Federal Court  Cour fédérale

Date: 20090727

Docket: IMM-4901-08

Citation: 2009 FC 767

Ottawa, Ontario, July 27, 2009

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

FABIO SOLIS BETANCOUR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72 (1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of a decision of the Refugee Division of the Immigration and Refugee Board (Board), dated October 15, 2008 (Decision) refusing the Applicant's application to be deemed a Convention refugee or person in need of protection under sections 96 and 97 of the Act.

BACKGROUND

[2] The Applicant is a citizen of Colombia. He is married and has two children.

[3] The Applicant alleges that, in 1996, the guerrillas from the Fuerzas Armadas Revolucionarias de Colombia (FARC) began to call at his workshop to collect $100 US monthly. In the first three months of 1998, the Applicant did not pay three months in a row and three white men came to his workshop and told him that they needed him to do a welding job in the harbour. He was told that the job was very easy and that he was to fix a large door at a warehouse after the men had finished their shift. They told him that they would pay him 250,000 pesos and that they would bring him to and from the warehouse in their car.

[4] The Applicant was told to go to a billiard room close to his house to meet with the white men. When he went, he was invited to drink a beer and they told him that they were guerrillas and that he owed them three months of money, but that if he did the welding job everything would be even. In addition, he would be paid 250,000 pesos for the job.

[5] The Applicant and one of his employees attended to do the welding job. The work was done in 30 minutes and the Applicant waited for his pay and for the car to take him home.

[6] While he was waiting, a police car approached him and the police asked him what he was doing. He explained the job he had been doing and that his ride hadn't come. He said he would have to leave his equipment and come back in the morning for it. The police interrogated the security guards at the warehouse and they told the police that the Applicant and his partner had been working on the warehouse door. The Applicant was arrested along with his partner and five other men.

[7] Before the Applicant made a statement, one of the three white men who originally contacted him told him that he could not say anything about the FARC and that they would pay and arrange for a lawyer to act for him. He was told that if he opened his mouth he would "know what [would] happen." The Applicant interpreted this to mean that his family would be killed.

[8] After 15 days, the Applicant was told that he would have to plead guilty in order to leave the jail quickly. When he was sentenced, the judge told him that everything was going to be okay and he was released on house arrest and given 100 pesos by the white men and told to have a "nice weekend" with his family. The Applicant was sentenced to two years house arrest and 36 months probation. A 250,000 pesos fine was paid by the white men.

[9] The Applicant alleges that he was forced to continue working for the FARC as a welder making bullet-proof cars. He was paid sometimes, but he knew he had to do what they said or they would kill him and his family.

[10] In 1998, the FARC asked the Applicant to go with one other person to a jail with some dynamite in his equipment and to plant it in the right place. The Applicant knew some of the prisoners there. The Applicant believed that someone at the jail would call him to do a job inside the jail and would allow him to enter and plant the dynamite. He says he knew that he would either be killed or that he might kill someone, so he refused to do the work. Through the news, the Applicant heard that some explosives had been found at that jail.

[11] Near the end of 1998, the Applicant found the letters “A.U.C.” painted on the doors of his workshop. He knew this stood for the Auto Defensas Unidas de Colombia (ADUC), which is a paramilitary group that was established by members of the military, politicians, civilians, industrialists and cattlemen in order to exterminate the guerrillas and anyone who was connected with them.

[12] The Applicant immediately painted over the letter on his doors. He says he knew that the ADUC was trying to let him know that they suspected he was involved with the FARC. He thought the ADUC were going to kill him, but felt he had no choice but to go on working with the FARC. After the letters appeared on the Applicant’s workshop doors, FARC no longer appeared at his workshop. They told him they would protect him if someone tried to harass him.

[13] The Applicant decided to go to Venezuela and made up a story that his father was in Venezuela and was very ill and needed him at his side. The Applicant arrived in Venezuela on December 8, 2000. In 2001, while in Venezuela, the Applicant’s youngest son (who was 12 years

old at the time) disappeared. The Applicant's wife called him and told him that his son had disappeared. The guerrillas called the Applicant's wife and asked why the Applicant was not looking for his son. They asked for 2000 US dollars for his return and the Applicant's wife told them that she did not have the money to pay them. The wife was asked where the Applicant was and she told them that he was in Venezuela.

