



SUPREME COURT OF CANADA

CITATION: *Febles v. Canada (Citizenship and Immigration)*, 2014
SCC 68

DATE: 20141030
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BETWEEN:

Luis Alberto Hernandez Febles
Appellant
and
Minister of Citizenship and Immigration
Respondent
- and -

**Amnesty International, United Nations High Commissioner for Refugees,
Canadian Association of Refugee Lawyers, Canadian Council for Refugees and
Canadian Civil Liberties Association**
Interveners

CORAM: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver and
Wagner JJ.

REASONS FOR JUDGMENT: McLachlin C.J. (LeBel, Rothstein, Moldaver and Wagner JJ.
(paras. 1 to 70) concurring)

DISSENTING REASONS: Abella J. (Cromwell J. concurring)
(paras. 71 to 136)

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FEBLES v. CANADA (CITIZENSHIP AND IMMIGRATION)

Luis Alberto Hernandez Febles

Appellant

v.

Minister of Citizenship and Immigration

Respondent

and

**Amnesty International,
United Nations High Commissioner for Refugees,
Canadian Association of Refugee Lawyers,
Canadian Council for Refugees and
Canadian Civil Liberties Association**

Interveners

Indexed as: Febles v. Canada (Citizenship and Immigration)

2014 SCC 68

File No.: 35215.

2014: March 25; 2014: October 30.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver and Wagner JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Immigration law — Convention refugees — Exclusion based on commission of serious crime prior to admission to country of refuge — Cuban national seeking refugee protection in Canada — Immigration and Refugee Board rejecting claim for refugee protection on grounds that claimant committed serious crimes prior to admission to Canada — Whether consideration of grounds for exclusion should include matters or events after commission of crime, such as whether claimant is fugitive from justice or unmeritorious or dangerous at the time of the application for refugee protection — Whether claimant who has committed serious crime in the past may nevertheless qualify for refugee protection because he or she has served sentence or because of redeeming conduct in the interim — Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 98 — United Nations Convention Relating to the Status of Refugees, Can. T.S. 1969 No. 6, art. 1F(b).

Febles was admitted to the United States as a refugee from Cuba. While living in the United States, he was convicted and served time in prison for two assaults with a deadly weapon — in the first case he struck a roommate on the head with a hammer, and in the second, he threatened to kill a roommate's girlfriend at knifepoint. The U.S. revoked his refugee status and issued a removal warrant. Febles subsequently fled to Canada and sought Canadian refugee protection.

Refugee protection claims in Canada are governed by the *Immigration and Refugee Protection Act* (“IRPA”). Section 98 of the IRPA excludes from refugee protection in Canada all persons referred to in Article 1F(b) of the United Nations

Convention Relating to the Status of Refugees (“*Refugee Convention*”). Article 1F(b) of the *Refugee Convention* excludes from refugee protection all persons who have committed a serious non-political crime outside the country of refuge prior to admission to that country as a refugee. Refugee protection claims in Canada are adjudicated by the Refugee Protection Division of the Immigration and Refugee Board (“Board”). In deciding Febles’ refugee protection claim, the Board concluded that Febles was among the persons referred to by Article 1F(b) of the *Refugee Convention*, and therefore ineligible for refugee protection in Canada pursuant to s. 98 of the *IRPA*. Both the Federal Court and the Federal Court of Appeal dismissed Febles’ application for judicial review.

Held (Abella and Cromwell JJ. dissenting): The appeal should be dismissed.

Per McLachlin C.J. and LeBel, Rothstein, Moldaver and Wagner JJ.: Section 98 of the *IRPA* excludes from refugee protection in Canada all persons “referred to in section E or F of Article 1 of the *Refugee Convention*”. Article 1F(b) of the *Refugee Convention* refers to “any person with respect to whom there are serious reasons for considering that . . . he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee”. The primary issue in this case is how to interpret the meaning of Article 1F(b) of the *Refugee Convention*.

Interpretation of an international treaty is governed by the *Vienna Convention on the Law of Treaties* (“*Vienna Convention*”). Pursuant to Article 31(1) of the *Vienna Convention*, interpretation of a treaty should be approached by considering: (1) the “ordinary meaning” of its terms; (2) the context; and (3) the object and purpose of the treaty. Article 32 of the *Vienna Convention* further specifies that, aside from confirming an interpretation resulting from the application of Article 31, recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, only if application of Article 31 leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable.

The ordinary meaning of Article 1F(b)’s terms “has committed a serious . . . crime” refers only to the crime at the time it was committed and not to anything subsequent to the commission of the crime. There is nothing in the text of the provision suggesting that Article 1F(b) only applies to fugitives, or that factors such as current lack of dangerousness or post-crime expiation or rehabilitation are to be considered or balanced against the seriousness of the crime.

The context around Article 1F(b) supports this interpretation. The immediate context of Article 1F(b) is Article 1F as a whole. There is nothing in the wording of Articles 1F(a) and 1F(c) to support the view that the exclusion from refugee protection under Article 1F(b) is confined to fugitives. Nor does Article 33(2) of the *Refugee Convention* support the view that Article 1F(b) is confined to fugitives. The

reason Article 33(2) applies only to particularly serious crimes, and has the additional requirement that “danger to the community” be demonstrated, is because it authorizes removal of a person whose need for protection has been recognized.

Likewise, the object and purposes of the *Refugee Convention* do not support the contention that Article 1F(b) is confined to fugitives. The *Refugee Convention* has twin purposes: it aims to strike a balance between helping victims of oppression by allowing them to start new lives in other countries, while also protecting the interests of receiving countries, which they did not renounce simply by negotiating specific provisions to aid victims of oppression. The *Refugee Convention* is not itself an abstract principle, but an agreement among sovereign states in certain specified terms, negotiated by them in consideration of the entirety of their interests. Accordingly, exclusion clauses should not be enlarged in a manner inconsistent with the *Refugee Convention*’s broad humanitarian aims, but neither should overly narrow interpretations be adopted which ignore the contracting states’ need to control who enters their territory. Ultimately, the purpose of an exclusion clause is to exclude, and broad purposes do not invite interpretations of exclusion clauses unsupported by the text. Article 1F(b) is not directed solely at fugitives and neither is it directed solely at some subset of serious criminals who are undeserving at the time of the refugee application. Rather, in excluding all claimants who have committed serious non-political crimes, Article 1F(b) expresses the contracting states’ agreement that such persons by definition would be undeserving of refugee protection by reason of their serious criminality.

Excluding people who have committed serious crimes may support a number of subsidiary rationales — it may prevent people fleeing from justice; it may prevent dangerous and particularly undeserving people from entering the host country. It may help preserve the integrity and legitimacy and ultimate viability of the refugee protection system. It may deter states from exporting criminals as refugees. It may allow states to reduce danger to their society from serious criminality cases as a class, given the difficult task and potential for error when attempting to determine the ongoing dangerousness of criminals from abroad on whom they may often have limited reliable information. Whatever rationales for Article 1F(b) may or may not exist, its purpose is clear in excluding persons from protection who previously committed serious crimes abroad.

With respect to the *Travaux préparatoires*, the *Vienna Convention* conditions for their use in interpretation are not present in this case. The meaning of Article 1F(b) is clear, and admits of no ambiguity, obscurity or absurd or unreasonable result. Therefore, the *Travaux préparatoires* should not be considered. Further, even if they were considered, the *Travaux préparatoires* do not support the contention that Article 1F(b) is confined to fugitives.

A review of the jurisprudence demonstrates the difficulty of confining Article 1F(b) to a narrow category of people, like fugitives from justice, and confirms that it applies, as its words suggest, to anyone who has ever committed a serious non-political crime outside the country of refuge prior to his admission to that country as a

refugee. The dominant tide of the jurisprudence also supports the conclusion that the seriousness of the crime is not to be balanced against factors extraneous to commission of the crime such as current dangerousness or post-crime rehabilitation or expiation.

In terms of what constitutes a “serious crime” under Article 1F(b), 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. However, the ten-year rule should not be applied in a mechanistic, decontextualized, or unjust manner.

In the present case, Febles is covered under Article 1F(b) as a result of his commission of serious non-political crimes outside Canada prior to admission to Canada as a refugee. As a result, the Board was correct to conclude that he is ineligible for refugee protection in Canada pursuant to s. 98 of the *IRPA*. If his removal to Cuba would place him at risk of death, torture or cruel and unusual treatment or punishment, his recourse is to apply for a stay of removal under ss. 97, 112, 113(d)(i) and 114(1)(b) of the *IRPA*. If he wishes to challenge the revocation by U.S. authorities of the refugee status he was previously granted in the United States, he must do so in the justice system of the United States. The Canadian justice system is not to be invoked to determine the correctness or the constitutionality of decisions made by U.S. officials pursuant to U.S. laws.

Per Abella and Cromwell JJ. (dissenting): The claim for refugee status in this case depends on a determination of when the commission of a serious non-political crime outside the country of refuge will disqualify an individual from the protective scope of the *Refugee Convention*.

The consequences of exclusion are significant. If an individual becomes ineligible for the status of a “refugee” on the basis of one of the exclusionary grounds in Article 1F, the humanitarian protections provided in the *Refugee Convention* are denied altogether, including the protection from *refoulement* under Article 33. An excluded individual is consequently at risk of being returned to face persecution in his or her country of origin, barring the availability of any residual protection under domestic or international human rights law. In light of the human rights purposes of the *Refugee Convention*, and the dramatic consequences of exclusion from the status of a refugee, Article 1F requires a particularly cautious interpretation.

There is little doubt that the primary purpose of Article 1F(b) was to exclude those individuals who would abuse the status of a refugee by avoiding accountability through prosecution or punishment for a serious crime outside the country of refuge. There is considerable debate, however, as to the extent to which Article 1F(b) was also intended to fulfill the additional purpose of excluding individuals who, as a result of having committed and been prosecuted for serious non-political crimes in the past, are considered undeserving of refugee protection under the *Refugee Convention*. The human rights approach to interpretation

mandated by the *Vienna Convention* suggests that except in the case of very serious crimes, an individual is not automatically disqualified from the humanitarian protection of the *Refugee Convention* and should be entitled to have any expiation or rehabilitation taken into account.

To be fully understood, the text of Article 1F(b) must be situated in its surrounding context and considered in light of its drafting history. Given the widely divergent interpretations of Article 1F(b) adopted by courts in other jurisdictions and the uncertainty created by the territorial limits described in Article 1F(b), recourse to the interpretive assistance of the preparatory work is helpful.

The *travaux préparatoires* provide some insight into why the signatories to the *Convention* adopted the text which is currently found in Article 1F(b). They illustrate that the discussions were only about refugee claimants who had committed a crime outside the country of refuge *but had not been convicted or served a sentence for that crime*. The origins of these discussions was to expand the scope of those who were entitled to refugee status. In this context, there was broad agreement among the representatives that only fugitives from *serious* non-political crimes be excluded from entitlement. The issue was never about those who had committed serious crimes *and* had already served their sentences outside the receiving country. The language adopted with the intent of expanding protection should not be used to narrow the category of those entitled to protection.

