Federal Court  Cour fédérale

Date: 20190107

Docket: IMM-2494-18

Citation: 2019 FC 12

Ottawa, Ontario, January 7, 2019

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

ARASH GHULAM ABBAS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review by the Applicant, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision made by the Refugee Protection Division [RPD], rendered January 9, 2018, rejecting the Applicant's refugee claim [Decision].

II. Facts

[2] The Applicant is a citizen of Afghanistan, born there on March 18, 1979. He and his family left Afghanistan in 1966. They lived in Moscow from 1966 to 1998 before moving to the United States.

[3] The Applicant allegedly ran a prostitution-related escort business in the United States [US]. A warrant in this connection was obtained against the Applicant by the Arlington County, Virginia, Police Department on November 11, 2009 for pandering, that is, receiving money or valuables from an individual engaged in prostitution. In addition, the Montgomery County, Maryland, Police Department vice unit was both assisting Virginia police, and investigating the Applicant in connection with similar charges.

[4] Following the execution of a search warrant at the Applicant's residence in Maryland, the Applicant was taken into custody on December 16, 2009. He waived extradition from Maryland on December 29, 2009, and was transported to Arlington, Virginia where the outstanding warrant was executed. A bond of $5000 was set.

[5] The Applicant was charged in Virginia with pandering contrary to *Code of Virginia* § 18.2-357, on December 29, 2009. He was further charged and arrested in Maryland with human trafficking and prostitution contrary to *Maryland Code* §§ 11-303, 306. The RPD held and is not disputed that, "[i]f the aforementioned crimes were committed in Canada, the [Applicant] would be subject to Section 286.2(1) of the *Criminal Code of Canada*, namely material benefit from

sexual services. [He] could also be subject to Section 279.01(1) of the *Criminal Code of Canada*, namely trafficking in persons."

[6] It is common ground these offences if committed in Canada could result in imprisonment for more than ten years.

[7] For reasons that are not known to the Court, the Virginia charges were dismissed on March 10, 2010. At or around the same time, the Maryland charges were voluntarily withdrawn by Maryland through a plea of *nolle prosequi*.

[8] The Applicant arrived in Canada and made a refugee claim on May 18, 2016. The Minister notified the RPD of an intention to intervene in the hearing. His Notice of Intent to Intervene indicated the Minister's representative intended to present evidence, question the Applicant, and make representations. The Notice also stated the Minister was of the opinion that issues pursuant to Article 1F(b) of the *United Nations Convention related to the Status of Refugees* [*Refugee Convention*] were raised by this claim because the Applicant had committed serious non-political crimes outside of Canada, namely the prostitution related activities already referred to in the US.

III. Decision under review

[9] The RPD heard and decided the Applicant's claim on January 9, 2018. The determinative issue was whether or not the Applicant was excluded under Article 1F(b). Both the Minister's representative and the Applicant submitted that the Applicant should not be excluded from

applying for refugee protection based on the dismissed charges in Virginia and the voluntarily withdrawn charges in Maryland.

[10] However, the RPD disagreed. The RPD found that the Applicant's "criminality (if committed) in the US constitutes multiple serious non-political crimes." The RPD did not find the Applicant "to be a credible or reliable witness." The RPD's rationale is summarized in the Decision at para 7:

> Simply put, the Board finds there is enough credible and trustworthy evidence to demonstrate that there is serious reason for considering that the claimant committed the said crimes. As noted, the evidentiary standard to exclude a claimant is serious reasons for considering and that this evidentiary standard is below that required in civil law (on a balance of probabilities) and of course much less than that required in criminal law (beyond a reasonable doubt). Furthermore, there is case law that states that a claimant may be excluded even if he or she is not charged or convicted of the criminal acts in question.

IV. Issues

[11] The Applicant submits the following three issues:

> [1] Did the Member err in his assessment of the withdrawal of the Applicant's charge?
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> [2] Did the Member err in making findings in absence of reliable evidence?
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> [3] Did the Member err in his application of the standard of proof for exclusion under 1F(b)?