[14] The Applicant's son was missing for one month, but he turned up in "rough shape." The Applicant stayed in Venezuela until December 5, 2004, because he knew he could not return home. He made his way to the United States and arrived there on January 3, 2005. He entered Canada by foot at White Rock, British Columbia on June 8, 2006 and filed for refugee protection on June 28, 2006 in Vancouver, British Columbia.

[15] The Applicant alleges that several of his employees have fled Colombia and others have been murdered by paramilitaries for being suspected helpers of the FARC.

DECISION UNDER REVIEW

[16] The Board found that the Applicant was excluded under Article 1F(b) of the *Convention relating to the Status of Refugees*, and Section 98 of the Act.

[17] The Applicant's finger prints were sent to authorities in the United States to check if he had a criminal record. It was determined that he had an outstanding warrant for his arrest in connection

with an investigation into his being in possession of cocaine with a intent to sell the substance. The Applicant was questioned about his involvement with cocaine and, in oral evidence, he stated that he did not know that there was a warrant out for his arrest in the United States.

[18] The Applicant did not deny that he had an association with people who dealt with cocaine and testified that, while he was living in Tampa, Florida, he had worked as a painter for someone who was a cocaine addict. The Applicant testified that when that person went away, he would hide the man's cocaine and hold it for him so that the man's wife could not use it. The Applicant insists that he never sold cocaine and only looked after it for his boss.

[19] The Applicant has no previous convictions, but he does have a history of arrests in Colombia and the United States. In Colombia, the arrests were for theft and driving without a license. The first two violations in the United States were dropped but there is an active warrant out for the Applicant in the United States regarding the trafficking of cocaine. The Applicant disclosed all of the arrests and jail time in Colombia in his interview with CIC and in his PIF. He admitted orally to the first two arrests in the United States and explained how they came about and why the charges were dropped and repeated his assertion that he had no idea about the alleged trafficking or the warrant before he entered Canada.

[20] The Board pointed out that for a finding under Article 1F(b) of the Convention, there must be more than a mere suspicion that the Applicant committed a serious non-political crime, but the evidentiary standard of proof is less than a balance of probabilities.

[21] The Board found that, regardless of the absence of concrete evidence and specific information regarding the outstanding United States warrant for trafficking cocaine in the Applicant's name, the Applicant had testified to having access to, and handling, cocaine. The outstanding warrant and the incident report, together with the Applicant's testimony, were sufficient, in the Board's view, to establish a "serious reason to believe that the principal claimant did traffic cocaine."

ISSUES

[22] The Applicant submits the following issue on this application:

1) Did the Board err in its finding that there were "serious reasons to consider" that the Applicant, prior to his arrival in Canada, committed the serious non-political offence of trafficking in narcotics?

STATUTORY PROVISIONS

[23] The following provisions of the Act are applicable in these proceedings:

Convention refugee	**Définition de « réfugié »**
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular	**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa

social group or political opinion,

nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

(*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

b) soit, si elle n’a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Person in need of protection

Personne à protéger

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n’a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s’il y a des motifs sérieux de le croire, d’être soumise à la torture au sens de l’article premier de la Convention contre la torture;

(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Person in need of protection

Personne à protéger

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

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.

[24] The following provision of the Convention is applicable in this proceeding:

1 F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that.	1F. Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser :
…	…
(b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;	*b*) Qu'elles ont commis un crime grave de droit commun en dehors du pays d'accueil avant d'y être admises comme réfugiés;

STANDARD OF REVIEW

[25] The Respondent and the Applicant agree that the Board's finding on "serious reasons to consider" is a question of mixed fact and law and requires a standard of review of reasonableness: *Jayasekara v. Canada (Minister of Citizenship and Immigration)* 2008 FCA 404.

[26] In *Dunsmuir v. New Brunswick* 2008 SCC 9 (*Dunsmuir*) the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review": *Dunsmuir* at paragraph 44. Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of "reasonableness" review.

