Date: March 27, 2009

Docket: IMM-1332-08

Citation: 2009 FC 324

Ottawa, Ontario, March 27, 2009

PRESENT: THE CHIEF JUSTICE

BETWEEN:

JEAN TOUFIC CHAWAH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant claims refugee status as a victim of Hezbollah and Syrian agents of persecution. He was allegedly targeted in 1998 and 2000 because of his membership in the Lebanese Forces.

[2] The member of the Refugee Protection Division (the member) considered the three exclusion provisions of Article 1F(a),(b) and (c) of the *Refugee Convention*. He found that the Minister did not establish serious reasons for considering the applicant had committed crimes against humanity or acts contrary to the principles of the United Nations.

[3] The member determined, however, that the applicant was excluded under Article 1F(b) for having committed a serious non-political crime in France prior to his seeking refuge in Canada. In 1986, the applicant was sentenced to six years imprisonment in relation to his conviction for the possession of 500 grams of heroin.

[4] The member made no inclusion analysis.

[5] In his reasons, the member suggested that Article 1F(b) would not apply to a refugee claimant who had served his sentence for the serious non-political crime. When he wrote his reasons, there was some debate in the Federal Courts concerning this issue.

[6] Subsequently, however, the issue has been clarified. It can now be said that the member's view was an error in law.

[7] In *Jayasekara v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 238 at ¶ 16, Deputy Judge Barry Strayer ruled that persons who served their sentence prior to their seeking refuge in Canada were still subject to the exclusion provision under Article 1F(b). In his decision, he reviewed two judgments of the Federal Court of Appeal which could have been interpreted as reaching conflicting conclusions: *Chan v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1180 (C.A.)(QL), and *Zrig v. Canada (Minister of Citizenship and Immigration)*, 2003 FCA 178.

[8] On appeal, *Jayasekara v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404 at ¶ 57, the decision of Deputy Judge Strayer was confirmed.

[9] In his analysis on behalf of the unanimous three-person court, Justice Letourneau noted at ¶ 44 that the consensus among courts in various jurisdictions concerning the interpretation of Article 1F(b) required " … 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."

[10] Justice Letourneau also listed the factors that had been considered by the Refugee Protection Board in *Jayasekara* at ¶ 55 of his reasons:

> a) the gravity of the crimes (trafficking in opium and criminal possession of marijuana) under New York legislation which, even for a first offender, resulted in a jail term as well as a five year probation period;
> b) the sentence imposed by the New York court;
> c) the facts underlying the conviction, namely the nature of the substance trafficked and possessed, a traffic of opium in three parts, the quantity of drugs possessed and trafficked;
> d) the finding of this Court in *Chan* that a crime is a serious non political crime if a maximum sentence of ten years or more could have been imposed if the crime had been committed in Canada;
> e) the objective gravity of a crime of trafficking in opium in Canada which carries a possible penalty of life imprisonment; and
> f) the fact that the appellant violated his probation order by failing to report three times to his probation officer and eventually absconded.

[11] The applicant in this proceeding did not deny his conviction in his testimony before the member. He claimed that he was a victim of circumstances and was in the wrong place at the

wrong time. The conviction was brought to the attention of Canadian officials by their counterparts in the United States and France in 2007, after the refugee hearing had begun. The applicant did not disclose the conviction in response to the relevant queries in his personal information form.

[12] Also, his evidence was that he completed his sentence. The member appears, perhaps unreasonably, to have rejected this testimony. However, in the light of *Jayasekara*, whether the applicant's sentence was completed or not is now a moot issue, at least in the sense that it may not be in and of itself determinative of the application of Article 1F(b).

[13] For these reasons, I have concluded that the member's decision will be set aside. A new refugee hearing will be ordered which will be limited to a redetermination of the issue under Article 1F(b), in a manner consistent with the reasons for judgment in *Jayasekara*. Also, this judgment may be relied upon by the Minister as his notice to the applicant that Article 1F(b) will be in issue in the rehearing. The Minister's notice is a requirement under section 25 of the *Immigration and Refugee Protection Division Rules*, SRO/2002-228, and was not sent to the applicant concerning the Article 1F(b) exclusion in the first hearing.

[14] Parenthetically, if it were necessary to decide the issue, I would have concluded that the member breached procedural fairness. He created the apprehension of having predetermined the issue of a possible adjournment after providing the applicant with three weeks to find new counsel to attend the fourth day of the hearing. He insisted that the new counsel would be

required to proceed on that day. The applicant's previous counsel withdrew from the file on very short notice after participating in the first three days of the hearing in 2006 and 2007. It is not surprising that the applicant was unable to find new counsel to accept the brief given the complexity of the file, the short timeframe and the admonition that no further adjournment was to be sought by the new counsel. The applicant represented himself on the last day of the hearing when the evidence focussed principally on his conviction and sentence. It is not apparent from the transcript that the applicant understood the legal implications of Article 1F(b).

[15] Neither parties suggested the certification of a serious question and none will be certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is granted.

2. The decision, dated February 21, 2008, of the Refugee Protection Division is set aside but only with respect to the finding that the applicant was excluded under Article 1F(b).

3. The matter is referred for redetermination by a different member. The redetermination will be limited to the issue under Article 1F(b), in a manner consistent with the reasons for judgment in *Jayasekara v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404.

"Allan Lutfy"
Chief Justice

FEDERAL COURT

SOLICITORS OF RECORD

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