V. Standard of review

[12] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada holds that a standard of review analysis is unnecessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question." In connection to the first issue regarding the RPD's assessment of the charges, in relation to the seriousness of the alleged non-political crime, the jurisprudence already determined the standard of review applicable. In *Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FC 238, per Strayer DJ, aff'd 2008 FCA 404, per Létourneau JA [*Jayasekara*], this Court holds at para 10: "[I]n the matter of the standard of review, I respectfully concur with other judges of this Court in the view that on a question of exclusion under Article 1F(b), the standard should be that of reasonableness. The decision which the Board must make is as to whether 'there are serious reasons for considering that… he has committed a serious non-political crime outside the country ….' This is a mixed question of fact and law and involves some discretion in assessing what is a 'serious' reason [citation omitted]." The reasoning of *Jayasekara* relies on the instructions of *Dunsmuir* in the Supreme Court of Canada: "[T]he going-in presumption should be that the standard of review of any administrative outcome on grounds of substance is not correctness but reasonableness ('contextually' applied)" (at para 146), and the reasonableness "standard must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated" (at para 53). This is further maintained in *Gama Sanchez v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 157, per Stratas JA, aff'g 2013 FC 913, per Russell J at para 28: "[W]hether or not a person should be considered as falling within Article 1F(b) is a question of mixed fact and law that is

reviewable on a reasonableness standard. ” The parties agree, as do I, that the standard of review in this case is therefore reasonableness.

[13] In *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 55, the Supreme Court of Canada explains what is required of a court reviewing on the reasonableness standard of review:

> [55] In reasonableness review, the reviewing court is concerned mostly with “the existence of justification, transparency and intelligibility within the decision-making process” and with determining “whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir*, at para. 47; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 14). When applied to a statutory interpretation exercise, reasonableness review recognizes that the delegated decision maker is better situated to understand the policy concerns and context needed to resolve any ambiguities in the statute (*McLean*, at para. 33). Reviewing courts must also refrain from reweighing and reassessing the evidence considered by the decision maker (*Khosa*, at para. 64). At its core, reasonableness review recognizes the legitimacy of multiple possible outcomes, even where they are not the court’s preferred solution.

[14] In relation to the second issue of whether the RPD made its findings in absence of reliable evidence a material part of the RPD’s Decision is its finding that the Applicant was not credible. The Applicant’s credibility is a central issue. It is therefore worthwhile to set out the law in this respect, which was recently summarized in *Khakimov v Canada*, 2017 FC 18 at para 23:

> [23] …To begin with, the RPD has broad discretion to prefer certain evidence over other evidence and to determine the weight to be assigned to the evidence it accepts: *Medarovik v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 61 at para 16; *Pushpanathan v Canada (Minister of Citizenship and*

> *Immigration)*, 2002 FCT 867 at para 68. The Federal Court of Appeal has stated that findings of fact and determinations of credibility fall within the heartland of the expertise of the RPD: *Giron v Canada (Minister of Employment and Immigration)* (1992), 143 NR 238 (FCA) [*Giron*]. The RPD is recognized to have expertise in assessing refugee claims and is authorized by statute to apply its specialized knowledge: *Chen v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 805 at para 10. And see *Siad v Canada (Secretary of State)*, [1997] 1 FC 608 at para 24 (FCA), where the Federal Court of Appeal said that the RPD:
>
> > … is uniquely situated to assess the credibility of a refugee claimant; credibility determinations, which lie within "the heartland of the discretion of triers of fact", are entitled to considerable deference upon judicial review and cannot be overturned unless they are perverse, capricious or made without regard to the evidence.

[15] The Supreme Court of Canada also instructs that judicial review is not a line-by-line treasure hunt for errors; the decision is to be approached as an organic whole: *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34. Further, a reviewing court must determine whether the decision, viewed as a whole in the context of the record, is reasonable: *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65; see also *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

VI. Relevant legislation and jurisprudence

[16] Section 98 of the IRPA provides:

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

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

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

[18] The Federal Court of Appeal confirms that the Minister merely has to show, on a burden *less* than the civil standard of balance of probabilities, that there are serious reasons to consider the applicant committed the alleged acts. In *Zrig v Canada (Minister of Citizenship and Immigration)*, 2003 FCA 178 [*Zrig*] Nadon JA confirms the following principle at para 56:

> [56] The Minister does not have to prove the respondent's guilt. He merely has to show - and the burden of proof resting on him is "<u>less than the balance of probabilities</u>"-<u>that there are serious reasons for considering that the respondent is guilty</u>.
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> [Emphasis added.]