[27] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[28] Thus, in light of the Supreme Court of Canada's decision in *Dunsmuir* and the previous jurisprudence of this Court, I find the standard of review applicable to the issue on this application to be reasonableness. When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir* at paragraph 47. Put another way, the Court should only intervene if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

ARGUMENTS

The Applicant

[29] The Applicant does not take issue with the fact that the alleged subject offence is non-political and, if proved on the "serious reasons to consider" test, would warrant exclusion under Article 1F(b) of the Convention. The Applicant, however, contends that there is not enough

evidence to meet the “serious reasons to consider” test and that, for this reason, the Board’s Decision was unreasonable.

[30] The Applicant submits that the onus is on the Minister to establish an exclusionary claim and that the standard of evidence to be applied to this threshold test is higher than a mere suspicion but lower than proof on the civil balance of probabilities: *Lai v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 584 (F.C.A.) at paragraph 34 and *Zrig v. Canada (Minister of Citizenship and Immigration)*, [2003] 3 F.C. 761 (F.C.A.) at paragraph 174.

[31] The Applicant highlights the following relevant testimony from the record:

> Q Can you summarize your arrest record in the United States?
>
> A Yes. Well, first of all, the exact dates, because of the emotional state that I was in, I don’t recall them precisely, but the first time I was detained in the United States was for driving without a license. Three months later, because of the bail money that one person said that I hadn’t returned, said that I went into his house to attack him and to rob him.
>
> I was in jail for 20 days because when I was before the judge, they read the accusation and he said that, according to those charges, I could be incarcerated or guilty for about 20 years in jail sentence. 20 days went through and before I had the next appearance before the judge, they told me—they called me and they told me that I could leave freely, that I had nothing there—that I have nothing to do there, that I could leave the place.
> …
>
> A When I came here and I requested refuge here, because I found out that I had a warrant for my arrest in the United States for possession. It was three or four grams of cocaine. When I went to fill out the papers, the forms, there then I knew that they were looking for me because I found out here—I found that out here. So what I know there is I know that they’re looking for me. I cannot say no, but I cannot say that I was arrested because I was never arrested for possession.

PRESIDING MEMBER: Okay. That explains it. How did you find out that there was a warrant?

A I found out there because the Immigration officials detained me and they told me—and I was asking why was I detained and they told me that I was detained for that and that I was being sought for that offence. At that time, they did not ask me for much details—for many details. They just asked me about it. And in Tampa, I was going around with a person who we stayed together.

PRESIDING MEMBER: Okay.

A And he's the person who's addicted, liked to consume cocaine. So I admitted—I may have admitted that I had manipulated the cocaine for the reason that they were looking for me, because what did my boss do, he would buy his—whatever he needed to consume for three days and when we would leave work, he would ask me to go put it away because his wife is also—she also consumes. So when the officer read those charges, so then I accept that I have touched the drug because it could have been my own boss who involved me, but from then on I don't know any more details.

…

PRESIDING MEMBER: Okay. You need to be a little more clear, because we're spending a lot of time we don't need to use. Okay. Let's start here. Just answer this question. Before you left the United States, do you recall an event where the police asked you whether you were in possession or accused you of being in possession of cocaine?

A No.

PRESIDING MEMBER: Okay. All right. And the first time you found out about the arrest warrant was when you were arrested in Canada.

A Yes.

PRESIDING MEMBER: But you do—but you say you were working with an addict, that your boss was an addict.

A Yes.

PRESIDING MEMBER: And from time to time you would have to put his cocaine away because his wife was an addict also. Yes?

A Yes.

PRESIDING MEMBER: Okay. Let's stop. Okay. Carry on from there.

BY MR. LALJI:

Q So did you ever possess cocaine?

A In small quantities, yes.

Q And what did you do with that cocaine?

A I would return it to him when he would arrive to the home—to home. It was something like this. It was like a gram or two grams. And this wasn't something that was done every eight days or 30 days because I would tell him, "Look, if they stop me and they ask me and they see this, I'm going to be arrested."

Q Did he ever ask you to purchase cocaine for him?

A No. He had his own suppliers who would come to the job site to leave the things.

Q So he never asked you to pick up cocaine from somewhere and bring it to him?

A No. Marihuana, yes, he would ask me sometimes whether I could get some.

