Immigration and
Refugee Board of Canada
Refugee Protection Division

Commission de l'immigration et
du statut de réfugié du Canada
Section de la protection des réfugiés

RPD File No. / N° de dossier de SPR : VA9-05883, VA9-05869
VA9-05884, VA8-05885

Private Proceeding / Huis clos

Reasons and Decision – Motifs et décision

Claimant(s)	**XXXXX XXXXX** **XXXXX XXXXX** **XXXXX XXXXX** **XXXXX XXXXX**	**Demandeur(e)(s) d'asile**
Date(s) of Hearing	11 May 2011 28 September 2011	**Date(s) de l'audience**
Place of Hearing	Vancouver, BC	**Lieu de l'audience**
Date of Decision	08 December 2011	**Date de la décision**
Panel	Colleen Zuk	**Tribunal**
Counsel for the Claimant(s)	Shane Molyneaux Barrister and Sollicitor	**Conseil(s) du / de la / des demandeur(e)(s) d'asile**
Tribunal Officer	N/A	**Agent(e) des tribunaux**
Designated Representative(s)	N/A	**Représentant(e)(s) Désigné(e)(s)**
Counsel for the Minister	*Documents only*	**Conseil du ministre**

REASONS FOR DECISION

[1] **XXXXX XXXXX**, (the "principal claimant"), **XXXXX XXXXX**, (the "associated claimant") and principal claimant's husband, **XXXXX XXXXX**, (the "associated claimant") and the principal claimant's daughter and **XXXXX XXXXX**, (the "associated claimant") who is the son of **XXXXX XXXXX**, are citizens of Iran.[1] They claim refugee protection pursuant to sections 96 and 97(1) of the *Immigration and Refugee Protection Act*.

DETERMINATION

[2] I find that **XXXXX XXXXX** is excluded from the definition of Convention Refugee or a person in need of protection pursuant to Article 1F(b) of the Convention.[2]

[3] I find that **XXXXX XXXXX** and **XXXXX XXXXX** are Convention refugees as they have a well founded fear of persecution based on the Convention ground of political opinion.

[4] I find that **XXXXX XXXXX** is a Convention refugee as he has a well-founded fear of persecution based on the Convention ground of membership in a particular social group, namely being a family member of those who face persecution due to their political opinion.

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[1] Exhibit 2, copy of pages of the claimants' national ID cards and booklets provided by Canada Immigration, pages 24 through 36; Exhibit 6.1, Item 1, translations the ID cards and booklets.

[2] Section F of Article 1 of The United Nations Convention Relating to the Status of Refugees
1.F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
(*b*) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee.

IDENTITY

[5] The claimants' identities as nationals of Iran are established by their testimony and the supporting documentation filed: passports.[3]

ALLEGATIONS[4]

[6] The claimants allege persecution in Iran based on the principal claimant's political activities with the **XXXXX** and associations in Iran, in addition to the associated claimant **XXXXX** *sur place* political activities in Canada.

ANALYSIS

[7] The determinative issues are exclusion under Convention article 1F(b) for **XXXXX XXXXX**, and a well founded fear of persecution for **XXXXX**, **XXXXX** and **XXXXX**. The exclusion analysis appears first in this decision, followed by the analysis of the remaining three family members.

[8] During the second sitting, the Board received a response from the Specific Information Research Unit indicating that **XXXXX** held permanent residency in the U.S. from **XXXXX** 1998 and that his lawful permanent resident card expired on **XXXXX** 2010.[5] The Minister was notified in writing of a potential 1E exclusion issue based on this information and a tentative hearing resumption for **XXXXX** was scheduled for November 16, 2011. The Minister's representative informed the Board that she would not participate in the hearing resumption but may provide submissions. The tentative hearing was cancelled and the decision was made without assessing the 1E exclusion.

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3 Exhibits 2 and 6.1, Item 1.
4 Exhibits 1.1, 1.2, 1.3, and 1.4, Personal Information Forms completed by the claimants– summary of.
5 Exhibit 15.