[19] As to what constitutes a "serious" crime, the Supreme Court of Canada in *Febles v Canada (Minister of Citizenship and Immigration)*, 2014 SCC 68, per McLachlin CJ [*Febles*], instructs at para 62:

> [62] The Federal Court of Appeal in *Chan v. Canada (Minister of Citizenship and Immigration)*, [2000] 4 F.C. 390 (C.A.), and *Jayasekara* has taken the view that where a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada, the crime will generally be considered serious. I agree. However, this generalization should not be understood as a rigid presumption that is impossible to rebut. Where a provision of the Canadian *Criminal Code*, R.S.C. 1985, c. C-46, has a large sentencing range, the upper end being ten years or more and the lower end being quite low, a claimant whose crime would fall at the less serious end of the range in Canada should not be presumptively excluded Article 1F(*b*) is designed to exclude only those whose crimes are serious. The UNHCR has suggested that a presumption of serious crime might be raised by evidence of commission of any of the following offences: homicide, rape, child molesting, wounding, arson, drugs trafficking, and armed robbery (Goodwin-Gill, at p. 179). These are good examples of crimes that are sufficiently serious to presumptively warrant exclusion from refugee protection. However, as indicated, the presumption may be rebutted in a particular case. While consideration of whether a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada is a useful guideline, and crimes attracting a maximum sentence of ten years or more in Canada will generally be sufficiently serious to warrant exclusion, the ten-year rule should not be applied in a mechanistic, decontextualized, or unjust manner.
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> [Emphasis added.]

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

> [44] I believe there is a consensus among the courts that the interpretation of the exclusion clause in Article 1F(*b*) of the Convention, as regards the seriousness of a crime, requires an evaluation of the elements of the crime, the mode of prosecution, the penalty prescribed, the facts and the mitigating and aggravating circumstances underlying the conviction: see *S v. Refugee Status Appeals Authority*, (N.Z. C.A.), *supra*; *S and Others v. Secretary of*

> *State for the Home Department*, [2006] EWCA Civ 1157 (Royal Courts of Justice, England); *Miguel-Miguel v. Gonzales*, no. 05-15900, (U.S. Ct of Appeal, 9th circuit), August 29, 2007, at pages 10856 and 10858. In other words, whatever presumption of seriousness may attach to a crime internationally or under the legislation of the receiving state, that presumption may be rebutted by reference to the above factors.
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> [Emphasis added.]

VII. Parties' positions and analysis

A. *Issue 1–Did the Member err in his assessment of the withdrawal of the Applicant's charge?*

(1) Were the crimes alleged "serious" in relation to the test of "serious non-political crime"?

[21] The Applicant submits the RPD failed to properly assess weigh the withdrawn and dismissed charges. He relied on *Jayasekara* at para 44 which outlines five factors used to evaluate whether the crimes alleged are "serious". The Applicant relied on *Arevalo Pineda v Canada (Minister of Citizenship and Immigration)*, 2010 FC 454, per Gauthier J [*Arevalo Pineda*], and on Justice Roy's decision in *Victor v Canada (Public Safety and Emergency Preparedness)*, 2013 FC 979, at para 67: "[T]he other factors set out in *Jayasekara*, are therefore also important; the sole fact that someone's behavior outside Canada would constitute a crime punishable by ten years' imprisonment in Canada clearly does not suffice."

[22] In this case, the Applicant says the RPD erred by considering only one *Jayasekara* factor, namely the elements of the crime, before concluding the crimes alleged were "serious." In my respectful view, there is no merit to this argument. The RPD not only quoted the Supreme Court

of Canada's decision in *Febles*, but set out the factors enumerated by the Federal Court of Appeal in *Jayasekara.* As already noted I am not persuaded there is a special formula or form of words required by the RPD to evidence its consideration of the relevant tests of "seriousness." I am not persuaded the following assessment by the RPD is either incorrect or unreasonable:

> *Has the Claimant Committed a Serious Crime?*
>
> The US charges of pandering, prostitution, and human trafficking if committed in Canada, the claimant would be subject to Section 286.2(1) of the *Criminal Code of Canada*, namely material benefit from sexual services. The claimant could also be subject to Sections 279.01(1) of the *Criminal Code of Canada*, namely, trafficking in persons. If found guilty of the said offenses it would appear that they were not motivated for any political goal or purpose. As such, the Board finds that the claimant's criminality (if committed) in the US constitutes multiple serious non-political crimes.
>
> In the Board's view, the crime of receiving monies from prostitution and trafficking is one of the most serious criminal acts to be committed in any society or jurisdiction....
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> In respect to factors identified in Jayasekara, the elements of the said crimes were violent, degrading and inhumane to its victims and society as a whole....