Q And did you get it for him?

A No, because the place he wanted me to go, I always told him that I didn't want to go because it was a dangerous place. I would always say that it's a dangerous place.

Q Did you ever possess any larger quantities of cocaine, for example, approximately 15 grams of it?

A No. The most that I recall keeping for him was about two grams.

> Q Okay. There's a police report that we have submitted in Exhibit 9 on pages 9 and 10 which indicate, in some degree of detail, that you sold cocaine to a police informant in September of 2005. The informant provided your name to the police as somebody who could sell cocaine. In this report the police are alleging that you did sell cocaine and that they saw you do so.
> …
> EXAMINATION BY MR. HOBSON:
>
> Q Okay, sir, I'd like to clarify your knowledge of what happened on September 20, 2005, when you're alleged to have sold 15 grams of cocaine. When is the first time you knew about this allegation?
>
> A When I went to Immigration here.
>
> Q Okay. Did you ever sell someone 15 grams of cocaine ever?
>
> A No.
>
> Q So you believe the information in this report is not true.
>
> A I believe that it's not true.
>
> MR. HOBSON: Okay. I have no more questions on the exclusion issue.

[32] The Applicant submits that the Board made an unreasonable finding when it found that there was a serious reason to believe that he did traffic cocaine. From its plain reading, the Applicant argues that the police report regarding the trafficking of cocaine allegations is "purely speculative," as it refers to a dark-skinned subject "later identified as Fabio Solis Betancour." The Applicant also points out that the report does not provide any concrete evidence as to how he was identified. He denies that he is referred to in the report. The Applicant says that, without proof to support the allegation that he is referred to in the report, together with his denial, the Board should have concluded that there was no serious reason for finding that he did traffic cocaine.

[33] The Applicant submits that, when assessing the evidence presented by the Minister to support the argument under Article1 F(b) of the Convention, the Board did not hold the Minister to the same evidentiary standards that the Applicant was held to. In the reasons, the Board acknowledged a "lack of concrete evidence and specific information." In order for the Board to exclude the Applicant under Article 1F(b) of the Convention, the Minister should have produced further evidence, if such evidence existed. The Minister bore the burden of proof and the Minister did not provide any concrete evidence or specific information that the person referred to as the Applicant in the police report was actually the Applicant.

[34] The Applicant submits it is also important that: no charges were laid; there was no arrest; no corroborative evidence (such as a surveillance tape) was produced; there was no cocaine found on the Applicant; there was no picture of the Applicant; there was no follow up by the police; the arrest warrant was sworn five months after the event took place; and the Applicant remained in the jurisdiction for several months after the warrant was sworn and was not sought after by the police. The Applicant submits that this alleged incident was based on what a confidential informant had told an undercover police officer. This lack of evidence should have been fatal to the Minister's exclusion argument. By excluding the Applicant, the Board made its finding in a "perverse manner without regard to the evidence."

[35] The Applicant also submits that if this Court decides that the circumstances leading to the issuance of the warrant for the Applicant's arrest in the U.S. are too speculative to support the

Board's 1F(b) exclusion finding, the Applicant would like the Court to consider *Jayasekara* (F.C.A.) at paragraphs 37-46:

> The standards applicable to the determination of the gravity of a crime
>
> **37** The UNHCR-issued *Guidelines on International Protection* (The UN Refugee Agency), at paragraph 38, suggest that the gravity of a crime be "judged against international standards, not simply by its characterization in the host State or country of origin". This is, of course, to avoid the profound disparities which may exist between countries with respect to the same behaviour. As Branson J. wrote in *Igor Ovcharuk v. Minister for Immigration and Multicultural Affairs, supra*, at page 15 of his reasons for judgment, "one needs only to bring to mind regimes under which conduct such as peaceful political dissent, the possession of alcohol and the "immodest" dress of women is regarded as seriously criminal".
>
> **38** The UNHCR Guidelines propose, at paragraph 39, the following factors as relevant in determining the seriousness of a crime for the purpose of Article 1F(*b*) of the Convention:
>
> - the nature of the act;
> - the actual harm inflicted;
> - the form of procedure used to prosecute the crime;
> - the nature of the penalty for such a crime; and
> - whether most jurisdictions would consider the act in question as a serious crime.
>
> The Guidelines go on to give as examples of serious crimes the crimes of murder, rape, arson and armed robbery. They also refer to other offences which could be deemed to be serious "if they are accompanied by the use of deadly weapons, involve serious injury to a person or there is evidence of serious habitual criminal conduct and other similar factors": *ibidem*, at paragraph 40. Reference here is clearly made to circumstances surrounding the commission of the crime which, the Guidelines submit, should be taken into account in assessing the seriousness of the crime.
>
> **39** The UNHCR Guidelines are not binding. Nor is the *UN Handbook on Procedures and Criteria for Determining Refugee Status* (under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees), Geneva, January 1988, although the