Courts in other jurisdictions, it is widely accepted that the original purpose of Article 1F(b) was to deny refugee status to fugitives, namely, those individuals who had avoided prosecution for serious non-political crimes committed abroad. This was based on the premise that enabling those individuals to obtain refugee status would compromise the integrity of the international system of refugee protection. All jurisdictions also appear to agree that there are other circumstances in which Article 1F(b) excludes individuals from the *Refugee Convention*, but there seems to be little agreement as to when those circumstances arise.

But recent international jurisprudence shows that it remains far from clear that the signatories to the *Refugee Convention* intended to exclude all individuals who were believed to have committed serious non-political crimes, without regard for whether they had been rehabilitated. This leaves it open to this Court to reach its own conclusion as to how to interpret the scope of 1F(b).

The requisite good faith interpretive approach mandates not divorcing the text of Article 1F(b) from its human rights purpose. This is particularly so given the clear concern reflected by the *travaux préparatoires* that the basis for exclusion under Article 1F(b) should be restrictively written so that it would not be “too easy” for states to deny the humanitarian protections guaranteed by the *Refugee Convention*. Moreover, there is little or no authority for the proposition that *everyone* who has committed a serious crime outside the country of refuge remains permanently undeserving of the *Refugee Convention*’s protection regardless of their supervening

personal circumstances. Such a relentlessly exclusionary — and literal — approach would contradict both the “good faith” approach to interpretation required by the *Vienna Convention*, as well as the *Refugee Convention*’s human rights purpose.

Depending on the seriousness of the crime, if an individual is believed to have committed a serious non-political crime, the purpose of Article 1F(b) can be met where the individual’s circumstances reflect a sufficient degree of rehabilitation or expiation that the claimant ought not to be disqualified from the humanitarian protection of the *Refugee Convention*. The completion of a sentence, along with factors such as the passage of time since the commission of the offence, the age at which the crime was committed, and the individual’s rehabilitative conduct, will all be relevant. On the other hand, individuals who have committed such serious crimes that they must be considered undeserving of the status of being a refugee, would be excluded. This approach accords with the intention of the signatories to the *Refugee Convention* to protect the integrity and viability of the international system of protection for refugees by limiting the obligations of the contracting parties towards individuals who have committed very serious crimes.

The claimant in this case expressed remorse immediately after the commission of the offence and turned himself in to the police. He pleaded guilty and served his sentence for his criminal conduct. He also admitted that he was suffering from problems with alcohol at the time of the offence. While it is clear that the criminal conduct was serious, what has yet to be determined is whether the crime is

so serious that the claimant's personal circumstances since serving his sentence in 1984 ought to be disregarded in considering whether he is entitled to refugee status. As a result, the appeal should be allowed and the matter returned to the Immigration and Refugee Board for redetermination.

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By McLachlin C.J.

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et aux apatrides, No. 27.479, May 18, 2009; *X v. Commissaire général aux réfugiés et aux apatrides*, No. 69656, November 8, 2011; *Office français de protection des réfugiés et apatrides v. Hykaj*, No. 320910, May 4, 2011; *Jayasekara v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404, [2009] 4 F.C.R. 164; *Chan v. Canada (Minister of Citizenship and Immigration)*, [2000] 4 F.C. 390; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3.

By Abella J. (dissenting)

Yugraneft Corp. v. Rexx Management Corp., 2010 SCC 19, [2010] 1 S.C.R. 649; *Peracomo Inc. v. TELUS Communications Co.*, 2014 SCC 29; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Ezokola v. Canada (Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 S.C.R. 678; *Al-Sirri v. Secretary of State for the Home Department*, [2012] UKSC 54, [2013] 1 A.C. 745; *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689; *Bundesrepublik Deutschland v. B.*, [2010] EUECJ C-57/09; *SRYYY v. Minister for Immigration and Multicultural and Indigenous Affairs*, [2005] FCAFC 42, 220 A.L.R. 394; *Attorney-General (Minister of Immigration) v. Tamil X*, [2010] NZSC 107, 1 N.Z.L.R. 721; *AH (Algeria) v. Secretary of State for the Home Department*, [2013] UKUT 00382; *Office français de protection des réfugiés et apatrides v. Hykaj*, No. 320910, May 4, 2011; *Dhayakpa v. Minister of Immigration and Ethnic Affairs*, [1995] FCA 1653, 62 F.C.R. 556; *Minister for Immigration and Multicultural Affairs*

v. Singh, [2002] HCA 7, 209 C.L.R. 533; *X v. Commissaire général aux réfugiés et aux apatrides*, No. 69656, November 8, 2011; *XXX v. État belge*, No. 199.079, A. 192.074/XI-16.797; *X v. Commissaire général aux réfugiés et aux apatrides*, No. 27.479, May 18, 2009; *KK (Turkey) v. Secretary of State for the Home Department*, [2004] UKIAT 00101; *Secretary of State for the Home Department v. AA (Palestine)*, [2005] UKIAT 00104; *R. (JS (Sri Lanka)) v. Secretary of State for the Home Department*, [2010] UKSC 15, [2010] 3 All E.R. 881.

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Convention relating to the Status of Refugees”, HCR/GIP/03/05, September 4, 2003 (online: www.unhcr.org).

APPEAL from a judgment of the Federal Court of Appeal (Evans, Sharlow and Stratas JJ.A.), 2012 FCA 324, 442 N.R. 290, 357 D.L.R. (4th) 343, [2012] F.C.J. No. 1609 (QL), 2012 CarswellNat 5012, affirming a decision of Scott J., 2011 FC 1103, 397 F.T.R. 179, [2011] F.C.J. No. 1360 (QL), 2011 CarswellNat 3917. Appeal dismissed, Abella and Cromwell JJ. dissenting.

Jared Will and Peter Shams, for the appellant.

François Joyal, for the respondent.

Jennifer Klinck, Perri Ravon, Michael Sabet and Justin Dubois, for the intervener Amnesty International.

John Terry, Ryan Lax and Rana R. Khan, for the intervener the United Nations High Commissioner for Refugees.

Aviva Basman and Alyssa Manning, for the intervener the Canadian Association of Refugee Lawyers.

Catherine Dauvergne, Angus Grant and Pia Zambelli, for the intervener the Canadian Council for Refugees.

*Peter Edelmann, Lorne Waldman and Aris Daghighian, for the intervener
the Canadian Civil Liberties Association.*

*Solicitors for the appellant: Jared Will, Montréal; Peter Shams,
Montréal.*

Solicitor for the respondent: Attorney General of Canada, Montréal.

Solicitors for the intervener Amnesty International: Power Law, Ottawa.

*Solicitors for the intervener the United Nations High Commissioner for
Refugees: Torys, Toronto; UNHCR, Toronto.*

*Solicitors for the intervener the Canadian Association of Refugee
Lawyers: Refugee Law Office, Toronto.*

*Solicitor for the intervener the Canadian Council for
Refugees: University of British Columbia, Vancouver.*

*Solicitors for the intervener the Canadian Civil Liberties
Association: Edelmann & Co. Law Office, Vancouver; Waldman & Associates,
Toronto.*

The judgment of McLachlin C.J. and LeBel, Rothstein, Moldaver and Karakatsanis JJ. was delivered by

THE CHIEF JUSTICE —

I. Introduction

[1] The issue in this case is whether Luis Alberto Hernandez Febles is ineligible for refugee protection because of crimes committed before he came to Canada. Mr. Febles was admitted to the United States as a refugee from Cuba. While living in the United States, he was convicted and served time in prison for two assaults with a deadly weapon — in the first case, he struck a roommate on the head with a hammer, and in the second, he threatened to kill a roommate’s girlfriend at knifepoint. The U.S. revoked his refugee status and issued a removal warrant, which is still outstanding.

[2] After his refugee status in the U.S. was revoked, Mr. Febles fled to Canada, entering illegally. He now claims refugee protection in Canada. The question is whether Article 1F(b) (the “serious criminality” exclusion) of the *Convention Relating to the Status of Refugees*, Can. T.S. 1969 No. 6 (“*Refugee Convention*”), incorporated in Canada by s. 98 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (“*IRPA*”), bars him from refugee protection because of the crimes he committed in the past.

[3] Essentially, different interpretations of Article 1F(b) of the *Refugee Convention* are in contention. The Minister of Citizenship and Immigration (“Minister”) says that the Article 1F(b) serious criminality exclusion is triggered whenever the refugee claimant has committed a serious non-political crime before coming to Canada. It is not confined to fugitives from justice. Nor are post-crime events, like rehabilitation or expiation, relevant, in the Minister’s view. The only question is whether the claimant committed a serious non-political crime before seeking refugee protection in Canada.

[4] Mr. Febles and the United Nations High Commissioner for Refugees (“UNHCR”) advocate narrower interpretations of Article 1F(b). Mr. Febles argues that the exclusion in Article 1F(b) is confined to fugitives from justice (which Mr. Febles, having served his sentences, is not). The UNHRC (with whom Mr. Febles agrees) argues that the question is whether the refugee claimant is “deserving” of refugee protection *at the time of the application*, which requires consideration not only of the seriousness of the offence itself, but of how long ago the offence was committed, the conduct of the claimant since the commission of the offence, whether the claimant has expressed regret or renounced criminal activities, and whether the claimant poses a threat to the security of Canada at the present time.

[5] In a nutshell, the Minister says that serious criminality under Article 1F(b) is simply a matter of looking at the seriousness of the crime when it was committed, while Mr. Febles and the UNHRC say it requires consideration of other

matters — whether the claimant is a fugitive and/or his current situation, including rehabilitation, expiation and current dangerousness.

[6] For the reasons that follow, I agree with the conclusion of the Immigration and Refugee Board (“Board”), upheld in the courts below, that only factors related to the commission of the criminal offences can be considered, and whether those offences were serious within the meaning of Article 1F(b). On this interpretation of Article 1F(b), Mr. Febles does not qualify for refugee protection because of the serious crimes he committed in the U.S. before seeking admission to Canada as a refugee.

II. The Statutory Scheme

[7] Refugee protection claims in Canada are adjudicated by the Board under the *IRPA*. Three procedures under the *IRPA* are relevant to the present appeal.

[8] The first procedure (ss. 100 to 102 of the *IRPA*) determines whether a claim for refugee protection is eligible for referral to the Board. At the time of Mr. Febles’ application, ss. 101(1)(f) and 101(2)(b) provided that a claim was ineligible to be referred to the Board if the claimant had been convicted of an offence outside Canada, where the same offence in Canada is punishable by a maximum term of imprisonment of at least 10 years, and the claimant represented a danger to the public in the Minister’s opinion. This procedure did not bar Mr. Febles’ claim for refugee protection because the Minister did not file an opinion of dangerousness.

[9] The second procedure (ss. 95 to 98 of the *IRPA*) determines whether a claimant is entitled to refugee protection. Section 98 — the provision at issue here — requires the Board to reject a refugee protection claim by any person referred to in Articles 1E or 1F of the *Refugee Convention*. Article 1F(b) of the *Refugee Convention* provides that a person with respect to whom there are serious reasons for considering that “he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee” is excluded from the protection of the *Refugee Convention*. Interpretation of the meaning of that article is the primary issue in this case.