(2) Did the RPD err in its assessment of the withdrawal and dismissal of the charges?

[23] The Applicant's Maryland charges were voluntarily withdrawn by the State entering a plea of *nolle prosequi*. The Virginia charges were dismissed for reasons unknown. We do not know why either of these events took place; indeed the Applicant claimed he did not know why the charges against him were not proceeded with. The Applicant says the RPD failed to adequately consider these factors. Although the Applicant concedes that a criminal conviction is not required to establish serious reasons (*Arevalo Pineda* at paras 23–25; *Zrig* at para 82), he submits that the withdrawal of a charge points to the absence of a penalty and signifies the

lack of prosecution. The Applicant notes the Minister's representative pointed to this in submitting that there was not enough evidence to establish the burden for exclusion.

[24] In *Arevalo Pineda*, this Court found the RPD erred in finding a dismissed charge led to the exclusion of the claimant. When considering the value of charges and warrants laid in countries with similar justice systems, such as the United States, the Court held at paras 30, 31:

> [30] Naturally, for such premise to apply, the RPD must first be satisfied that the issuing authority does respect the rule of law, that is, for example, that it is not dealing with a country known for the filing of false charges as a means of harassment or intimidation.
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> [31] But, by the same token, it also means that the value of the charges laid in a country like the United States is greatly diminished when such charges are dismissed. In fact, I would think that in such a case, the dismissal of the charges is *prima facie* evidence that those crimes were not committed by the refugee claimant and that the Minister cannot simply rely on the laying of charges to meet his burden of proof. The Minister must either bring credible and trustworthy evidence of the commission of the crime *per se* or show that in the particular circumstances of the case, the dismissal should not be conclusive because it does not affect the basic foundation on which the charges were laid. Again, for example, this could be achieved by establishing that crucial evidence on the basis of which the charges were laid was excluded for a reason that does not bind the RPD and does not totally destroy its probative value.

[25] The Applicant submits that to successfully rely on a withdrawn charge as evidence of serious reasons for the existence of a non-political crime, there must be further evidence of the circumstances underlying the charges. He says that withdrawn charges cannot be used, in and of themselves, as evidence of an individual's criminality: *Sittampalam v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 326, per Linden JA [*Sittampalam*] at para 50. In

Arevalo Pineda, the main evidence relied upon in addition to the charges was the complainant's statement, which he was subsequently recanted. This was not considered to be sufficient evidence to outweigh the fact of dismissal of the charge: *Arevalo Pineda* at paras 32–33.

[26] The Applicant submits the RPD erred in failing to distinguish between the evidence underlying a charge and the fact that the Applicant was charged. In *Veerasingam v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1661, per Snider J [*Veerasingam*], the IAD looked only at a police report to arrive at its conclusion in the face of a withdrawn charge. This Court stated in *Veerasingam* at para 3 that: "a distinction must be drawn between the reliance on the fact that somebody has been charged with a criminal offence, and reliance on the evidence that underlies the charge in question." The Applicant also submits the RPD unreasonably relied solely upon newspaper articles and a police report. This, he says, may be distinguished from a case such as *Thuraisingam v Canada (Minister of Citizenship and Immigration)*, 2004 FC 607, per Mactavish J, where, despite the lack of criminal charges, the evidence of police affidavits, witness transcripts, and wiretapped phone conversations were considered strong enough to give rise to serious reasons. In contrast to this evidence, submitted newspaper articles were given very little evidentiary weight (para 39).

[27] In response, the Respondent notes *Zrig*, where the Federal Court of Appeal recognizes a person does not need to be criminally convicted in a foreign country to be excluded under Article 1F(b), per Décary JA, concurring at para 129:

> [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.

