The accused, admittedly who pled guilty, was given 6 months for actively raising funds for the LTTE in Canada. It is arguable that this is activity would be more blameworthy than that of the Applicant and that the deterrence effect on Canadians would play a greater role than with the Applicant.

[27] The British Columbia Court of Appeal had this to say about the sentence on appeal:

> [22] The sentencing judge recognized the second factor, the continuing danger the offender presents, raises particular difficulties in terrorist offences. By definition, these offences are often motivated by political, religious, or ideological purposes or objectives. Such beliefs are often immutable. Thus, Mr. Thambaithurai's lack of remorse was perhaps not surprising, given his Tamil heritage, the impact of the war on his family, and his continuing concern for the dire circumstances of the Tamil population in Sri Lanka. The sentencing judge, however, concluded Mr. Thambaithurai did not present an ongoing terrorist threat, given his otherwise good character. Moreover, by the time Mr. Thambaithurai came before the courts, concern about further terrorist financing of the LTTE had been abated by events in Sri Lanka. In May 2009, Prabhakaran was killed and the Sri Lankan government declared victory over the LTTE.
>
> […]
>
> [24] Nor am I persuaded that the sentence of six months' incarceration was unfit. While terrorist offences have unique features, they are governed by the same sentencing framework and objectives as other crimes under the *Criminal Code*, and Parliament has left the full range of sentencing options, except conditional sentences, open to the courts for consideration in

> dealing with them. The sentencing judge accurately outlined the facts and Mr. Thambaithurai's personal circumstances. He considered the sentencing objectives in the *Criminal Code*, and reviewed the relevant mitigating and aggravating factors. He recognized the unique and serious nature of terrorism but, in my view, properly accepted the Crown's submission that Mr. Thambaithurai's activities fell at the low end of the scale. Despite that, the sentencing judge decided a suspended sentence would not adequately serve the objectives of deterrence and denunciation. Instead, he ordered a custodial sentence of six months, a result that would ordinarily be viewed as a harsh penalty for a first offender with an otherwise unblemished record. As well, Mr. Thambaithurai's conviction will have long-lasting effects, as it will interfere with his ability to travel beyond Canada.
>
> [Emphasis added]

[28] Finally, I think that there is some merit in the Applicant's arguments about the weakness of the case against him. There is really no evidence of what the LTTE did with their computers. Once into speculation there normally would be a reasonable doubt preventing conviction. The Applicant speculated that they might use their computers for accessing Google maps or to store data. He did not know though what they did with the computers. The inference that his work played a direct or meaningful role in their activities is tenuous without some supporting evidence. The applicant would not likely take the stand and it appears to be a case where the prosecutor would be anxious to work out a reduced sentence because of the lack of hard evidence for conviction.

[29] I am also informed by two recent decisions of former judges of this Court which are to similar effect. I here refer to the decisions of *Jung v Canada (Citizenship and Immigration)*, 2015 FC 464 [*Jung*] of Justice De Montigny and that of Justice Gleason in *Tabagua v Canada*

*(Citizenship and Immigration)*, 2015 FC 709. Both also set aside the decision under review on the basis on *Febles*.

[30] In *Jung*, Justice De Montigny found the failure to take into account Febles to be an error sufficient to set aside the decision stating as follows:

> [48] At the end of the day, however, the most egregious error of the Board member was her failure to take into account what the Supreme Court considered a critical factor in *Febles*, namely the wide Canadian sentencing range and the fact that the crime for which the Applicant was convicted would fall at the less serious end of the range. This consideration was quite relevant in the case at bar: the Canadian sentence for fraud over $5,000 has a large sentencing range (0 to 14 years), and the Applicant's crime – fraud of $50,000 with a 10 month sentence – *prima facie* falls at the low end of this range. The wide sentencing range and the Applicant's low actual sentence (not only was the actual sentence only two years but it was suspended and the only jail time was 165 days pre-trial custody) were clearly a most relevant factor in determining whether the crime was serious.
>
> [49] On that basis alone, the decision of the Board ought to be quashed and the matter returned for reconsideration by a different panel of the Board.

[31] The Board did not attempt to consider where the Applicant fell on the range of sentences that would be applied to him for committing the alleged crime of servicing the computers of the LTTE. I also conclude that for the same reason, the Board applied the 10-year rule in a somewhat mechanistic, decontextualized, or unjust manner. It cannot be faulted for doing so, as this was to some extent the approach prior to *Febles*.

## VII. Conclusion and Certified Question

[32] The decision must be set aside and the matter returned for reconsideration by a different panel of the Board. No submissions were provided for certified questions and none will be certified, as it appears that the failure to adhere to the *Febles* decision has been established as a ground for setting aside a decision.

## JUDGMENT

**THIS COURT ORDERS** that the application is allowed, the decision is set aside and the matter returned for reconsideration by a different panel of the Board. No question is certified for appeal.

"Peter Annis"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-5379-14 |
| **STYLE OF CAUSE:** | ROSHAN AKTHAR JIBREEL MOHAMED v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | JUNE 10, 2015 |
| **JUDGMENT AND REASONS:** | ANNIS J. |
| **DATED:** | AUGUST 25, 2015 |

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