[10] Finally, even where a refugee protection claim is rejected by application of s. 98 and a removal order is issued, a claimant may still apply to the Minister for protection against a removal order. In determining whether to stay the removal order, the Minister must balance any danger to the public in Canada against the risk that a claimant would face death, torture or cruel and unusual treatment or punishment if removed from Canada to the place designated in the removal order (ss. 97, 112, 113(d)(i) and 114(1)(b) of the *IRPA*).

III. Analysis

A. *Interpretation of a Canadian Statute that Incorporates an International Treaty*

[11] Parliament has incorporated Articles 1E and 1F of the *Refugee Convention* into s. 98 of the *IRPA*. Interpretation of an international treaty that has

been directly incorporated into Canadian law is governed by Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37 (“*Vienna Convention*”): *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at paras. 51-52; *Thomson v. Thomson*, [1994] 3 S.C.R. 551, at pp. 577-78. It follows that the meaning of the incorporated Articles of the *Refugee Convention* must be determined in accordance with the *Vienna Convention*.

[12] Articles 31 and 32 of the *Vienna Convention* set out the principles of treaty interpretation which are similar to general principles of statutory interpretation:

Article 31. GENERAL RULE OF INTERPRETATION

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
 - (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) Any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32. SUPPLEMENTARY MEANS OF INTERPRETATION

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) Leaves the meaning ambiguous or obscure; or

(b) Leads to a result which is manifestly absurd or unreasonable.

B. *The Scope of Article 1F(b) of the Refugee Convention*

[13] Article 1F(b) excludes any person from refugee protection “with respect to whom there are serious reasons for considering that: . . . he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee”.

[14] Despite its facial clarity, the meaning of the phrase “has committed a serious non-political crime” is the subject of debate by courts and academic writers. While there are many variations of these debates, the main issue in the present case is whether “has committed a serious . . . crime” is confined to matters relating to the crime committed, or should be read as also referring to matters or events after the commission of the crime, such as whether the claimant is a fugitive from justice or is unmeritorious or dangerous at the time of the application for refugee protection. If Article 1F(b) is read as including consideration of matters occurring after the commission of the crime, people who have committed a serious crime in the past may nevertheless qualify as refugees because they have served their sentence or because of redeeming conduct subsequent to the crime.

[15] Article 31(1) of the *Vienna Convention* states how interpretation of the *Refugee Convention* should be approached — by considering: (1) the “ordinary meaning” of its terms; (2) the context; and (3) the object and purpose of the *Refugee Convention*. For the reasons that follow, these considerations, as well as the *Collected Travaux Préparatoires of the 1951 Geneva Convention Relating to the Status of Refugees* (1989), vol. III (“*Travaux préparatoires*”) and the jurisprudence, lead me to conclude that the phrase “has committed a serious . . . crime” refers to the crime at the time it was committed. Article 1F(b), in excluding from refugee protection people who have committed serious crimes in the past, does not exempt from this exclusion persons who are not fugitives from justice, or because of their rehabilitation, expiation or non-dangerousness at the time they claim refugee protection.

(1) The Ordinary Meaning of Article 1F(b)

[16] The point of departure for interpreting a provision of a treaty is the plain meaning of the text. As the House of Lords put it in *Januzi v. Secretary of State for the Home Department*, [2006] UKHL 5, [2006] 2 A.C. 426, at para. 4, “the starting point of the construction exercise must be the text of the Convention itself, . . . because it expresses what the parties to it have agreed. The parties to an international convention are not to be treated as having agreed something they did not agree, unless it is clear by necessary implication from the text”.

[17] The ordinary meaning of the terms used in Article 1F(b) — “has committed a serious . . . crime outside the country of refuge prior to his admission to that country. . .” — refers only to the crime at the time it was committed. The words do not refer to anything subsequent to the commission of the crime. There is nothing in the text of the provision suggesting that it only applies to fugitives, or that factors such as current lack of dangerousness or post-crime expiation or rehabilitation are to be considered or balanced against the seriousness of the crime.

[18] The mandatory wording of the Article (“*shall* not apply”) chosen by the parties to the *Refugee Convention* unequivocally supports the view that all a subscribing country can consider in determining whether a claimant is excluded under Article 1F(b) is whether the claimant committed a serious crime outside the country of refuge prior to applying for refugee status there. Nothing in the words used suggests that the parties to the *Refugee Convention* intended subsequent considerations, like rehabilitation, expiation and actual dangerousness, to be taken into account.

(2) The Context

[19] The second interpretive consideration is the context. The immediate context of Article 1F(b) is Article 1F as a whole. Article 1F is comprised of three provisions, each of which excludes certain classes of persons from the *Refugee Convention*’s protection. Article 1F(a) excludes anyone who has “committed a crime

against peace, a war crime, or a crime against humanity”. Article 1F(c) excludes anyone “guilty of acts contrary to the purposes and principles of the United Nations”.

[20] Mr. Febles argues that this context suggests that Article 1F(b) is limited to fugitives. He appears to concede that Articles 1F(a) and 1F(c) are not themselves limited to fugitives, and that they operate to exclude all persons who have committed the acts listed in those provisions. Nevertheless, he argues that limiting Article 1F(b) to fugitives would not be incongruous. He submits that, unlike Article 1F(b), Articles 1F(a) and 1F(c) are designed to prevent people who are themselves persecutors from seeking protection from persecution, and that it would undermine the *Refugee Convention*’s viability if persecutors who create refugees could seek refugee protection. Persons who have committed serious crimes under Article 1F(b) are in a different situation, Mr. Febles argues. It would not undermine the *Refugee Convention*’s viability to allow non-fugitives who have already served sentences for standard crimes to seek refugee protection. On this basis, he invites this Court to confine Article 1F(b) to fugitives from justice.

[21] Against this, the Minister argues that the word “committed” should be given the same meaning in Articles 1F(a) and 1F(b): these provisions apply to anyone who has ever committed the offences, not only to fugitives or some other subset of those persons who have in fact committed the described offences.

[22] I agree. I cannot accept Mr. Febles’ argument that Articles 1F(a) and 1F(c) support the view that the exclusion from refugee protection under Article 1F(b) is

confined to fugitives. There is nothing in the wording of these provisions or in the jurisprudence to support this contention. (See *Ezokola v. Canada (Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 S.C.R. 678, at paras. 38 and 101, and *Pushpanathan*, at paras. 65-66 and 70 where the scope of these articles is discussed.) While Article 1F(c) uses the word “guilty”, Articles 1F(a) and 1F(b) both use the word “committed”.

[23] The immediate context therefore supports the Minister’s interpretation. It would be anomalous if the word “committed” were ascribed different meanings in Articles 1F(a) and 1F(b) and the use of consistent language in these two articles was meant to evince an intention on the part of the drafters that they be applied inconsistently. As nobody has suggested that Article 1F(a) is confined to fugitives, it follows that Article 1F(b) would similarly not be restricted to fugitives.

[24] Mr. Febles also says that Article 33(2) of the *Refugee Convention* supports the view that Article 1F(b) is confined to fugitives. Article 33(2) allows a host country to expel a refugee who has been “convicted by a final judgment of a particularly serious crime” and “constitutes a danger to the community of that country”. As far as *Refugee Convention* provisions go, Article 1F(b) only applies to crimes committed *outside* the country of refuge, whereas a refugee who commits a crime *in* the country of refuge can only be expelled under Article 33(2). Mr. Febles argues that this results in an absurdity. Why should someone who has served his sentence for a crime committed outside the country of refuge be automatically

disentitled to refugee protection, when someone who commits a serious crime inside the country of refuge is allowed to retain refugee protection absent a danger to the public? This apparent absurdity disappears, Mr. Febles says, if Article 1F(b) is read as being restricted to fugitives.

[25] Again, the argument fails to persuade. Article 33(2) is an exception to the Article 33(1) principle of non-*refoulement* of persons whose need for protection has been recognized (or not yet adjudicated). That is why the drafters used different language in Article 33(2) than they did in Article 1F(b): Article 33(2) allows persons to nevertheless be removed in the exceptional circumstances it describes, including in the event of *particularly* serious crimes, and “danger to the community”.

[26] That the *Refugee Convention* drafters intended that persons who commit crimes in the country of refuge be treated differently than those who commit crimes outside the country of refuge prior to claiming refugee protection makes sense. When a person commits a crime inside the country of refuge, the country of refuge is called to rely on *its own* sovereign legal system, rather than on an international treaty. In Canada’s case, it has done so by enacting a parallel and virtually identical provision regarding the effect of commission of a crime: s. 101(2)(a) of the *IRPA* specifies that a refugee protection claim cannot be made in the event “of a conviction *in Canada* [where] the conviction is for an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years”. Therefore, the discrepancy and resultant absurdity contended by Mr. Febles do not exist. In any event, different

concerns arise when a country is asked to take in claimants who have committed crimes abroad, and the context provided by Article 33(2) of the *Refugee Convention* does not aid in the interpretive task at hand.

(3) The Object and Purpose of the *Refugee Convention*

(a) *The Refugee Convention as a Whole*

[27] The purposes of the *Refugee Convention* include the international community's "profound concern for refugees" and commitment to "assure refugees the widest possible exercise of . . . fundamental rights and freedoms": see *Ezokola*, at para. 32, and *Pushpanathan*, at para. 57. While Article 1F(b) has a more specific exclusionary purpose, that purpose must be consistent with the broader protective aims of the *Refugee Convention*.

[28] Mr. Febles argues that broad construction of exclusion provisions risks subverting the *Refugee Convention's* humanitarian aims — courts should accordingly construe exclusion provisions as narrowly as is possible while still preserving the viability of the *Refugee Convention*.

[29] The problem with this approach is that it risks upsetting the balance between humane treatment of victims of oppression and the other interests of signatory countries, which they did not renounce simply by together making certain provisions to aid victims of oppression. The *Refugee Convention* is not itself an

abstract principle, but an agreement among sovereign states in certain specified terms, negotiated by them in consideration of the entirety of their interests. In *R. (European Roma Rights Centre) v. Immigration Officer at Prague Airport*, [2004] UKHL 55, [2005] 2 A.C. 1, the U.K. House of Lords stated that the *Refugee Convention* “represent[s] a compromise between competing interests, in this case between the need to ensure humane treatment of the victims of oppression on the one hand and the wish of sovereign states to maintain control over those seeking entry to their territory on the other” (para. 15).

[30] I agree with this statement of the *Refugee Convention*’s twin purposes. While exclusion clauses should not be enlarged in a manner inconsistent with the *Refugee Convention*’s broad humanitarian aims, neither should overly narrow interpretations be adopted which ignore the contracting states’ need to control who enters their territory. Nor do a treaty’s broad purposes alter the fact that the purpose of an exclusion clause is to exclude. In short, broad purposes do not invite interpretations of exclusion clauses unsupported by the text.