[28] The Respondent notes the Federal Court of Appeal has confirmed that in certain situations, a warrant, combined with other evidence, may be sufficient to meet the threshold of "serious reasons for considering": *Xie v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 250, per Pelletier JA [*Xie*] at para 23.

[29] In this connection, in *Qazi v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1204, per von Finckenstein J, this Court held that the Board does not normally have to inquire into the guilt or innocence of an applicant charged abroad. Further, the existence of a valid warrant issued by a foreign country, in the absence of allegations that the charges are trumped up, satisfies the "serious reasons for considering." The Court concluded that in some circumstances, the existence of a warrant coupled with a lack of credibility of the Applicant could satisfy the serious issue test, at paras 18–19 and 26:

> [18] The Board has to satisfy itself that there are "serious reasons for considering that [the Applicant] has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee". Normally the Board does not inquire into the guilt or innocence of an applicant charged abroad (see *Moreno v. Canada (M.E.I.)* [1994] 1 F.C. 298). <u>The existence of a valid warrant issued by a foreign country would, in the absence of allegations that the charges are trumped up, satisfy the "serious reasons for considering" requirement.</u>
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> [19] When, however, as in this case, the Applicant alleges that the charges are fabricated, the Board has to go further. It has to establish whether to accept the allegations or not, i.e. whether the Applicant is credible. If he is found to be credible, then the mere existence of a warrant may not be enough.

> …
>
> [26] Not having found the Applicant credible, the Board could legitimately disregard his allegation that the charges were fabricated, given that no other evidence was provided. Thus the existence of a warrant (found to be authentic) coupled with a lack of credibility of the Applicant (thus undermining any allegation of fabricated charges) were sufficient to satisfy the requirement of "serious reasons for considering that [the Applicant] has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee".
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> [Emphasis added.]

[30] In my respectful view, the dispute on this point comes down to assessing the weight given to evidence before the RPD. Before turning to that evidence, I note the RPD has broad discretion to prefer certain evidence over other evidence. The RPD has the duty to determine the weight assigned to the evidence it accepts. In these respects, the RPD is entitled to deference as fact finder. The Federal Court of Appeal tells us that findings of fact and determinations of credibility fall within the heartland of the expertise of the RPD: *Giron*. Moreover, the jurisprudence has determined that the RPD has expertise in assessing refugee claims and is authorized by statute to apply its specialized knowledge in matters before it. In addition, the RPD, by subsection 170(g) of IRPA, is not bound by any legal or technical rules of evidence.

[31] After the charges were withdrawn and dismissed in Maryland and Virginia, the underlying court records were destroyed.

[32] However, the RPD had before it several documents over and above the charges, that were obtained from the Virginia Police Department. The first is a copy of the Incident Report dated June 24, 2009, authored by an officer [Officer]. The RPD also had a copy of a Supplementary

Incident Report dated November 11, 2009, with what appears to be the signature of the same Officer. Further, it had a copy of a further Supplementary Incident Report, dated December 30, 2009, signed by the same Officer, and also signed as having been reviewed by his or her Supervisor. These reports relate to the Applicant's pandering charges, i.e., receiving money or valuables from a subject engaged in prostitution, which also refer to the Applicant facing pending charges in Maryland. The thrust of the police reports is that the Applicant was acting as a pimp for prostitutes; hence he was charged with and arrested for pandering. These reports contained considerable detail of his activities.

[33] Moreover, the Applicant gave evidence before the RPD. The Applicant had the assistance of counsel. The RPD found the Applicant was neither credible nor reliable. The RPD, having heard the Applicant, concluded:

> Further, it is important to note that the Board did not find the claimant to be a credible or reliable witness. The Board in a number of occasions did not find the claimant's testimony to be truthful. For example, the claimant testified that Cpl Detective Dan Fitzgerald (one of the senior officers in charge of the investigation) had a personal vendetta against him and was pursuing him. The claimant maintained that Detective Fitzgerald tried to coerce and threatened him to plead guilty to the charges (even though he had nothing to do with the prostitution ring) because he had a relationship with Detective Fitzgerald's step-daughter and the step-daughter wanted to marry him. Nevertheless, the claimant and his lawyer did not inform the police force, the persecutors or the court about Detective Fitzgerald's actions which amounted to obstruction of justice and have resulted in criminal charges against the claimant being dropped.