EXCLUSION ARTICLE 1F(b)

[9] The Minister of Public Safety and Emergency Preparedness Canada (the "Minister") filed a Notice of Intention to participate in this claim. The Minister's counsel alleged that matters involving Article 1F(b) of the Convention were raised due to the claimant's criminality in the USA. Specifically, through confirmation of a 10 print fingerprint analysis, the claimant was arrested on **XXXXX**, 2004 in the state of Virginia and charged with three counts of sexual battery and was found guilty in absentia on **XXXXX**, 2008 on those three charges.[6] For the purposes of U.S. Immigration Law, a conviction in absentia does not constitute a conviction.[7] The Minister's counsel submits that the claimant should be excluded for having committed acts while he was living in the U.S. in 2004 which constitute sexual assaults in Canada, and which she contends amounts to serious non-political crimes.

[10] Article IF(b) of the *United Nations Convention Relating to the Status of Refugees* states as follows:

> F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> b. he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refuge.

Are there serious reasons for considering?

[11] The claimant first came to the U.S. in 1998, sponsored by his first wife, **XXXXX**, and obtained permanent residency in 2000. He was charged with sexual battery on **XXXXX** 2004, **XXXXX**, 2004,[8] and **XXXXX** 2004.[9] He was arrested on **XXXXX**, 2004[10] and released on

[6] Exhibit 5, pages 4, 27 – 34.
[7] Exhibit 6.1, Item 7, page 78, U.S. Permanent Residence Law, U.S. Department of State Foreign Affairs Manual Volume 9 – Visas, Section 9 FAM 40.21(a) N3.4-2 Conviction in Absentia.
[8] Exhibit 5, page 9.
[9] Exhibit 6.1, page 30.
[10] Exhibit 6.1, page 29.

recognizance and a $ **XXXXX** bond. He was tried in absentia and found guilty on **XXXXX**, 2008 and fined $ **XXXXX** with costs, per charge.[11]

[12] The claimant testified that he did commit the acts as alleged, that he was guilty of the crimes, which he now knows to be wrong, and that the crimes occurred in the U.S. in 2004, which was prior to his refugee claim in Canada. He admits to having touched, grabbed, and attempted to have kissed three women who were students at his estranged wife's **XXXXX XXXXX**. One of the women alleged that he touched her breasts, which the claimant did not dispute.[12] He has no intention of appealing his conviction in absentia. On a balance of probabilities, I find there is credible and trustworthy evidence based on the U.S. police reports and the claimant's testimony that the claimant committed these crimes.

[13] No evidence was put forth that the crimes committed were of a political nature and I find that the crimes were non-political. Counsel for the claimant submits and I agree that the only issue is whether the crimes committed are considered serious crimes.

Is sexual battery a serious crime?

[14] The next issue before me is whether "sexual battery" is a serious crime. According to the Criminal Code of the state of Virginia, where the claimant was convicted on three counts of sexual battery, sexual battery is defined as:

18.2-67.4. Sexual Battery. [13]

> An accused is guilty of sexual battery if he sexually abuses, as defined in §18.2-67-10 (i) the complaining witness against the will of the complaining witness, by force, threat, intimidation, or ruse...

Sexual battery is a Class 1 misdemeanour.

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11 Exhibit 6.1, page 30.
12 Exhibit 5, page 12.
13 Exhibit 5, Item 11, Excerpts from Code of Virginia, page 42.

[15] Also according to the Criminal Code of Virginia, there are four classes of misdemeanours, with Class 1 being the highest and carrying authorized punishments of confinement in jail for *up to* twelve months or a fine of *up to* $2500, either or both.[14]

[16] The Minister's counsel submits that at the very least the claimant committed assault in that he applied force, hugged and kissed the women. The police reports indicated that they all pushed away, and one of the victims screamed and ran. Sexual assault is not defined in the Criminal Code of Canada, however sub-section 265 of the code states:[15]

> **265.** (1) A person commits an assault when
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> *(a)* without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
>
> *(b)* he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or
>
> *(c)* while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.
>
> (2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.