[31] For these reasons, I conclude that consideration of the purposes of the *Refugee Convention* as a whole do not support Mr. Febles’ argument that Article 1F(b) is confined to fugitives.

(b) *Article 1F(b)*

[32] This brings me to the purpose of Article 1F(b) itself. Mr. Febles argues that the main rationale for Article 1F(b) is the exclusion of fugitives (although he allows for the possibility that Article 1F(b) may apply to non-fugitives in certain rare circumstances where the crimes at issue are especially heinous and contribute to the creation of refugees). It follows, he says, that since Article 1F(b) is directed at preventing fugitives from evading justice, it should generally have no application to persons who have already served their sentences for prior crimes. Mr. Febles relies on *obiter dicta* of this Court in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, and *Pushpanathan* that Article 1F(b) is directed at the exclusion of fugitives.

[33] The Minister counters that the main rationale for Article 1F(b) is the exclusion of serious criminals because persons who have committed serious offences are by definition undeserving of refugee protection, supported by a secondary rationale of protection of the host society. By the Minister's interpretation, determination of a crime's seriousness 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, but does not include post-offence considerations. A person who commits a serious non-political crime is forever barred from claiming refugee protection. This interpretation was adopted by the courts below, and was recently endorsed by the European Court of Justice.

[34] The UNHCR argues that Article 1F(b) has two purposes — exclusion of fugitives and exclusion of claimants undeserving of refugee protection at the time it is

claimed. If a person has committed a crime within the scope of Article 1F(b), but has since served a sentence commensurate with that criminal conduct or has been otherwise rehabilitated, the decision maker on the refugee application must in each case determine whether such a person is *deserving* of refugee protection at that time, having regard to: the passage of time since the commission of the offence; the seriousness of the offence (and whether it can be characterized as “truly heinous”); the age at which the person committed the crime; the conduct of the individual since then; whether the individual has expressed regret or renounced criminal activities; and whether the individual poses a threat to the community or security of the receiving state. Justice Abella similarly suggests that for all but “very” serious crimes, expiation and rehabilitation must be considered (para. 74).

[35] I cannot accept the arguments of Mr. Febles and the UNHCR on the purposes of Article 1F(b). I conclude that Article 1F(b) serves one main purpose — to exclude persons who have committed a serious crime. This exclusion is central to the balance the *Refugee Convention* strikes between helping victims of oppression by allowing them to start new lives in other countries and protecting the interests of receiving countries. Article 1F(b) is not directed solely at fugitives and neither is it directed solely at some subset of serious criminals who are undeserving at the time of the refugee application. Rather, in excluding all claimants who have committed serious non-political crimes, Article 1F(b) expresses the contracting states’ agreement that such persons by definition would be undeserving of refugee protection by reason of their serious criminality.

[36] Excluding people who have committed serious crimes may support a number of subsidiary rationales — it may prevent people fleeing from justice; it may prevent dangerous and particularly undeserving people from entering the host country. However, Article 1F(b) cannot be confined to any of these subsidiary purposes. Excluding people who have committed crimes in other countries prior to seeking refugee protection may serve other state interests. It may help preserve the integrity and legitimacy of the refugee protection system, and, hence, the necessary public support for its viability. It may deter states from exporting criminals by pardoning them or imposing disproportionately lenient sentences while supporting their departure elsewhere as refugees. Finally, it may allow states to reduce the danger to their society from all serious criminality cases taken together, given the difficult task and potential for error when attempting to determine whether criminals from abroad (on whom they have more limited sources of information than on domestic criminals) are no longer dangerous. Whatever rationales for Article 1F(b) may or may not exist, its purpose is clear in excluding persons from protection who previously committed serious crimes abroad.

(4) The *Travaux Préparatoires*

[37] Besides the arguments already addressed, Mr. Febles argues that the *Travaux préparatoires* to the *Refugee Convention* (the working documents preceding the *Refugee Convention*'s adoption) support his view that Article 1F(b) is confined to

fugitives. Acknowledging that the *Travaux préparatoires* “do not provide any ‘hard answers’”, he nonetheless says that they generally support this inference.

[38] As discussed, Article 31(1) of the *Vienna Convention* provides for interpretation of treaty provisions in accordance with the ordinary meaning of the terms in their context and in light of the treaty’s object and purpose. Article 32 only allows for recourse to “supplementary means of interpretation” — including the *Travaux préparatoires* — in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable.

[39] These conditions for use of the *Travaux préparatoires* are not present in this case. With great respect to Justice Abella’s contrary view, the meaning of Article 1F(b) is clear, and admits of no ambiguity, obscurity or absurd or unreasonable result. Therefore, the *Travaux préparatoires* should not be considered.

[40] In any event, the *Travaux préparatoires* support the Minister’s interpretation rather than Mr. Febles’ reading of Article 1F(b). In the case *B (Area of Freedom, Security and Justice)* (2008), BVerwG 10 C 48.07, OVG 8 A 2632/06.A, both the German Federal Administrative Court and the European Court of Justice, *Bundesrepublik Deutschland v. B.*, [2010] EUECJ C-57/09, reviewed the *Travaux préparatoires* and concluded that the aim of the drafters was to protect the dignity of refugee status by excluding serious criminals from such status. The Court of Appeal

in this case similarly concluded that “it is clear from the *Travaux Préparatoires* that the drafters did not intend to limit the exclusion provision to fugitives from justice” (2012 FCA 324, 442 N.R. 290, at para. 62).

[41] Mr. Febles points to statements made by certain delegates that he says support his interpretation when taken in context, but on a review of the *Travaux préparatoires* as a whole, no concluded intention to that effect emerges. Indeed, the French delegate stressed the need to distinguish between *bona fide* refugees and non-political criminals, and added that “refugees whose actions might bring discredit on that status” should be excluded (*Travaux préparatoires*, U.N. Doc. A/CONF.2/SR.29, at 19).

[42] Accordingly, I conclude that the *Travaux préparatoires* do not assist Mr. Febles’ position.

(5) The Case Law on Article 1F(b)

[43] Courts around the world have suggested various rationales for the inclusion of Article 1F(b) in the *Refugee Convention* and have interpreted the provision in different ways. While the jurisprudence is inconclusive as to the precise scope and all of the rationales, there is agreement that Article 1F(b) is not limited to fugitives. After reviewing the foreign jurisprudence, I conclude that the interpretation adopted by the German Federal Administrative Court and the European Court of Justice, that Article 1F(b) excludes anyone who has previously committed a serious

non-political crime, is the most consistent with both the prevailing trend in the case law and the text of the provision.

[44] I will first consider this Court's *obiter dicta* in *Ward* and *Pushpanathan* to the extent that these are read as suggesting that Article 1F(b) is confined to fugitives. I will then review the international and Federal Court jurisprudence. A review of the jurisprudence demonstrates the difficulty of confining Article 1F(b) to a narrow category of people, like fugitives from justice, and confirms that it applies, as its words suggest, to anyone who has ever committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee.

[45] In *Ward*, the Court was concerned with what the meaning is of "membership in a particular social group or political opinion", corresponding to the terms of Article 1A(2) of the *Refugee Convention*. In *obiter*, La Forest J. made this brief comment regarding Article 1F(b):

Hathaway would appear to confine paragraph (b) to accused persons who are fugitives from prosecution. The interpretation of this amendment was not argued before us. I note, however, that Professor Hathaway's interpretation seems to be consistent with the views expressed in the *Travaux préparatoires*, regarding the need for congruence between the Convention and extradition law. [p. 743]

[46] The most that can be said of this comment is that La Forest J., noting that the issue had not been argued, tentatively accepted the view of Professor Hathaway that Article 1F(b) was confined to fugitives, on the basis that it seemed to be

consistent with certain statements found in the *Travaux préparatoires*. As noted earlier in these reasons, the *Travaux préparatoires* should not be relied on in interpreting Article 1F(b). Nor, looking at them in their totality, beyond the particular comments referred to by La Forest J. with respect to extradition law, do the *Travaux préparatoires* support the view that Article 1F(b) is confined to fugitives. Earlier in his *Ward* reasons, La Forest J. explicitly recognized the rationale of a concern to keep out criminal claimants, and the fact that Canada had amended its legislation to better serve that purpose:

In the amended *Immigration Act*, R.S.C., 1985, c. I-2, Parliament has further responded to the concern of keeping out dangerous and criminal claimants by excluding from the definition of “Convention refugee” in s. 2 of the Act any person to whom the Convention does not apply pursuant to s. E or F of Art. 1. [p. 742]

[47] In *Pushpanathan*, this Court was concerned not with Article 1F(b), but with Article 1F(c), which excludes from protection those guilty of crimes contrary to the purposes and principles of the United Nations. Bastarache J., discussing the potential for overlap between Articles 1F(b) and 1F(c), suggested in *obiter* that Article 1F(b) was limited to “ordinary criminals extraditable by treaty” (para. 73). Bastarache J. gave no reasons for interpreting the clause as limited to extraditable fugitives, and the only authority cited at that section of the reasons is Professor G. S. Goodwin-Gill’s *The Refugee in International Law* (2nd ed. 1996). Under the heading *The drafting history of article 1F(b)*, Goodwin-Gill’s text contains a phrase identical

to that used by Bastarache J.: “The IRO Constitution excluded refugees who were ‘ordinary criminals . . . extraditable by treaty’” (p.101 (emphasis added)).

[48] It may therefore bear note that the more recent version of Professor Goodwin-Gill and J. McAdam’s text (*The Refugee in International Law* (3rd ed. 2007)), under the title *The relation to extradition*, observes as follows:

[T]he “fugitives from justice” thesis appears to be on the wain, as being inconsistent with the ordinary meaning of the words. It is one thing to say that those seeking to escape prosecution for serious non-political crimes should not be recognized as refugees; but quite another to say that *only* such fugitives come within the scope of article 1F(b). [Emphasis in original; p. 175.]

[49] The restrictive views contained in the passing comments regarding Article 1F(b) made in *obiter dicta* in *Ward* and *Pushpanathan* find little support in the international case law. Recent jurisprudence out of the United Kingdom, Australia, New Zealand, and the European Union rejects the view that the purpose of Article 1F(b) is confined to exclusion of fugitives.

[50] In *T. v. Secretary of State for the Home Department*, [1996] 2 All E.R. 865, the U.K. House of Lords discussed the purpose of Article 1F generally and indicated that the purpose of Article 1F(b) was not limited to exclusion of fugitives. Rather, Article 1F(b) recognizes that there are those “whose criminal habits ma[ke] it unreasonable for them to be forced on to a host nation against its will” (p. 875). More recently, the U.K. Upper Tribunal (Immigration and Asylum Chamber) confirmed

that Article 1F(b) is not confined to fugitives in *AH (Algeria) v. Secretary of State for the Home Department*, [2013] UKUT 00382 (IAC) (para. 97).