Handbook can be relied upon by the courts for guidance: see *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, at pages 713-714; *Tenzin Dhayakpa*, *supra*, at paragraph 27; *Igor Ovcharuk*, *supra*, at page 8; *INS v. Aguirre-Aguirre*, 526 U.S. 415, U.S. 1999, 1, at pages 10 and 11 (U.S. Supreme Court). I also agree that the Handbook cannot override the functions of the Court in determining the words of the Convention: see the reasons for judgment of Henry J. in *S. v. Refugee Appeals Authority*, [1998] 2 NZLR 291, at paragraph 20 (N.Z. C.A.).

40 For the purpose of determining whether a person is ineligible to have his or her refugee claim referred to the Refugee Protection Division on the basis of "serious criminality", paragraph 101(2)(*b*) of the IRPA requires a conviction outside Canada for an offence which, if committed in Canada would be an offence in Canada punishable by a maximum term of at least 10 years. This is a strong indication from Parliament that Canada, as a receiving state, considers crimes for which this kind of penalty is prescribed as serious crimes. In the case of a crime committed outside Canada, paragraph 101(2)(*b*) makes the length of the sentence actually imposed irrelevant. This is to be contrasted with paragraph 101(2)(*a*) which deals with inadmissibility by reason of a conviction in Canada. In this last instance, Parliament has seen fit to require that the offence be punishable by a maximum term of imprisonment of at least 10 years and that a sentence of at least two years has been imposed (emphasis added).

41 I agree with counsel for the respondent that, if under Article 1F(*b*) of the Convention the length or completion of a sentence imposed is to be considered, it should not be considered in isolation. There are many reasons why a lenient sentence may actually be imposed even for a serious crime. That sentence, however, would not diminish the seriousness of the crime committed. On the other hand, a person may be subjected in some countries to substantial prison terms for behaviour that is not considered criminal in Canada.

42 Further, in many countries, sentencing for criminal offences takes into account factors other than the seriousness of the crime. For example, a player in a prostitution ring may, out of self-interest, assist the prosecuting authorities in the dismantling of the ring in return for a light sentence. Or an offender may seek and obtain a more lenient sentence in exchange for a guilty plea that relieves the victim of the ordeal of testifying about a traumatic sexual assault. Costly and time-consuming mega-trials involving numerous accused can be avoided in the public interest through the negotiation of guilty pleas and

lighter sentences. The negotiations relating to sentences may involve undertakings of confidentiality, protection of persons and solicitor-client privileges. Access to the confidential, secured and privileged information may not be permitted, so that a look at the lenient sentence in isolation by a reviewing authority would provide a distorted picture of the seriousness of the crime of which the offender was convicted.

43 While regard should be had to international standards, the perspective of the receiving state or nation cannot be ignored in determining the seriousness of the crime. After all, as previously alluded to, the protection conferred by Article 1F(*b*) of the Convention is given to the receiving state or nation. The UNHCR Guidelines acknowledges as much: see paragraph 36 above.

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. There is no balancing, however, with factors extraneous to the facts and circumstances underlying the conviction such as, for example, the risk of persecution in the state of origin: see *Xie v. Canada, supra*, at paragraph 38; *INS v. Aguirre-Aguirre, supra*, at page 11; *T v. Home Secretary* (1995), 1 WLR 545, at pages 554-555 (English C.A.); *Dhayakpa v. The Minister of Immigration and Ethnic Affairs, supra*, at paragraph 24.