[34] On balance, while the onus is on the Applicant, I am not persuaded that the RPD acted unreasonably in relying upon police records from the Virginia Police Department in coming to its conclusions with respect to the withdrawn and dismissed charges, particularly given the

Applicant could not say why the charges were withdrawn and dismissed. While the Applicant relied upon Sittampalam, it is clearly distinguishable because there the RPD was criticized for relying on charges only, while in this case, the RPD not only relied on the charges, but also detailed supporting police reports. In addition, the RPD had the opportunity to question the Applicant on the core issues and assess his credibility and reliability.

[35] In my determination, it is relevant that there was no evidence that a trial or judicial assessment on the merits of these charges took place in either Maryland or Virginia; that is, no court of law made any kind of determination on the merits of the charges one way or the other. In this connection, the Applicant's evidence was that he did not know why the charges were not proceeded with, which testimony was rejected by the RPD. I agree that if the charges were dismissed after a trial or judicial assessment in the US on the merits, such a dismissal would be *prima facie* evidence those crimes were not committed by the refugee claimant. That did not happen here. In all the circumstances I am not persuaded the RPD acted unreasonably in relying on the charges, in addition to the police reports, together with the testimony of the Applicant himself in coming to its conclusions.

B. *Issue 2–Did the Member err in making findings in absence of reliable evidence?*

[36] The Applicant submits it was unreasonable for the RPD to presume the newspapers and police reports are reliable for the truth of their contents to determine exclusion. The RPD erred because these documents do not provide credible support for the RPD's claims and should not be given serious weight when they claim opposite of the Applicant's sworn testimony.

[37] Dealing with this point, I agree sworn testimony is presumed to be true, unless there is reason to doubt its truthfulness: *Maldonado v Canada* (1979), 31 NR 34 (FCA), per Heald J. As stated in *Hilo v Canada (Minister of Employment and Immigration*) (1991), 130 NR 236 (CA), per Heald J, the RPD is under a duty to give its reasons in clear and unmistakeable terms when casting doubt on the claimant's credibility.

[38] However, contrary to what the Applicant alleges, in this case the RPD gave clear reasons for doubting the Applicant. First, the Applicant testified a US detective had a personal vendetta against him because the Applicant was in a relationship with his step-daughter. The RPD found this questionable given the fact neither the Applicant nor his US counsel brought this to the attention of the relevant police force or Court since such conduct would amount to obstruction of justice, putting the charges at risk. Secondly, the Applicant testified the alleged prostitutes fabricated the charges against him for the purpose of negotiating a plea bargain with the police, because they believed the Applicant was wealthy. However, the RPD found this raised credibility concerns, given the Applicant himself only reported income of $27,988. With respect, given this, the Applicant significantly overreaches in alleging there was no explanation for the RPD's finding that parts of the Applicant's testimony did not have "a ring of truth to it", and did "not make sense and simply is not credible." To this one might add the Applicant's argument that he did not know why the charges were dismissed or withdrawn given the RPD's rejection of this testimony.

[39] The Applicant also submits the RPD failed to explain why the newspaper articles and police reports were more persuasive than the Applicant's testimony. There is no merit to this

submission. As already discussed, the RPD found the Applicant was neither credible nor reliable. Both of these findings were open to it within its fact-finding jurisdiction and expertise, which the transcript reasonably supports.

[40] As indicated at the hearing, I am not inclined to accept or give much weight to what was reported in the newspapers in this particular case. That said, I certainly do not say the RPD may not rely on newspaper articles, which it often does and is entitled to do in matters before it. Generally, this is a matter for the RPD to decide. In assessing this case for reasonableness on judicial review, particularly in terms of its defensibility on the facts, I have given the newspaper articles little weight. That said, the RPD's decision is reasonable, because it is defensible on the facts and law, even without the newspaper evidence.

[41] The Respondent correctly observed that the Applicant's own testimony corroborated many aspects of the police reports. For example, the Applicant knew relevant women were prostitutes, he drove a prostitute around and waited outside places she went, he knew of the website used to link the prostitutes to customers, and he knew how the prostitution ring operated. He testified he was not the ringleader and instead pointed to one of the prostitutes he knew. As noted, the RPD found his evidence unreliable and not credible.