[51] Similar reasoning has been adopted in Australia. In *Dhayakpa v. Minister of Immigration and Ethnic Affairs*, [1995] FCA 1653, 62 F.C.R. 556, French J. of the Australian Federal Court stated that “[t]he exemption in Article 1F(b) . . . is protective of the order and safety of the receiving State” (para. 29). *Dhayakpa* was subsequently affirmed in *Ovcharuk v. Minister for Immigration and Multicultural Affairs*, [1998] FCA 1314, 88 F.C.R. 173, where the Australian Federal Court specifically declined to follow this Court’s *dicta* in *Ward* and *Pushpanathan* that Article 1F(b) applied only to fugitives (pp. 6 and 13).

[52] The leading Australian case is *Minister for Immigration and Multicultural Affairs v. Singh*, [2002] HCA 7, 209 C.L.R. 533. Kirby J. made an extensive survey of the applicable principles of international law, and the context, object and purposes of the *Refugee Convention*. While he acknowledged the *Refugee Convention*’s humanitarian objectives and the “heavy burdens” it imposes on the contracting states (para. 94), he also found that the *Refugee Convention* represented a compromise between competing purposes:

[C]ountries of refuge are usually entitled to ensure the integrity of their own communities. In the case of serious crimes, such countries are normally entitled to exclude persons convicted of, or suspected of complicity in, such crimes. This is because such involvement may indicate, to some degree at least, the possibility of future risk to the community of the country of refuge. Without such entitlement in defined extreme cases, there would be a risk that the protective objectives of the

Convention might be undermined by strong popular and political resentment. [Footnote omitted; para. 95.]

[53] In *Attorney-General (Minister of Immigration) v. Tamil X*, [2010] NZSC 107, 1 N.Z.L.R. 721, the Supreme Court of New Zealand stated that two purposes underlie Article 1F(b): (1) to prevent fugitives from avoiding punishment for their crimes; and (2) to protect the security of states. The court made clear that the language of Article 1F(b) “cannot . . . be read as confining exclusion to those who are fugitives from justice” (para. 82).

[54] In *B (Area of Freedom, Security and Justice)*, both the German Federal Administrative Court and the European Court of Justice held that current dangerousness is not relevant to the application of Article 1F(b). While the claimants in *B (Area of Freedom, Security and Justice)* were fugitives, both courts went on to discuss the general purpose and scope of both Articles 1F(b) and (c) and suggested that the exclusions apply to anyone who has ever committed the acts referenced in those provisions. After examining the *Travaux préparatoires* of the *Refugee Convention*, the German Federal Administrative Court held that the dominant purpose of Article 1F(b) is to “protect refugee status from abuse, by keeping it from being granted to undeserving applicants” and to “prevent refugee status from being discredited by including criminals in the group of recognised refugees” (paras. 29-30). The European Court of Justice stated that Article 1F(b) operates as “a penalty for acts committed in the past” (para. 103) and was “introduced with the aim of excluding from refugee status persons who are deemed to be undeserving of the

protection which that status entails” (para. 104). In other words, Article 1F(b) is aimed at excluding from refugee status persons who have committed a serious crime, regardless of what may have happened since.

[55] I cannot agree with Justice Abella when she says that *B (Area of Freedom, Security and Justice)* “said nothing about whether — or the extent to which — Article 1F(b) deals with non fugitives” (para. 120). To the contrary, the European Court of Justice, at paras. 100-5, made it clear that Articles 1F(b) and 1F(c) operate in the same way: to preserve the dignity of refugee status by excluding anyone who has ever committed the acts listed in those provisions. Indeed, even the appellant properly concedes that “a number of the propositions [in the European Court’s reasoning] seem to suggest that the Article [1F(b)] applies without limit” (A.F., at para. 78).

[56] Two courts, however, have taken a narrow view of Article 1F(b). In Belgium, the Conseil du contentieux des étrangers has held that factors such as expiation, remorse, or even subsequent acts of charity are relevant to whether a claimant is deserving of refugee protection in a given case (see *X v. Commissaire général aux réfugiés et aux apatrides*, No. 27.479, May 18, 2009, and *X v. Commissaire général aux réfugiés et aux apatrides*, No. 69656, November 8, 2011).

[57] And in France, the Conseil d’État has stated that, while protection of the host society is, besides exclusion of fugitives, a rationale for Article 1F(b), a claimant who has served his sentence for a serious crime should not be excluded *unless* it is

found, on the basis of something more than the fact that an Article 1F(b) crime was committed, that he would represent a danger to the public (*Office français de protection des réfugiés et apatrides v. Hykaj*, No. 320910, May 4, 2011).

[58] The Federal Court of Appeal, confronted with this array of jurisprudence, has inclined to the view of the High Court of Australia and the European Court of Justice in a series of cases that includes *Jayasekara v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404, [2009] 4 F.C.R. 164, and the decision under appeal. The Federal Court of Appeal has not followed the *obiter* statements in *Ward* and *Pushpanathan* and has held that sentence completion does not “allow [a claimant] to avoid the application of Article 1F(b)” (*Jayasekara*, at para. 57).

[59] I conclude that the dominant tide of the jurisprudence is inconsistent with the conclusion that Article 1F(b) operates so as to exclude only fugitives, as well as with the proposition that post-crime conduct must be balanced against the crime’s seriousness. Of particular note, none of the international courts accept the *dicta* in *Ward* and *Pushpanathan* that exclusion of fugitives is the *only* rationale for Article 1F(b). In my view, the *Ward* and *Pushpanathan obiter* statements should no longer be followed.

(6) Conclusion on the Scope of Article 1F(b)

[60] Article 1F(b) excludes anyone who has ever committed a serious non-political crime outside the country of refuge prior to his admission to that country as a

refugee. Its application is not limited to fugitives, and neither is the seriousness of the crime to be balanced against factors extraneous to the crime such as present or future danger to the host society or post-crime rehabilitation or expiation.

C. *How Should a Crime's Seriousness Be Assessed?*

[61] The appellant concedes that his crimes were “serious” when they were committed, obviating the need to discuss what constitutes a “serious . . . crime” under Article 1F(b). However, a few comments on the question may be helpful.

[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 (G. S. Goodwin-Gill, *The Refugee in International Law* (3rd ed. 2007), 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.

D. *The Domestic Statutory Context and the Canadian Charter of Rights and Freedoms*

[63] Mr. Febles' final argument is that his suggested interpretation of Article 1F(b) should be adopted because it creates harmony within the *IRPA* and ensures consistency with the *Charter*. This argument conflates two different interpretive exercises.

[64] As discussed, Article 1F(b) of the *Refugee Convention* is part of an international treaty, the meaning of which is not affected by provisions of the *IRPA*. However, the Board is bound by the *IRPA*, and not by the *Refugee Convention* itself. Parliament has the power to pass legislation that complies with Canada's obligations under the *Refugee Convention*, or to pass legislation that either exceeds or falls short of the *Refugee Convention's* protections. In this case, therefore, there are two separate inquiries. First, what does Article 1F(b) of the *Refugee Convention* mean? For this first inquiry, the statutory scheme and the *Charter* are not relevant. Second,

what does s. 98 of the *IRPA* mean? For this second inquiry, the domestic statutory context and the *Charter* are potentially relevant.

[65] I earlier concluded that Article 1F(b) of the *Refugee Convention* applies to anyone who has ever committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee.

[66] Section 98 of the *IRPA* expressly incorporates Article 1F(b) of the *Refugee Convention*, stating: “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”. As such, it is clear that Parliament’s intent was for s. 98 to exclude from refugee protection in Canada all persons falling under Article 1F(b) of the *Refugee Convention*. There is nothing in the scheme of the *IRPA* as a whole that indicates a contrary intention.

[67] There is similarly no role to play for the *Charter* in interpreting s. 98 of the *IRPA*. Where Parliament’s intent for a statutory provision is clear and there is no ambiguity, the *Charter* cannot be used as an interpretive tool to give the legislation a meaning which Parliament did not intend: *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at paras. 61-2. Moreover, as the Court of Appeal held, s. 98 of the *IRPA* is consistent with the *Charter*. As stated at para. 10 of these reasons, even if excluded from refugee protection, the appellant is able to apply for a stay of removal to a place if he would face death, torture or cruel and unusual treatment or punishment if removed to that place (ss. 97, 112, 113(d)(i) and 114(1)(b)).

of the *IRPA*). On such an application, the Minister would be required to balance the risks faced by the appellant if removed against the danger the appellant would present to the Canadian public if not removed (s. 113(d) of the *IRPA*). Section 7 of the *Charter* may also prevent the Minister from issuing a removal order to a country where *Charter*-protected rights may be in jeopardy: *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at para. 58.

[68] While the appellant would prefer to be granted refugee protection than have to apply for a stay of removal, the *Charter* does not give a positive right to refugee protection. The appellant is excluded from refugee protection as a result of his commission of serious non-political crimes. If removal of the appellant to Cuba jeopardizes his *Charter* rights, his recourse is to seek a stay of removal, as discussed earlier.

[69] Alternatively, if the appellant believes that the refugee status he was previously granted by the United States was improperly stripped by U.S. authorities under 8 U.S.C. § 1158(c)(2)(B) and § 1158(c)(3), he must challenge this in the justice system of the United States. The Canadian justice system cannot be invoked to determine the correctness or the constitutionality of decisions made by U.S. officials pursuant to U.S. laws.

IV. Disposition

[70] I would dismiss the appeal and uphold the decision of the Board denying refugee protection to the appellant.

The reasons of Abella and Cromwell JJ. were delivered by

ABELLA J. —

[71] In the wake of the mass persecution and displacement of persons during World War II, the international community responsively consolidated and entrenched international protection for refugees through the 1951 United Nations *Convention Relating to the Status of Refugees*, Can. T.S. 1969 No. 6 (*Refugee Convention*).

[72] The *Refugee Convention*, as amended by a 1967 *Protocol relating to the Status of Refugees*, 606 U.N.T.S. 267, is today the Rosetta Stone of refugee protection under international law, setting out the definition of who is considered a refugee, the rights of refugees, and the corresponding obligations of states towards refugees in their territory. Among other humanitarian protections provided in the *Refugee Convention*, the prohibition against *refoulement* under Article 33 provides that signatory states are prohibited from forcibly expelling or returning refugees to a territory in which there is a risk of persecution.

[73] While Article 1 sets out broad parameters for those persons with a well-founded fear of persecution who will be considered refugees, the category is not

open-ended. The signatories to the *Refugee Convention* did not want the protections flowing from refugee status to be extended to individuals whose designation as refugees would compromise the integrity and political viability of those very protections.

[74] Article 1F sets out the grounds for excluding an individual from the status of “refugee”. The claim for refugee status in this case depends on a determination of when the commission of a serious non-political crime in accordance with Article 1F(b) will disqualify an individual from the protective scope of the *Refugee Convention*. With great respect, I draw a different interpretive conclusion than does the majority. While Articles 1F(a) and (c) represent absolute barriers to refugee status, the human rights approach to interpretation mandated by the *Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37 (*Vienna Convention*), suggests a less draconian interpretation of Article 1F(b). In my view, except in the case of very serious crimes, an individual should not automatically be disqualified from the humanitarian protection of the *Refugee Convention* under this provision and should be entitled to have any expiation or rehabilitation taken into account.