[17] The Minster's counsel further submits that the assaults were sexual assaults, per the Supreme Court of Canada decision in *Chase*[16] wherein Justice McIntyre determined:

> Sexual assault is an assault within any one of the definitions of that concept in [then – *my addition*] s. 244(1) of the *Criminal Code* which is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated. The test to be applied in determining whether the impugned conduct has the requisite sexual nature is an objective one: "Viewed in the light of all the circumstances, is the sexual

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14 Exhibit 6.1, Item 9, page 110.

15 *Controlled Drugs and Substances Act* Section 5(1) No person shall traffic in a substance in Schedule I, II, II or IV or in any substance represented or held out by that person to be such a substance. Section 5(3)(a) … where the subject matter of the offence is a substance included in Schedule I or II, is guilty of an indictable offence and liable to imprisonment for life. Schedule I lists cocaine.

16 Exhibit 9, *R. v. Chase*, [1987] 2 S.C.R. 293 Date: October 15, 1987.

> or carnal context of the assault visible to a reasonable observer". The part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats which may or may not be accompanied by force, will be relevant. The accused's intent or purpose as well as his motive, if such motive is sexual gratification, may also be factors in considering whether the conduct is sexual. Implicit in this view of sexual assault is the notion that the offence is one requiring a general intent only. In the present case, there was ample evidence before the trial judge upon which he could find that sexual assault was committed. Viewed objectively in the light of all the circumstances, it is clear that the conduct of the respondent in grabbing the complainant's breasts constituted an assault of a sexual nature.

[18] Both the Minister's counsel and the claimant's counsel agree that the acts committed by the claimant would constitute sexual assault in Canada, and I am also in agreement.

[19] The question of determination of the "seriousness" of a crime was raised in the *Chan*[17] decision where the Federal Court made obiter comments that a serious crime is to be equated with one in which a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada.

[20] The Federal Court of Appeal (FCA) decision of *Jayasekara*[18] has reaffirmed that the perspective of the receiving state (Canada) cannot be ignored in determining the seriousness of the crime. As well, that decision states that the interpretation of the exclusion clause in Article IF(b) of the Convention, in regards to the seriousness of a crime, requires an evaluation of the elements of the crime, the mode of prosecution, the penalty prescribed, the facts and the mitigating and aggravating circumstances underlying the conviction. In other words, whatever presumption of seriousness may be attached to a crime internationally or under the legislation of the receiving state, that presumption may be rebutted by reference to the above factors.

[17] *Chan v. Canada* [2000] 4 FC 390 (C.A.).
[18] *Jayasekara* v. *Canada* (Minister of Citizenship & Immigration) 2008 FCA 404.

Elements of the crime

[21] According to the police report interviews in evidence, an investigation was commenced against the claimant when his estranged second wife **XXXXX**, whom he married in 2002, filed a complaint for marital sexual assault. She also informed police that three women in her **XXXXX XXXXX** were assaulted by **XXXXX** when they were attending **XXXXX XXXXX**.[19] Interviews with these women, as part of the investigation, are what lead to the sexual battery charges and convictions against the claimant.

[22] According to testimony, the claimant was arrested and taken to the police station in **XXXXX** or **XXXXX** 2004. He was told that three people had filed complaints against him and given a court date for approximately one month later. In contrast, documentary evidence indicates that he was arrested on **XXXXX**, 2004, released on recognizance after paying $ **XXXXX** bond,[20] and due to appear in court on **XXXXX**, 2004 at **XXXXX** for charges of sexual battery occurring on or about **XXXXX**, 2004 against victim **XXXXX**.,[21] for sexual battery occurring on or about **XXXXX**, 2004 against victim **XXXXX**,[22] and for sexual battery occurring on or about **XXXXX**, 2004 against victim **XXXXX**. [23]

[23] The claimant testified that all of the allegations against him were true. He admitted to touching these women and attempting to kiss them. The reason for his actions was that from his perspective, they had a very close relationship and he thought they wanted him to do it. He realized he was wrong when one of them reacted adversely. He could not remember the name of the one that reacted that way, nor could he remember the name of the woman whose breast he touched. In regards to the other two complainants, he stated that he misread the signals. He explained that in his culture men and women never hugged and kissed and touched each other, but that when he was there, everybody was hugging, kissing and touching and so he misunderstood that they wanted to be touched.