45 For instance, a constraint short of the criminal law defence of duress may be a relevant mitigating factor in assessing the seriousness of the crime committed. The harm caused to the victim or society, the use of a weapon, the fact that the crime is committed by an organized criminal group, etc. would also be relevant factors to be considered.

> **46** I should add for the sake of clarity that Canada, like Great Britain and the United States, has a fair number of hybrid offences, that is to say offences which, depending on the mitigating or aggravating circumstances surrounding their commission, can be prosecuted either summarily or more severely as an indictable offence. In countries where such a choice is possible, the choice of the mode of prosecution is relevant to the assessment of the seriousness of a crime if there is a substantial difference between the penalty prescribed for a summary conviction offence and that provided for an indictable offence.

[36] The Applicant submits that subsection 100(4) of the Act provides, in part, that the claimant must produce all documents and information as required by the rules of the Board. Rule 7 states as follows:

7. The claimant must provide acceptable documents establishing identity and other elements of the claim. A claimant who does not provide acceptable documents must explain why they were not provided and what steps were taken to obtain them.	**7.** Le demandeur d'asile transmet à la Section des documents acceptables pour établir son identité et les autres éléments de sa demande. S'il ne peut le faire, il en donne la raison et indique quelles mesures il a prises pour s'en procurer.

[37] The Applicant notes that the lack of "acceptable documents," without a reasonable explanation for their absence, or the failure to take reasonable steps to obtain them, is a significant factor in assessing any claimant's credibility. The Applicant asks: Should not this same evidentiary standard be applied to the Minister when assessing the veracity of the Minister's evidence on an exclusion case? The Applicant alleges that in this matter the Minister had other evidence available to him but no evidence was produced, and no attempts were made to obtain the evidence, and no

explanation was given for the absence of the evidence. The Applicant cites portions from the transcript which acknowledged that this lack of evidence was a serious problem for the Board:

> PRESIDING MEMBER: So there's no way of establishing whether this was actually was Fabio or not or another black person using the name Fabio.
>
> Mr. LALJI: Well, this isn't—this report does not document whether there was an actual arrest and it only says that the informant referred—provided the name and date of—or the name of the claimant.
>
> PRESIDING MEMBER: Right. So the guy wasn't arrested, he wasn't taken in. We don't know if, in fact, it was the claimant.
> …
>
> Mr. LALJI: The quality of the report may not be as high as we would have liked in order to present this case perhaps in a more convincing manner, but the facts are clear that this warrant is linked to this claimant's criminal history in the United States. It's linked to his fingerprints, in the sense that it is listed on the charges—or not the charges—it's listed on the history that is obtained when entering his fingerprint number into the National Crime Information Centre and if he were to be encountered in a jurisdiction where this warrant is valid, right now he would likely be arrested because he is the subject of this warrant. So that provides fairly serious reasons to consider that he is the person named in this report.
>
> The report is not very thorough in providing the details that we would wish to rely on at the hearing such as this one, but it does indicate that the detective and the confidential informant positively identified the subject in this incident as Fabio Solis Betancour and they did so apparently looking into DHS MV record. We don't know what that is, but it was enough for them to produce this report and name him as the subject of their warrant.
>
> This is all they provided to us. They provided a warrant and an incident report with this claimant's name and this claimant's date of birth. I supposed my friend would prefer for us to produce the cocaine that was seized as well at this hearing. We can't do that. They haven't provided all of the evidence in this case.

> Mr. HOBSON: Have you got the disc?
>
> MR. LALJI: Well, we do, we have this. I have no indication on file that the disc was pursued from that department.

[38] The Applicant also submits that when the Minister appears at a refugee hearing, it is an adversarial hearing where the same evidentiary standard set out in Rule 7 should apply to both the claimant and the Minister. This submission was made directly to the Board at the hearing and the Board acknowledged this submission in the reasons. The Board, however, refused to apply the same standard to the Minister's evidence and so erred in law.

The Respondent

[39] The Respondent submits that Board did not err with respect to its analysis of what constitutes sufficient evidence to satisfy the "serious evidence for considering" requirement. The question the Board had to determine was whether the information before it was sufficient to exclude the Applicant on the basis of Article 1F(b) of the Convention.