[42] I have already discussed the police reports, which the Applicant also raised under this rubric. To recall, I determined on the facts of this case that the RPD acted reasonably in considering the police reports in coming to its conclusions. In doing so, the RPD exercised

its fact-finding expertise, which is within the heartland of its jurisdiction. The RPD is entitled to considerable deference in weighing and assessing evidence as it was doing here.

C. *Issue 3–Did the Member err in his application of the standard of proof for exclusion under 1F(b)?*

[43] The Applicant submits the RPD erred in its application of the standard of proof for exclusion under 1F(b). With respect, there is no merit to this argument. The RPD put it this way:

> The Board acknowledges that in a court of law these items may be at best secondary evidence and it certainly does not establish that the claimant is guilty of the criminal acts he was alleged to have committed in the US. But it must be emphasized that is the evidentiary standard/test to determine if a claimant will be excluded is not the test in a civil court (on a balance of probabilities) and certainly not the standard used in a criminal court (beyond a reasonable doubt). The test is lower regarding excluding a claimant from making a refugee protection claim in Canada. According to jurisprudence the burden is merely to demonstrate serious reasons for considering that a claimant committed such acts.

[44] The test for establishing exclusion under lF(b) is to demonstrate "serious reasons for considering" the claimant committed criminal acts: *Zrig* at para 56. Indeed this test is set out in Article 1F(b) of the *Refugee Convention* itself. In *Mohamad Jawad v Canada (Minister of Citizenship and Immigration)*, 2012 FC 232, Mosley J held at para 27:

> [27] The test of serious reasons for considering that a refugee claimant has committed a serious non-political offence within the scope of Article 1 F (b) is similar to the evidentiary standard of reasonable grounds to believe. It is more than mere suspicion but less than the civil standard of a balance of probabilities: *Ramirez v Canada (Minister of Employment and Immigration)*, [1992] 2 FC 306 (CA) at para 4-6. The test requires compelling and credible information: *Mugeresa v Canada (Minister of Employment and Immigration)*, 2005 SCC 40 at para 114.

[45] The fact the Minister's representative said his burden was not met did not and could not bind the RPD, which is an independent decision-maker. It is settled that the RPD is not bound to accept the position of the Minister, or for that matter, the position of any party in any case. Instead, the RPD is required to carry out its statutory duty of applying the IRPA for itself: *Ospina Velasquez v Canada (Minister of Citizenship and Immigration)*, 2013 FC 273, per Gleason J [*Ospina Velasquez*] at para 15*:*

> [15] Second, and more fundamentally, the Board is not bound to accept the position of a party in any case and, instead, is required to carry out its statutory duty of applying the IRPA. Under the Act, the RPD's role is an inquisitorial one (see e.g. Board Chairperson's Guideline 7 Concerning Preparation and Conduct of a Hearing in the Refugee Protection Division at ss 2.1 and 2.2). Accordingly, it was required to determine whether section 98 of the Act was applicable and was not required to agree with the position advanced by the Minister (although it did consider the fact of that position as a factor in its determination). Thus, the second argument advanced by the applicant is without merit.

VIII. Conclusion

[46] For the reasons set out above, I have concluded the RPD acted reasonably in excluding the Applicant. It applied the test of "serious reasons for considering." Its reliance on the police reports and credibility findings were reasonable. It correctly and reasonably assessed the seriousness of the non-political crimes at issue. Standing back and assessing the RPD's Decision as a whole, it exhibits justification, transparency, and intelligibility within its decision-making process. Respectfully, the Decision falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and law, pursuant to *Dunsmuir* at para 47. Therefore judicial review must be dismissed.

IX. Certified question

[47] Neither party submitted a question of general importance to certify, and none arises.

JUDGMENT in IMM-2494-18

THIS COURT'S JUDGMENT is that judicial review is dismissed, no question is certified, and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2494-18
STYLE OF CAUSE:	ARASH GHULAM ABBAS v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	DECEMBER 6, 2018
JUDGMENT AND REASONS:	BROWN J.
DATED:	JANUARY 7, 2019

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