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19 Exhibit 5, page 12.
20 Exhibit 6.1, page 26.
21 Exhibit 6.1, Item 8, Criminal Matters, page 104.
22 Exhibit 6.1, Item 8, Criminal Matters, page 106.
23 Exhibit 6.1, Item 8, Criminal Matters, page 100.

[24] Additionally, according to testimony, he and his estranged wife **XXXXX** separated in the spring, which he stated was months before committing the assaults in contrast to the police reports, but he does not remember what month. He had wanted to separate and was not feeling good at the time because when he and **XXXXX** married, they agreed to cut off their relations with people that they had known before. However, she did not cut off these relationships and each time when he told her, she apologized. She had come home late one night drunk, having been out with her ex-boyfriend and he could not take that life any more.

[25] Following the incidents, he had no recollection of what he did in regards to the women. He then stated that he apologized to them and tried to explain that he did not mean to hurt or harm them. He wanted to go to court and apologize to them. He never wanted them to go to the police. He did not know why they had gone to the police if he had apologized to them. He only knew that three people had filed a complaint. When his counsel questioned him as to whether he had further contact with these women following the incidents, he answered in the negative.

[26] Chronologically, the reaction of the first complainant, **XXXXX** was the most severe. She indicated that in **XXXXX** or **XXXXX** 2003 when the claimant was helping her carry **XXXXX** to her car, he told her that "his wife was going to Germany and she could take a private class from him but she was not to tell his wife."[24] She ignored him, and then later on **XXXXX**, 2004, while she was waiting to speak with the claimant's then wife **XXXXX**, he asked her to look at an **XXXXX** he was working on. He stood behind her while she looked at it. When she turned around, he put his arms around her, kissed her and touched her breast. She threw her arms in the air and screamed, and left the **XXXXX** without saying anything to anyone. She went home and discussed the matter with her husband and sons.

[27] In her hand written statement she states, "He lured me to the back of the warehouse to show me what he was working on. I purposefully kept my distance because I didn't feel comfortable. I then turned to leave the warehouse when he came up behind me and grabbed

me from behind and tried to pull me toward him. He then grabbed me by the breast and I threw my arms up and screamed. He said don't scream. I ran out of the warehouse."[25]

[28] Based on the evidence before me, I find the claimant showed pre-meditated and manipulative behaviour towards this complainant, who did not consent to the behaviour. Further, he physically restrained her for his own gratification of a sexual nature. The evidence that he did not want his wife to know is an indicator that he knew what he was doing was wrong on some level. Furthermore, I find the claimant showed predatory behaviour towards the first complainant, which escalates the gravity of the circumstances surrounding his crime.

[29] The second complainant, **XXXXX**, was interviewed by the Virginia police and filed a complaint that on **XXXXX**, 2004, **XXXXX** made sexual advances towards her while she was a **XXXXX** at the **XXXXX**. According to the report, **XXXXX** stated that he wanted to show her something. He led her up to an upstairs **XXXXX** to show her a **XXXXX** on the wall. As they were standing there, **XXXXX** grabbed her in a bear hug trapping her arms. He then attempted to kiss her and she turned her head. He kissed her cheek by accident and she used her arms to push away. Nothing was said during the encounter and she walked out of the room. She sated that there were 20 to 23 other **XXXXX** who this had happened to at this location.[26]

[30] In her hand written statement **XXXXX** indicates that the claimant asked to show her a particular **XXXXX**. Once inside, there was no **XXXXX**. As she headed to the exit he grabbed her (bear hug) tried to kiss her on the lips. She pushed him away (her hands were up against his chest) they struggled. Her fist hit his chest. He let go.[27]

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[24] Exhibit 5, page 12.
[25] Exhibit 6.1, pages 33 and 34.
[26] Exhibit 5, page 18.
[27] Exhibit 6.1, page 32.

[31] When confronted with complainant **XXXXX**.'s statement that 20 to 23 other **XXXXX** had experienced similar treatment,[28] he stated that those were not true.

[32] Based on the evidence before me, I find the claimant demonstrated pre-meditated manipulative, persistent and aggressive behaviour towards this complainant, who did not consent to the behaviour. He physically restrained her for his own gratification of a sexual nature.