[40] The Respondent relies upon *Xie v. Canada (Minister of Citizenship and Immigration)* 2004 FCA 250 which dealt with a warrant alleging embezzlement for a significant sum of money combined with the appellant's possession of a sum of money of comparable magnitude for which she had no probative explanation. This was sufficient for the Board to find that there was "serious evidence for considering." The Court in *Xie* held that the fact that the evidence may fall far short of the standard of proof in criminal cases is irrelevant, since the issue is not whether the appellant

committed the crime of which she was accused. The issue is whether there were serious reasons for considering that she did.

[41] The Respondent also relies upon *Qazi v. Canada (Minister of Citizenship and Immigration)* 2005 FC 1204 where the court held that 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.

[42] The Respondent contends that the warrant in the present case is supported by the fact it was obtained by a fingerprint search, and not simply a name search. The Applicant acknowledged that he had access to, and had handled, cocaine. With this information, it was reasonable for the Board to find that the Applicant had met the "serious reasons for considering" criteria.

[43] The Respondent also cites *Murillo v. Canada (Minister of Citizenship and Immigration)* 2008 FC 966 at paragraphs 24-26:

> 24 It is trite law that the Minister bears the onus of proving that a claimant is excluded from refugee protection under Article 1F(*b*) of the Refugee Convention. An exclusion hearing under Article 1F of the Refugee Convention is not in the nature of a criminal trial where guilt or innocence must be proven beyond a reasonable doubt. The Minister need only show that "there are serious reasons for considering" that a claimant committed a serious non-political crime outside of Canada, prior to his arrival in Canada. It is not the role of the RPD to establish the guilt or innocence of the claimant. (*Vlad*, above at paras. 17, 20; *Moreno v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 298, 107 D.L.R. (4th) 424 (C.A.) at para. 21.)

> 25 Mr. Murillo argues that the RPD erred by not balancing aggravating and mitigating factors before determining the seriousness of the crime committed by him. In particular, Mr. Murillo suggests that the RPD failed to consider the he was forthcoming about his participation in the commission of the offence, that he was only an accomplice to the drug trafficking, and that he never received the $50,000 payment for participating in the crime. The Minister submits that there is no merit to Mr. Murillo's argument. (Applicant's Memorandum of Argument at paras. 6-10, AR at pp. 372-373.)
>
> 26 There is no obligation or requirement on the RPD to conduct a "balancing" exercise to determine whether a claimant is excluded under Article 1F(*b*) of the Refugee Convention. It is reasonable for the RPD to use as a measurement of a "serious" crime, the view which Canadian law takes of that offence. Any offence for which a maximum sentence of ten years could be imposed under Canadian law is a "serious" crime. The focus must be on whether the acts of the claimant could be considered crimes under Canadian law. Canadian Courts have consistently held that drug trafficking is a serious non-political crime. (*Jayasekara*, above; *Farkas*, above; *Chan*, above; *Vlad*, above; *Medina*, above.)

[44] The Respondent submits that it is important to consider that the facts concerning the serious crime do not involve the Applicant's occasional handling of cocaine for his employer. Rather, the serious crime allegations arise from a CBSA fingerprint match with the fingerprints found on a 15 gram bag of cocaine that a confidential informant bought from an individual identified as Mr. Betancour. The outstanding warrant for Mr. Betancour's arrest from Hillsborough Country in Florida arose as a result of that fingerprint match.

[45] The Respondent emphasizes that the test in question is not determined on a balance of probabilities. When the serious crime involves a warrant for arrest, the question is whether or not

the charges are trumped up and, if they are not, whether they satisfy the serious reasons for considering test set out in *Qazi*.

ANALYSIS

[46] Both parties agree that I should apply the reasonableness standard set out in *Dunsmuir* when reviewing the issues raised in this application. I agree. What that means, of course, is that I do not need to agree with the Decision. I must ask myself whether justification, transparency and intelligibility occurred within the decision making process and "whether the decision falls within a range of possible acceptable outcomes which are defensible in respect of the facts and law."

[47] As the Applicant points out, the core of the Decision occurs at paragraph 19 where the Board found there were serious reasons for considering that the Applicant had committed a serious non-political crime outside of Canada prior to his admission.