Background

[75] The facts underlying the criminal conduct in question in this appeal are not contested. Luis Alberto Hernandez Febles is a Cuban citizen born on December 4, 1954. He left Cuba for the United States on May 14, 1980. He was granted

refugee status in the United States on the ground of fear of persecution as a political dissident.

[76] Mr. Febles pleaded guilty in 1984 and 1993 to two criminal offences in California. They are the basis of this appeal.

[77] On July 2, 1984, Mr. Febles turned himself in to the police after having struck someone on the head with a hammer while the victim was sleeping. He had consumed alcohol at the time of the offence. On November 20, 1984, Mr. Febles pleaded guilty to “assault . . . with deadly weapon . . . other than a firearm” under the *Penal Code of California* (s. 245(a)(1)), and was sentenced to two years in prison and three years of probation.

[78] The second offence occurred on October 3, 1993, when Mr. Febles uttered threats while pointing a knife at someone. Mr. Febles pleaded guilty to “assault with a deadly weapon other than a firearm”. He was sentenced to two years in prison and three years of probation.

[79] Mr. Febles does not deny responsibility for these offences. He admitted that he had serious alcohol problems at the time, but said that he has since stopped drinking after completing an Alcoholic Anonymous course between 1998 and 2002. From 2002 to 2008, Mr. Febles was gainfully employed in the United States.

[80] Mr. Febles entered Canada on October 12, 2008. Two days later, on October 14, 2008, he reported to the authorities and applied for refugee status on the ground of fear of persecution in Cuba for his political beliefs. He freely disclosed his criminal convictions to the Canadian authorities in his interview with the Canada Border Services Agency.

[81] On the basis of the Border Services report, Mr. Febles was referred to the Immigration Division of the Immigration and Refugee Board (Board) for an inadmissibility hearing. The Immigration Division concluded that Mr. Febles was inadmissible based on having committed a serious non-political crime.

[82] A deportation order was issued on June 3, 2010.

[83] On October 14, 2010, the Board's Refugee Protection Division heard Mr. Febles' claim for refugee protection. The Minister of Public Safety and Emergency Preparedness filed a notice to intervene, arguing that Mr. Febles should be excluded from the definition of refugee under Article 1F(b) of the *Refugee Convention* because he had committed a serious non-political crime. Mr. Febles' position was that he had served his sentences, was now rehabilitated, and posed no danger to Canada.

[84] The Board dismissed his claim for refugee status on October 27, 2010, concluding that the gravity of his crime in 1984 disqualified him from refugee status under Article 1F(b) of the *Refugee Convention*.

[85] Mr. Febles' application for judicial review was dismissed by both the Federal Court, 2011 FC 1103, 397 F.T.R. 179, and Federal Court of Appeal, 2012 FCA 324, 442 N.R. 290. For the following reasons, I would allow the appeal and remit the matter to the Board for redetermination.

Analysis

[86] Article 1F of the *Refugee Convention* excludes three categories of individuals from the protective scope of its provisions by limiting the definition of a "refugee":

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

- (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;**
- (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

[87] The consequences of exclusion under Article 1F are significant. If an individual becomes ineligible for the status of a "refugee" on the basis of one of those exclusionary grounds, the humanitarian protections provided in the *Refugee Convention* are denied altogether, including the protection from *refoulement* under

Article 33. An excluded individual is consequently at risk of being returned to face persecution in his or her country of origin, barring the availability of any residual protection under domestic or international human rights law.

[88] Parliament incorporated Article 1F into the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. Section 95 of the Act states that refugee protection is conferred on an individual where the Immigration and Refugee Board “determines the person to be a Convention refugee or a person in need of protection”. Section 98 carves out an exception for persons covered by Article 1F.

[89] Article 31 of the *Vienna Convention* sets out the general rule for the interpretation of international treaties such as the *Refugee Convention*. Article 31(1) states:

A treaty shall be interpreted *in good faith* in accordance with the ordinary meaning to be given to the terms of the treaty in their context *and in the light of its object and purpose*.

[90] Among other interpretive methods, Article 31(3) of the *Vienna Convention* provides that subsequent practice among the signatory states is relevant to context in the interpretive exercise where that practice “establishes the agreement of the parties regarding its interpretation”; see also *Yugraneft Corp. v. Rexx Management Corp.*, [2010] 1 S.C.R. 649, at para. 21. Article 32 provides that recourse may be had to the *travaux préparatoires* of a treaty as a supplementary means of interpretation “in order to confirm the meaning resulting from the

application of article 31”, or where the application of Article 31 results in ambiguity or a result which is “manifestly absurd or unreasonable”: *Peracomo Inc. v. TELUS Communications Co.*, 2014 SCC 29, at para. 100.

[91] In *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, Bastarache J. described the application of this interpretive approach in the context of interpreting the *Refugee Convention*:

[The *Vienna Convention* rules on treaty interpretation] have been applied by this Court in two recent cases, one involving direct incorporation of treaty provisions (*Thomson v. Thomson*, [1994] 3 S.C.R. 551) and another involving a section of the *Immigration Act* intended to implement Canada’s obligations under the Convention (*Ward, supra*). In the latter case, La Forest J. makes use of several interpretative devices: the drafting history of, and preparatory work on the provision in question; the United Nations High Commissioner for Refugees’ *Handbook on Procedures and Criteria for Determining Refugee Status* (“UNHCR Handbook”), and previous judicial comment on the purpose and object of the treaty. Indeed, at p. 713, La Forest J. was willing to consider submissions of individual delegations in the *travaux préparatoires*, although he recognized that, depending on their content and on the context, such statements “may not go far” in supporting one interpretation over another.

...

[A] *priori* denial of the fundamental protections of a treaty whose purpose is the protection of human rights is a drastic exception for the purposes of the Convention [. . .] and can only be justified where the protection of those rights is furthered by the exclusion. [paras. 53 and 74]

[92] In light of the human rights purposes of the *Refugee Convention* and the dramatic consequences of exclusion from the status of a refugee, Article 1F requires a particularly cautious interpretation: *Ezokola v. Canada (Citizenship and Immigration)*

[2013] 2 S.C.R. 678, at paras. 31-36; *Pushpanathan*, at para. 57; see also *Al-Sirri v. Secretary of State for the Home Department*, [2012] UKSC 54, [2013] 1 A.C. 745, at paras. 12 and 16; United Nations High Commissioner for Refugees (UNHCR), “Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees”, HCR/GIP/03/05, September 4, 2003 (online) at para. 2 (UNHCR Guidelines).

[93] The link between the human rights object and a cautious interpretation is highlighted in the Preamble to the *Refugee Convention* itself, as LeBel and Fish JJ. confirmed in *Ezokola*:

The preamble to the *Refugee Convention* highlights the international community’s “profound concern for refugees” and its commitment “to assure refugees the widest possible exercise of . . . fundamental rights and freedoms”. Our approach to art. 1F(a) must reflect this “overarching and clear human rights object and purpose”. [para. 32, citing *Pushpanathan*, at para. 57]

[94] In *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, La Forest J. explained how the animating human rights purposes of the *Refugee Convention* inform the interpretation of the elements of the definition of “Convention refugee”:

Underlying the Convention is the international community’s commitment to the assurance of basic human rights without discrimination. This is indicated in the preamble to the treaty as follows:

Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human

beings shall enjoy fundamental rights and freedoms without discrimination.

This theme outlines the boundaries of the objectives sought to be achieved and consented to by the delegates. It sets out, in a general fashion, the intention of the drafters and thereby provides an inherent limit to the cases embraced by the Convention. Hathaway . . . thus explains the impact of this general tone of the treaty on refugee law:

The dominant view, however, is that refugee law ought to concern itself with actions which deny human dignity in any key way, and that the sustained or systemic denial of core human rights is the appropriate standard.

This theme sets the boundaries for many of the elements of the definition of “Convention refugee”. [p. 733]

[95] This takes us to the purpose of the exclusion clauses in Article 1F. In *Pushpanathan*, Bastarache J. described their underlying purpose and relationship to the *Refugee Convention* as follows:

The rationale is that those who are responsible for the persecution which creates refugees should not enjoy the benefits of a Convention designed to protect those refugees. As La Forest J. observes in *Ward, supra*, at p. 733, “actions which deny human dignity in any key way” and “the sustained or systemic denial of core human rights . . . se[t] the boundaries for many of the elements of the definition of ‘Convention refugee’”. This purpose has been explicitly recognized by the Federal Court of Appeal in the context of the grounds specifically enumerated in Article 1F(a) in *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433, where Linden J.A. stated (at p. 445): “When the tables are turned on persecutors, who suddenly become the persecuted, they cannot claim refugee status. International criminals, on all sides of the conflicts, are rightly unable to claim refugee status. [para. 63]

[96] Bastarache J. rejected the suggestion that the exclusion clauses in Article 1F were intended to protect the country of refuge from dangerous refugees who are at

a risk of reoffending. In his view, this interest is addressed by Article 33 of the *Refugee Convention*, which permits a state to expel a refugee to his or her native country if the individual is considered a danger to the receiving state (*refoulement*). To fold this function into Article 1F as well, in his view, would render Article 33 redundant:

The purpose of Article 1 is to define who is a refugee. Article 1F then establishes categories of persons who are specifically excluded from that definition. The purpose of Article 33 of the Convention, by contrast, is not to define who is and who is not a refugee, but rather to allow for the *refoulement* of a *bona fide* refugee to his or her native country where he or she poses a danger to the security of the country of refuge, or to the safety of the community. This functional distinction is reflected in the Act, which adopts Article 1F as part of s. 2, the definitional section, and provides for the Minister's power to deport an admitted refugee under s. 53, which generally incorporates Article 33. *Thus, the general purpose of Article 1F is not the protection of the society of refuge from dangerous refugees, whether because of acts committed before or after the presentation of a refugee claim; that purpose is served by Article 33 of the Convention. Rather, it is to exclude ab initio those who are not bona fide refugees at the time of their claim for refugee status. Although all of the acts described in Article 1F could presumably fall within the grounds for refoulement described in Article 33, the two are distinct. . . .* [Emphasis added; para. 58.]

[97] The UNHCR Guidelines also provide guidance on the purpose of the exclusion clauses in Article 1F generally:

The rationale for the exclusion clauses, which should be borne in mind when considering their application, is that certain acts are so grave as to render their perpetrators undeserving of international protection as refugees. Their primary purpose is to deprive those guilty of heinous acts, and serious common crimes, of international refugee protection and to ensure that such persons do not abuse the institution of asylum in order to avoid being held legally accountable for their acts. The exclusion clauses must be applied "scrupulously" to protect the integrity of the institution

of asylum, as is recognised by UNHCR's Executive Committee in Conclusion No. 82 (XLVIII), 1997. At the same time, *given the possible serious consequences of exclusion, it is important to apply them with great caution and only after a full assessment of the individual circumstances of the case. The exclusion clauses should, therefore, always be interpreted in a restrictive manner.* [Emphasis added; para. 2.].