[33] The third complainant, **XXXXX** was interviewed by the Virginia police which states that "on **XXXXX**, 2004, she arrived for **XXXXX**... She went into the back room to use change (sic) her clothes in the bathroom. When she entered this area, **XXXXX** was in the back room and motioned for her to come to him. When she walked over to him he told her how proud he was of her work and went to give her a hug. She thought he was being nice but he tried to kiss her on her lips but she turned and he kissed her on the cheek. He attempted this twice. He made it clear to her not to tell his wife of his behaviour. He had never made any advances towards her in the past and the only relationship they had was of **XXXXX**. [She] immediately left the area and went to her **XXXXX**...On **XXXXX**, [she] had a note hand delivered to **XXXXX** informing her of this incident. [she] discontinued **XXXXX** until she was assured **XXXXX** would not be on site. ...She did not consent to the touching..."[29]

[34] Her hand written statement adds that she tried to push away. Then he offered to give her a **XXXXX**, and told her not to tell his wife **XXXXX**. She told him she did not know and would have to think about it. He tried to kiss her on the lips again and again she turned her head and tried to push away. He then let her go and wanted to know how she would let him know if she wanted the **XXXXX** without telling his wife. She told him she would be coming to the **XXXXX** within the next week and would let him know then. She left he room and joined the rest of the **XXXXX XXXXX**. After **XXXXX** she left the **XXXXX** and did not return until **XXXXX** let her know he was no longer at the **XXXXX**.[30]

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[28] Exhibit 5, page 18.
[29] Exhibit 5, page 15.
[30] Exhibit 6.1, pages 35 and 36.

[35] Based on the evidence before me, I find the claimant exhibited manipulative, persistent and aggressive behaviour towards this complainant, who did not consent to the behaviour. He used a physical means of restraining her for his own gratification of a sexual nature.

[36] As the complainant indicated that their relationship had only ever been one of **XXXXX XXXXX**, and that she pushed away more than once, I also find that he was in a position of authority and therefore attempted to use that position of authority to his advantage in pursuit of personal gratification of a sexual nature.

[37] I reject the claimant's explanations that there was cultural confusion and that he thought these women wanted him, or that he was psychologically in a difficult space because his estranged wife had been out with an ex-boyfriend. He had already being living in the U.S. since 2001, and had been in the U.S. for several months since 1998.[31] He therefore should reasonably have been adapted to the differences in behaviour between Iran and the U.S. at the time he committed these crimes. I reject his "cultural difference" argument that he did not understand his actions were inappropriate.

[38] Moreover, all three complainants gave him physical and verbal indications that his actions were not wanted. The first complainant was very clear as she screamed. He was married at the time of the incidents, or possibly separated, but still cautioned the complainants not to scream or tell his wife, with whom all three complainants had a professional relationship. Despite the strong reaction from the first complainant, he went on to try the same approach on at least two other women within a short period of time, disregarding their rights to their physical and psychological integrity. I find that he knew that what he was doing was wrong and he knew that the women did not want his sexual advances, yet he continued to do so. I reject his explanation that he thought they wanted him to do it.

Mode of prosecution

[39] The claimant failed to appear on the date specified for his court hearing, resulting in an order for his arrest and a hearing date set for **XXXXX**, 2005. On **XXXXX**, 2008 he was tried in absentia and found guilty. [32]

[40] According to the *Criminal Code of Canada*,[33] sexual assault is a hybrid offence:

> **271 (1)** Every one who commits a sexual assault is guilty of
>
> (a) an indictable offence and is liable to imprisonment for ten years; or
>
> (b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding 18 months.

[41] A maximum possible sentence of 10 years puts the crime in the category of "serious crime" as defined by the *Chan*[34] decision.

[42] At paragraph 46 of *Jayasekara*,[35] Justice Letourneau also addressed the issue of hybrid offences in countries such as Canada and the United States, where depending on the mitigating or aggravating circumstances surrounded their commission, a hybrid offence may be prosecuted either summarily or more severely as an indictable offence. He determined that:

> In countries where such a choice is possible, the choice of the mode of prosecution is relevant to the assessment of the seriousness of a crime if there is a substantial difference between the penalty prescribed for a summary conviction offence and that provided for an indictable offence.