[48] The dispute between the parties is over whether the evidence before the Board could, reasonably within the meaning of *Dunsmuir*, amount to serious reasons.

[49] The evidentiary basis for finding serious reasons was the existence of the warrant itself, which had been obtained as the result of a fingerprint search, as well as the fact that the Applicant had testified to handling cocaine, even though he denied trafficking.

[50] The Applicant has, as his written arguments reveal, raised many reasons why the warrant should not be considered reliable and why it cannot support a finding of “serious reasons for considering.”.

[51] However, as the Respondent points out, the Court has, in the past, found that warrants can form the basis for such a finding. See *Xie* and *Qazi*.

[52] Everything depends, of course, on the facts of each case and I am not saying that a warrant must, in all instances, be regarded as serious evidence for considering. In the present case, the warrant was discovered as a result of a fingerprint search. I also acknowledge that, in *Qazi*, the warrant actually charged the applicant with murder and was confirmed in various other ways so that Justice von Finckenstein, at paragraph 18 could confidently assert that the “existence of a valid warrant issued by a foreign country would, in the absence of allegations are trumped up, satisfy the ‘serious reasons for considering’ requirement.” In *Xie* moreover, the Federal Court of Appeal looked at the warrant itself, as well as other evidence, to conclude that the “evidence before the Board is capable of supporting” a conclusion that there were serious reasons for considering.

[53] I acknowledge that, on the present facts, there are more doubts about the warrant and its connection to the Applicant than existed in either *Xie* or *Qazi*. These doubts were fully acknowledged and explored by the Officer, yet she still felt that the existence of the warrant in this case with the Applicant’s name on it was, when taken together with the Applicant’s admission that

he had been involved with cocaine, sufficient to meet the evidentiary burden. The Officer, of course, also had the opportunity to see and hear the Applicant testify.

[54] While I can see it is possible to cast doubts upon the evidence before the Officer, and I can even say that a decision the other way would not have been unreasonable, I cannot say that this Decision falls outside the "range of possible acceptable outcomes which are defensible in respect of the facts and the law."

[55] The Applicant has suggested the following question for certification:

> Is the Minister, when arguing exclusion in a refugee claim, held to the same evidentiary standard as the claimant? And if so, should Rule 7 of the *Refugee Protection Division Rules* apply to the Minister?

[56] I appreciate the Applicant's position that there are several points in the transcript where both Applicant's counsel and the Board expressed concern about evidence the Minister had not produced, and might reasonably have been expected to produce or, at least, attempted to acquire. The disc is an example.

[57] However, in the end, the Board decided that, notwithstanding the fact that better evidence could have been provided, the Minister had provided sufficient evidence to support a finding of serious reasons for considering that the Applicant has committed a serious non-political crime outside the country.

[58] I have found that this finding, although it can be questioned, was not unreasonable within the meaning of *Dunsmuir*.

[59] The Minister's credibility was not an issue and I do not believe that the burden on the Minister can be equated to the evidentiary burden upon an applicant in a refugee claim. The issue in the present case is simply whether the evidence that was presented by the Minister, as well as the evidence elicited through the Applicant's own testimony, can reasonably support the Board's conclusions. The evidentiary burden upon the Minister is well established by the jurisprudence for the situation before me. See, for example, the cases cited above and Justice Shore's discussion in *Murillo* at paragraphs 24-26. In addition, the question posed would not be dispositive of the Appeal because the Board found that, notwithstanding the fact that the Minister could have produced better evidence, there was sufficient evidence to make a finding that there were serious reasons for considering that the Applicant had committed a serious non-political crime outside of Canada.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. This application is dismissed.
2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT FILE NO.:	IMM-4901-08
STYLE OF CAUSE:	***FABIO SOLIS BETANCOUR***
	v.
	THE MINISTER OF CITIZENSHIP AND MMIGRATION
PLACE OF HEARING:	Vancouver, B.C.
DATE OF HEARING:	June 10, 2009
REASONS FOR JUDGMENT:	RUSSELL J.
DATED:	July 27, 2009

WRITTEN REPRESENTATIONS BY:

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