[98] Broadly speaking, then, Article 1F operates to maintain the integrity of the system of international refugee protection and the status of being a "refugee". The parties to the *Refugee Convention* recognized this important function in their 2001 *Declaration of States Parties to the 1951 Convention and or its 1967 Protocol Relating to the Status of Refugees*, HCR/MMSP/2001/09 (*Declaration of States*), where the signatories reaffirmed their commitment

. . . to continue their efforts aimed at ensuring the integrity of the asylum institution, *inter alia*, by means of carefully applying Articles 1F and 33(2) of the 1951 Convention, in particular in light of new threats and challenges. . . . [Emphasis added; p.3]

[99] In order to screen individuals who are not "*bona fide* refugees", the application of Article 1F of the *Refugee Convention* operates to protect the integrity of the international refugee protection by excluding individuals who, as a result of having committed such "heinous acts, and serious common crimes", are themselves considered undeserving of the status of refugee: UNHCR Guidelines, at para. 2; *Pushpanathan*, at para. 63; *Ezokola*, at para. 34.

[100] The particular exclusion under scrutiny in this appeal is the one in Article 1F(b), which excludes individuals from the *Refugee Convention* where there “are serious reasons for considering that . . . he has committed a serious non-political crime *outside the country of refuge prior to his admission to that country as a refugee*”.

[101] There is little doubt that the primary purpose of Article 1F(b) was to exclude those individuals who would abuse the status of a refugee by avoiding accountability through prosecution or punishment for a serious crime outside the country of refuge. For the clause to apply, the crime must have been committed “outside the country of refuge prior to his [or her] admission to that country as a refugee”. This territorial limitation has been relied on as a strong textual indication that Article 1F(b) was intended to exclude those individuals who seek to abuse the status of being a refugee by evading prosecution in another jurisdiction: James C. Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd ed. 2014), at p. 544. Further support for this interpretation emerges from the surrounding context of Article 1F(b), the UNHCR Guidelines, at para. 2, the interpretation of Article 1F(b) adopted in other jurisdictions, and the drafting history and *travaux préparatoires* of the *Refugee Convention*. See also *Pushpanathan*, at para. 73; *Ward*, at p. 743.

[102] There is considerable debate, however, as to the extent to which Article 1F(b) was also intended to fulfill the additional purpose of excluding individuals who, as a result of having committed and been prosecuted for serious non-political crimes

in the past, are considered undeserving of refugee protection under the *Refugee Convention*.

[103] To be fully understood, the text of Article 1F(b) must be situated in its surrounding context and considered in light of its drafting history.

[104] The Preamble of the *Refugee Convention* directs that the contracting parties “revise and consolidate previous international agreements” relating to the rights of refugees, and “extend the scope of and the protection accorded by such instruments by means of a new agreement”.

[105] The “previous international agreements” referred to in the Preamble each denied refugee protection for individuals who had committed crimes in other countries prior to entering the country of refuge and had yet to be prosecuted and punished for those crimes: *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (*Universal Declaration*) (adopted by the U.N. General Assembly on December 10, 1948); *Constitution of the International Refugee Organization*, August 20, 1948, 18 U.N.T.S. 3, Ann. I, Part II (excluding “[o]rdinary criminals who are extraditable by treaty”); *Statute of the Office of the United Nations High Commissioner for Refugees*, G.A. Res. 428(V) of December 14, 1950, p. 7 (excluding persons who had committed a “crime covered by the provisions of treaties of extradition”).

[106] Moreover, in reaffirming their commitment to international refugee protection, the signatories declared in 2001 that the *Refugee Convention* is “consistent with Article 14 of the Universal Declaration of Human Rights”: *Declaration of States*, adopted by the U.N. G.A. A/RES/57/187, at para. 4, December 18, 2001. Article 14 of the *Universal Declaration* deals with an individual’s right of asylum from persecution:

1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.
2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

[107] Article 14(2) is also significant because it was central to the discussions by states’ representatives at the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons in Geneva in July 1951 (Conference of Plenipotentiaries). I agree that the import of the *travaux préparatoires* with respect to Article 1F(b) is not obvious. But I do not agree, with respect, that the *travaux préparatoires* provide no insight of significance into the issues before us. In my view, the widely divergent interpretations of Article 1F(b) adopted by courts in other jurisdictions and the uncertainty created by the territorial limits described in Article 1F(b), mandate recourse to the interpretive assistance of the preparatory work.

[108] Throughout the early stages of the drafting history, Article 14(2) of the *Universal Declaration*, rather than the provision which eventually became Article 1F(b), was directly incorporated in the *Refugee Convention*. The *travaux*

préparatoires provide some insight into why the signatories to the *Convention* modified the exclusionary language of Article 14(2) and adopted instead the text which is currently found in Article 1F(b).

[109] At the Conference of Plenipotentiaries, the representative for the United Kingdom prompted discussion by proposing that the reference to Article 14(2) should be deleted altogether. In his view, incorporating Article 14(2) was entirely unnecessary in light of the provision in the draft *Refugee Convention* — what eventually became Article 33(2) — which permitted signatories to “*refouler*” refugees who posed a danger or threat to the country of refuge.

[110] Nonetheless, some states — particularly France and Yugoslavia — were opposed to deleting the reference to Article 14(2) from the draft. France expressed a concern that there was a need to preserve the distinction between “ordinary common-law criminals” and “*bona fide* refugees” with respect to whether the individual was eligible for the status of a refugee under the *Refugee Convention* (Conference of Plenipotentiaries, Summary Record of the Twenty-fourth Meeting (*Plenipotentiaries*), U.N. Doc. A/Conf. 2/SR. 24 (1951)). The French representative argued that signatories to the Convention should not be required to grant refugee status to an individual who had no right of asylum within the meaning of Article 14(2) since asylum “was the *conditio sine qua non* of the possession of [refugee] status” (*Plenipotentiaries*, U.N. Doc. A/CONF. 2/S.R. 29 (1951)).

[111] Notably, the representative from the United Kingdom confirmed that Article 14(2) “was intended to apply to persons who were fugitives from prosecution in another country for non-political crimes” (*Plenipotentiaries*, U.N. Doc. A/CONF. 2/S.R. 29 (1951)), and the language ought more clearly to reflect this. None of the representatives disagreed with this position. This is not surprising, given that, as in the other previous international agreements noted above, the underlying assumption was that Article 14(2) restricted refugee protection for individuals who remained criminally liable abroad: Atle Grahl-Madsen, *The Status of Refugees in International Law* (1966, vol. I, *Refugee Character*, at p. 290. The UK representative also suggested that the language of Article 14(2) be modified so as to ensure that refugees who had committed trivial or minor crimes “should not thereby be placed once and for all beyond the reach of the Convention” (*Plenipotentiaries*, U.N. Doc. A/CONF. 2/S.R. 24 (1951)).

[112] Some representatives expressed concern that the draft *Refugee Convention* should be coordinated with extradition law, so as to prevent a conflict between the *Convention* and an extradition treaty, while others were of the view that this was not a concern that needed to be *expressly* addressed under the *Convention*, but could be dealt with by way of reservations or declarations as needed.

[113] Since it was apparent that the U.K.’s proposal to delete Article 14(2) was not broadly supported, the representatives turned their attention to revising its exclusionary language. France and Yugoslavia were of the view that the exclusion

clause should only relate to crimes committed before entry into the territory of the receiving country. France also emphasized that the term “crime” must be distinguished from “misdemeanour”, and proposed that the clause refer only to “serious crimes” (*Plenipotentiaries*, U.N. Doc. A/CONF. 2/S.R. 29 (1951)). In describing the “vital” necessity of retaining the provision, the representative from France emphasized the need for a provision which would permit France to screen individuals at the border and grant *asylum* for some individuals on French territory, without having to confer on those individuals the status of a refugee (*ibid.*).

[114] After some discussion, a variation proposed by Yugoslavia was ultimately adopted,¹ and agreed to by the U.K.’s representative because

. . . while he did not regard the revised Yugoslav amendment as entirely free from objection, [he] felt that it at least removed his . . . main objection to the text . . . as originally drafted, which would have made it *too easy for States to withdraw the status of refugee from many persons who had been granted asylum from persecution*. [Emphasis added; *ibid.*]

After Belgium proposed some minor modifications,² Article 1F(b) as it is now drafted was adopted by the representatives.

[115] This linguistic conclusion to the discussions, whose origins were to discuss whether to *expand* the scope of those who were entitled to refugee status

¹ Yugoslavia proposed that the text state: “. . . he has committed a serious crime under common law outside the country of reception” (*Plenipotentiaries*, U.N. Doc. A/CONF. 2/S.R. 29 (1951)).

² The final version, as modified by Belgium, is reflected in the 1951 *Convention*: “. . . he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee”.

notwithstanding their commission of a crime for which they evaded prosecution, argues strongly against using this expanded protection to narrow the category of those entitled to protection.

[116] The most significant aspect of the discussions for purposes of this appeal, is that the discussions were only about refugee claimants who had committed a crime outside the country of refuge *but had not been convicted or served a sentence for that crime*. In this context, there was broad agreement among the representatives that only fugitives from *serious* non-political crimes be excluded from entitlement. The issue was never about those who had committed serious crimes *and* had already served their sentences outside the receiving country.

[117] Turning to the interpretation adopted in other jurisdictions of Article 1F(b), it is widely accepted that the original purpose of Article 1F(b) was to deny refugee status to fugitives, namely, those individuals who had avoided prosecution for serious non-political crimes committed abroad. This was based on the premise that enabling those individuals to obtain refugee status would compromise the integrity of the international system of refugee protection. The European Court of Justice, in a decision about the interpretation of Article 12(2)(b) and (c) of the *Directive 2004/83/EC* of the Council of the European Union which incorporates Article 1F(b) and (c) into E.U. legislation, has recognized that one of the purposes of exclusion under those provisions is to prevent the status of being a refugee “from enabling those who have committed certain serious crimes to escape criminal liability”

(Bundesrepublik Deutschland v. B. [2010] EUECJ C-57/09, at para. 104). See also *Australia (SRYYY v. Minister for Immigration and Multicultural and Indigenous Affairs*, [2005] FCAFC 42, 220 A.L.R. 394); *New Zealand (Attorney-General (Minister of Immigration) v. Tamil X*, [2010] NZSC 107, [2011] 1 N.Z.L.R. 721, at para. 82 (*Tamil X*); the United Kingdom (*AH (Algeria) v. Secretary of State for the Home Department*, [2013] UKUT 00382 (IAC)) (*AH*); and France (*Office français de protection des réfugiés et apatrides v. Hykaj*, No. 320910, May 4, 2011).

[118] All jurisdictions also appear to agree that there are other circumstances in which Article 1F(b) excludes individuals from the *Refugee Convention*, but there seems to be little agreement as to when those circumstances arise.