[43] It is important to understand that the mode of prosecution in the U.S. was conducted in relation to the charge being a misdemeanour, since the offences there are not hybrid. However, that is not the end of the inquiry as the perspective of the receiving state is clearly relevant.

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31 Exhibit 1.2, page 4, q 7; page 6 q 11.
32 Exhibit 6.1, Item 8, Criminal Matters, pages 107, 105 and 103.
33 *Criminal Code of Canada*, RSC 1985.
34 *Chan v. Canada* [2000] 4 FC 390 (C.A.).

[44] The Minster's counsel submitted that the potential mode of prosecution of a hybrid offence is relevant in considering whether a crime is serious and because in Canada it is a hybrid offence, it could be prosecuted summarily or by indictment. However, she submits the case of *Jayasekara*[36] at paragraph 46 tells the Board that when considering foreign jurisdiction to only consider the mode of prosecution if the information before the Board shows why prosecutors in the U.S. proceeded one way versus another in a hybrid offence. She contends that the mode of prosecution may not project the seriousness of the crime and therefore the penalty may not indicate the seriousness of the crime. She referred to *Noha,*[37] where the mode of prosecution was not considered to be a relevant factor in a hybrid offence; *Tobin*,[38] where the court considered the seriousness of a hybrid offence and did not consider the surrounding circumstances; and *Vlad*,[39] where the court concluded that that the past record of the Applicant or other mitigating factors should be considered in excluding the Applicant under s. 98 of the *Act*. Finally, she submits there are no factors that rebut the presumption of seriousness of the crimes committed.

[45] Counsel for the claimant submits that the facts indicate that the claimant's behaviour was on the low end of the spectrum regarding the nature of the sexual battery that took place. Emphasizing that it is not the case that one has to look for equivalency and find a penalty of 10 years that could be imposed, he argues that the pivotal paragraph in *Jayasekara* is paragraph 44, which enumerates the factors to consider, including the elements of the crime, the mode of prosecution, the facts underlying the case, and mitigating and aggravating factors. He points out that elements of duress, the harm caused to society, whether a weapon was involved are all elements relevant to assessing the seriousness of the crime. He adds that in a criminal system similar to Canada's, such as the U.S. or U.K, the way they deal with the crime is relevant in determining the seriousness of the crime. And, while he notes that the

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[35] *Jayasekara* v. *Canada* (Minister of Citizenship & Immigration) 2008 FCA 404.
[36] *Jayasekara* v. *Canada* (Minister of Citizenship & Immigration) 2008 FCA 404.
[37] *Noha, Augustus Charles v. M.C.I.* (F.C., no. IMM-4927-08), Shore, June 30, 2009; 2009 FC 683.
[38] *Tobin v. Canada (Attorney General)* 2009 FCA 254.
[39] *Vlad v. Canada (Citizenship and Immigration)* 2007 FC 172, para 19.

UNHCR guidelines[40] are not binding on decision-makers, considering the exclusion clauses, there should be a restrictive approach because the consequence to claimants is that they do not have their claim heard.

[46] I find that sexual assault is a hybrid offence that can be punished up to a maximum of 10 years, which therefore puts the crime of sexual assault in the category of seriousness as envisioned by the *Chan* decision. I acknowledge that in Canada there is a range of penalties based on summary or indictment proceedings, and that while the crimes of sexual assault can fall into the category of serious crime, that seriousness can be rebutted by the other factors to be analyzed per the *Jayasekara* factors. Moreover, it is not within my mandate to determine how Canadian courts would proceed.

Penalty prescribed

[47] Counsel for the claimant submits the Class 1 misdemeanour is less serious than a felony and akin to a summary offence in Canada. He stresses the range of punishments is jail time, a fine, one or both. As the claimant was only fined $ **XXXXX** for each conviction, whereas the courts could have also given him a jail sentence, the maximum of which in Virginia is 12 months, the claimant received a light sentence. He urges the panel to look at the way the court of Virginia dealt with the case and how they gave him the lightest sentence possible. He further posits that the acts the claimant committed were short bursts of inappropriate criminality and while that should not be minimized, they are not serious. While the incidents did occur, counsel submits they do not amount to seriousness on the spectrum of seriousness envisioned by *Jayasekara*.

[48] I reject counsel's argument that he was given the lightest sentence possible; he was given the maximum financial sentence possible for each conviction.

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40 *UN Handbook on Procedures and Criteria for Determining Refugee Status* (under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees), Geneva, January 1988, para 149.

[49] The claimant testified that he did not appear for his scheduled court date because he had family problems and he had to return to Iran. He testified that he did not leave the U.S. until **XXXXX**, but his PIF indicates he left in **XXXXX** 2004.[41] He did not communicate with U.S. court authorities regarding his absence because his communication with the court was through his lawyer and his lawyer was on vacation. He attempted to contact his lawyer from Iran at some point by leaving her a message with a number to call, but she never returned his call.

[50] According to testimony he intended to return to the U.S. but his mother had a heart attack and he got married and had to take care of his personal life. He did not attempt to contact the U.S. authorities allegedly because he did not speak English well and did not know who to contact. In **XXXXX** or **XXXXX** 2007 he contacted a lawyer named **XXXXX** who informed him that the

41 Exhibit 1.2, page 6, q 12.

claimant would need permission to re-enter the U.S. and **XXXXX** needed $ **XXXXX** to process the re-entry and the court case. The claimant did not initiate re-entry to the U.S. He called his landlord and told him to rent his accommodations out. He did not ask for his mail to be forwarded, nor did he ask his landlord if any mail came in his name because he did not think to do so.

[51] As the claimant did not appear in court and there are no reasons issued for the sentencing, it is impossible for the panel to evaluate why the claimant received the sentencing that he did. The crimes can only be prosecuted as misdemeanours in the state of Virginia; there is no possibility of prosecuting as a felony. Nevertheless, I acknowledge that he did not receive the maximum sentence possible under a Class 1 misdemeanour, therefore suggesting the crimes were not serious. However, this is not determinative.

[52] During testimony he stated he was first aware that he was charged a fine in early 2010, through his current counsel. At the time of the first sitting of his hearing, that is **XXXXX**, 2011, he still had not paid the fines, though he had hired a lawyer six months earlier to facilitate paying the fines. He had no intention of appealing the convictions.

[53] In his submissions counsel points to the claimant's mother's illness that took him away from the U.S. and that he did attempted to contact two lawyers and there was partial information available regarding how to contact the claimant, through his lawyer.

[54] I find the claimant was not diligent in contacting U.S. authorities to either provide contact details or deal with the expectation of his criminal proceedings, having already known that a court date was set for his processing. Faced with the fact that he has still not made reparations by paying his fines, I find his lack of follow-through on his criminal proceedings, despite his assertions that he wanted to apologize and did not mean to hurt the complainants and wanted to pay his fines, demonstrate that he remains a fugitive from justice regarding the crimes that he committed.

Mitigating circumstances

[55] The Minister's counsel submits that there are no mitigating factors that rebut the presumption of seriousness of the crimes committed.

[56] Counsel for the claimant asserts the statement of **XXXXX** alleging that 20-23 other **XXXXX** were also assaulted is not relevant to the assessment because no other charges were filed. While the acts involved kissing or attempted kissing and one allegation that a breast was touched, he contends that there is no concrete evidence that he was targeting her breast; the evidence is silent on that matter. He adds there is no evidence of physical harm or psychological integrity being violated, no threats with weapons, and no coercion in any way. He contends the claimant backed off immediately when he determined that the gestures were not reciprocated and had no further contact with them afterwards. He also believes the surrounding circumstances are relevant, namely that the claimant did not attempt to conceal his criminality at the port of entry or his PIF, the inference of a breakup and associated stress immediately preceding the incidents in question, there was a lack of harm, and no threats.

[57] With no evidence before me regarding the level of vulnerability of the women who were sexually assaulted and had their physical security compromised, or the psychological or emotional impact on them, I am not in a position to evaluate the nature of the harm to the complainants in terms of psychological or emotional consequences attributable to the claimant's actions.