[119] Australian and New Zealand courts have concluded that Article 1F(b) is additionally intended to protect the country of refuge from individuals who are considered dangerous as a result of committing past crimes (*Dhayakpa v. Minister of Immigration and Ethnic Affairs*, [1995] FCA 1653, 62 F.C.R. 556, at para. 29); *Minister for Immigration and Multicultural Affairs v. Singh*, [2002] HCA 7, 209 C.L.R. 533, at paras. 15 and 95-96), as has New Zealand (*Tamil X*, at para. 82). Other jurisdictions, however, like this Court in *Pushpanathan*, have expressly rejected the proposition that exclusion of dangerous individuals is the underlying purpose of Article 1F(b), even if its application may incidentally have that effect in some cases.

[120] The European Court of Justice concluded that it would be inconsistent with the purposes of exclusion “to make exclusion from refugee status conditional

upon the existence of a present danger to the host Member State” (*Bundesrepublik Deutschland v. B.*, at para. 104). The court held that the dangerousness of the individual is not considered under Article 12(2) of the European directive (incorporating Article 1F), but under the Articles of the directive which incorporate Article 33(2) of the *Refugee Convention* (para. 101). Notably, this case said nothing about whether — or the extent to which — Article 1F(b) deals with non-fugitives. Nor did it conclude that it automatically excludes anyone who has ever committed a serious crime.

[121] And still other jurisdictions have found that rehabilitation, the seriousness of the crime, and other factors relating to the individual circumstance of the claimant are relevant. In Belgium, in a case about a refugee claimant who had committed and completed sentences for past crimes abroad, the Conseil du contentieux des étrangers concluded that Article 1F(b) applied to exclude the individual from the *Refugee Convention* on the basis of the individual’s lack of remorse for very grave criminal conduct (*X v. Commissaire général aux réfugiés et aux apatrides*, No. 69656, Novembre 8, 2011). The Conseil du contentieux des étrangers observed that the decision to exclude the individual at issue had been reached on grounds which included an express reference to the “Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees” (*Background Note*) (online), prepared by the UNHCR in 2003, that the completion of a sentence for a crime may be considered a relevant form of expiation, and that other factors such as the gravity of the offence and the claimant’s age and

remorsefulness must also be considered. But in cases involving truly heinous crimes, exclusion under Article 1F(b) will be mandated even where the claimant has completed a sentence for a crime committed and demonstrated remorse (*XXX v. État belge*, No. 199.079, A. 192.074/XI-16.797 Conseil d'État (Section du contentieux administratif), December 18, 2009; 27.479, Conseil du contentieux des étrangers), May 18, 2009).

[122] In the United Kingdom, earlier decisions of the Immigration Appeal Tribunal took a literal approach to the words of Article 1F(b) and rejected an interpretation in which expiation (understood as “punishment, pardon, or amnesty” or “remorse or change of heart”) is relevant to determining whether past criminal conduct is a basis for exclusion under Article 1F(b): *KK (Turkey) v. Secretary of State for the Home Department*, [2004] UKIAT 00101, at para 92); *Secretary of State for the Home Department v. AA (Palestine)*, [2005] UKIAT 00104, at paras. 59-62. Instead, the Tribunal considered it should instead apply the words of Article 1F(b) “exactly as they are written” (*KK*, at para. 92).

[123] But recently, a more generous approach has been taken to the interpretation of Article 1F “because of the serious consequences of excluding a person who has a well-founded fear of persecution from the protection of the *Refugee Convention*” [2010] 3 All E.R. 88). *Al-Sirri* at paras. 12 and 16; (*R. (JS (Sri Lanka)) v. Secretary of State for the Home Department*, [2010] UKSC 15, [2010] 3 ALL E.R. 88).

[124] In a recent decision involving a refugee claimant who had been convicted of and completed a sentence for a prior criminal offence, the Upper Tribunal (Immigration and Asylum Chamber) adopted a high threshold of seriousness for triggering Article 1F(b) where the individual had already completed a sentence for the crime, and left open the possibility that supervening events may be relevant to the analysis (*AH*). The Tribunal found that Article 1F(b) has two purposes: the “prevention of abuse of the asylum system by undermining extradition law or the mutual interest amongst states in prosecuting serious offenders”, and to exclude “those who have demonstrated by their conduct they are not worthy of it” (para. 85). In determining whether an individual is “unworthy” on the basis of past conduct, the Tribunal found:

. . . that limbs 1F(a) and (c) serve to illustrate the level of seriousness required to engage Article 1F(b); *the genus of seriousness is at a common level throughout*. Those who commit war crimes and acts against the principles and purposes of the United Nations are clear examples of people who are unworthy of protection. [Emphasis added; para. 86.]

[125] It also noted that the French text of Article 1F(b) provides important insight into the level of seriousness required for exclusion under that clause:

The French text of Article 1F(b) refers to “*un crime grave*” whereas that for Article 33 (2) refers to “*un délit particulièrement grave*”. A *crime* in French law is a more serious class of offence than a *délit*. According to Cornu’s *Vocabulaire Juridique* (9th edition) 2011, “*crime*” is a “*transgression particulièrement grave*”. We accept, however, that the classification of the offence in national law is not the issue (as it happens the offences of which the appellant was convicted in France were both *délits*). The point is rather that the focus on the use of the English word “crime” in both Articles loses the quality of seriousness reflected in the

French word. It may be that the language of the French text is where the UNHCR and the commentators obtain the notion that serious crimes were once capital crimes. [para. 88]

[126] On those facts, it was held that “personal participation in a conspiracy to promote terrorist violence can be a particularly serious crime for the purpose of Article 1F(b)” (para. 89). The Tribunal emphasized that “[w]e must search for the autonomous international meaning of the term rather than what might be purely national law concerns about what conduct should be penalised and sentencing policy” (para. 83). Seriousness is to be examined at the time the criminal acts were committed, but the Tribunal noted that events such as a pardon, or a final acquittal in the “supervening passage of time may be relevant to whether exclusion is justified” (para. 97).

[127] The UNHCR’s *“Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees”*, which “forms an integral part of UNHCR’s [position]” on the interpretation of Article 1F (UNHCR Guidelines), provides guidance of particular relevance:

. . . it is arguable that an individual who has served a sentence should, in general, no longer be subject to the exclusion clause as he or she is not a fugitive from justice. Each case will require individual consideration, however, bearing in mind issues such as the passage of time since the commission of the offence, the seriousness of the offence, the age at which the crime was committed, the conduct of the individual since then, and whether the individual has expressed regret or renounced criminal activities. In the case of truly heinous crimes, it may be considered that such persons are still undeserving of international refugee protection and the exclusion clauses should still apply. This is more likely to be the case

for crimes under Article 1F(a) or (c), than those falling under Article 1F(b). [Emphasis added; para. 73.].

[128] Two related observations emerge from this review. The first is that, like the international agreements relating to refugees which were consolidated and revised by the *Refugee Convention*, Article 1F(b) was originally intended to maintain the integrity of the status of refugee by excluding fugitives. The *travaux préparatoires* confirm that the exclusion of those who have committed serious and unpunished crimes was not only a practical concern; it was a moral one for the integrity of the international system of refugee protection.

[129] But as the recent international jurisprudence shows, it remains far from clear that the signatories to the *Refugee Convention* intended to exclude all individuals who were believed to have committed serious non-political crimes, without regard for whether they had been rehabilitated. In my view, this leaves it open to this Court to reach its own conclusion as to how to interpret the scope of 1F(b).

[130] The requisite good faith interpretive approach mandates not divorcing the text of Article 1F(b) from its human rights purpose. This is particularly so given the clear concern at the Conference of Plenipotentiaries that the basis for exclusion under Article 1F(b) should be restrictively written so that it would not be “too easy” for states to deny the humanitarian protections guaranteed by the *Refugee Convention* (*Plenipotentiaries*, U.N. Doc. A/CONF. 2/S.R. 29 (1951)).

[131] This means, as the UNHCR Guidelines state, that there is room for discretion to apply Article 1F(b) “*only after a full assessment of the individual circumstances of the case*” (para. 2 (emphasis added)). There is little or no authority for the proposition that *everyone* who has committed a serious non-political crime outside the country of refuge remains permanently undeserving of the *Refugee Convention*’s protection regardless of their supervening personal circumstances. Such a relentlessly exclusionary — and literal — approach would contradict both the “good faith” approach to interpretation required by the *Vienna Convention* as well as the *Refugee Convention*’s human rights purpose.

[132] In my view, depending on the seriousness of the crime, if an individual is believed to have committed a serious non-political crime, the purpose of Article 1F(b) can be met where the individual’s circumstances reflect a sufficient degree of rehabilitation or expiation that the claimant ought not to be disqualified from the humanitarian protection of the *Refugee Convention*. The completion of a sentence, along with factors such as the passage of time since the commission of the offence, the age at which the crime was committed, and the individual’s rehabilitative conduct, will all be relevant. On the other hand, individuals who have committed such serious crimes that they must be considered undeserving of the status of being a refugee would be excluded.

[133] Support for this interpretation comes from the approach taken by the UNHCR and by foreign courts in Belgium and the United Kingdom, which have

emphasized that those who have committed particularly serious crimes are excluded under the *Refugee Convention* on the basis that they are undeserving of the status of a refugee. This approach also accords with the intention of the signatories to the *Refugee Convention* to protect the integrity and viability of the international system of protection for refugees by limiting the obligations of the contracting parties towards individuals who have committed very serious crimes.

Application

[134] In concluding that Mr. Febles was excluded from the *Refugee Convention* on the basis of Article 1F(b), the Board considered “only the crime committed in 1984, for which there is more information” and found that Mr. Febles had committed a “serious non-political crime” (para. 22). It observed that Mr. Febles had completed the sentence imposed for the offence committed in 1984, and that “it might appear unfair to the claimant that, although he served his sentence and took the second chance that life was offering him 17 years ago and chose to follow a straighter path, the crimes he committed many years ago are coming back to haunt him” (para. 24). The question it did not determine is whether this offence was so serious that Mr. Febles must be considered undeserving of the status of a refugee.

[135] Mr. Febles expressed remorse immediately after the commission of the offence and turned himself in to the police. He pleaded guilty and served his sentence for his criminal conduct. He also admitted that he was suffering from problems with alcohol at the time of the offence. While it is clear that the criminal conduct was

serious, what has yet to be determined is whether the crime is so serious that Mr. Febles' personal circumstances since serving his sentence in 1984 ought to be disregarded in considering whether he is entitled to refugee status.

[136] I would therefore allow the appeal and return the matter to the Immigration and Refugee Board for redetermination in accordance with these reasons.

Appeal dismissed, ABELLA and CROMWELL JJ. dissenting.

Solicitors for the appellant: Jared Will, Montréal; Peter Shams, Montréal.

Solicitor for the respondent: Attorney General of Canada, Montréal.

Solicitors for the intervener Amnesty International: Power Law, Ottawa.

Solicitors for the intervener the United Nations High Commissioner for Refugees: Torys, Toronto; UNHCR, Toronto.

*Solicitors for the intervener the Canadian Association of Refugee
Lawyers: Refugee Law Office, Toronto.*

*Solicitor for the intervener the Canadian Council for
Refugees: University of British Columbia, Vancouver.*

*Solicitors for the intervener the Canadian Civil Liberties
Association: Edelman & Co. Law Office, Vancouver; Waldman & Associates,
Toronto.*