[58] The claimant's admissions of his crimes in the U.S. at his port of entry and in his PIF are irrelevant to the assessment. I reject counsel's evidence that a breast was potentially touched and that the evidence is silent in that regard. The police reports are clear that the breast was grabbed. The claimant admitted that the allegations were true. He did not deny that a breast was grabbed or indicate that it was an accident; it was open for him to do so under questioning from three different sources. I find that counsel's characterization is an effort to minimize the circumstances of the crimes committed. I also find counsel's submission that the claimant backed off immediately when he determined the gestures were

not reciprocated is unfounded. Contrary to testimony, the evidence on the first complainant shows repetition towards one complainant. Further, the evidence on the second and third complainants, within relatively short periods of time, demonstrates serial predatory behaviour. As the claimant was not able to remember who reacted severely or when, I prefer the documentary evidence over the claimant's testimony that he backed off when he realized his attentions were not welcomed.

[59] I find that the only mitigating circumstances in any of the three sexual assault cases are that the claimant did not use a weapon and the police reports do not indicate physical harm.

Aggravating Factors

[60] The claimant was not under the influence of any medication or drugs when he sexually assaulted these women. He may have taken medication for stress but was not aware of any side affects, nor was he advised of any side effects. Despite his description of stress due to marital turmoil, I find that he was in full control of his faculties when he committed these crimes, which is therefore an aggravating factor.

[61] In all cases the claimant used deception and physical force to position the targets of his actions, indicative of pre-meditated actions, all of which are aggravating factors.

[62] The Minister's counsel submits that the sexual integrity of three women who were students of the claimant was violated, for no other purpose than his own sexual gratification and that these actions were repeated is an aggravating factor. I am in agreement with this submission.

[63] The events surrounding the third conviction preceded two similar incidents where the claimant was aware that his sexual advances were not wanted. I am in agreement with the Minister's counsel that it is significant that he repeated these actions and find that his behaviour demonstrated predatory and serial tendencies, which are aggravating factors.

Concluding analysis on Exclusion

[64] As already established, owing to the hybrid mode of prosecution in Canada for crimes of sexual assault, the crimes fall within the category of seriousness as the maximum penalty that can be proscribed is 10 years incarceration. Contrary to counsel's urging, and in accordance with the reasoning in *Tobin,* I cannot treat the sentence imposed by the Virginia Criminal Court as a "distillation of the objective criteria and the subjective factors surrounding the offence."[42]

[65] I find the claimant, in a position of authority and trust as a **XXXXX** and husband to the owner **XXXXX XXXXX**, in a pre-meditated manner knowingly violated the physical and sexual integrity of three women who were **XXXXX XXXXX**, and therefore compromised their physical security. He used deception, manipulation and physical force. My finding that he was aware his actions were not wanted and were not appropriate, yet he chose to persist in his actions, demonstrates a predatory and serial tendency. He justified his actions through the guise of cultural misunderstandings, even though he had been in the U.S. since 1998 and was a permanent resident there for more than three years before committing the crimes, and because he was in turmoil in his marriage. Despite knowing that his actions were wrong, regardless of when he came to this realization, I find that he did not make serious attempts to communicate with the U.S. authorities regarding his location and his proceedings, and he did not make reparations by complying with his sentences. It was within his power to return to the U.S. to address his criminality issues, but he chose not to do so, thereby rendering himself a fugitive from justice.

[66] In weighing all of the *Jayasekara* evaluation factors in relation to the sentences imposed upon the claimant for his crimes, which can only be charged as misdemeanours in the U.S., I am also guided by *Jayasekara's* discussion of the purpose of Article 1F(*b*) of the Convention. Therein, the Federal Court of Appeal emphasized that the purpose of exclusion under Article 1F(b) identified in *Chan* is neither the only nor necessarily the primary purpose

42 *Tobin v. Canada (Attorney General)* 2009 FCA 254, para 67.

sought by the exclusion contained in Article 1F(*b*) of the Convention.[43] Quoting Justice Décary J at paragraphs 118 and 119, four complimentary purposes to the exclusion clause are summarized. It is the first and fourth purposes in *Zrig*[44] that are most applicable to the assessment of this claimant's actions: (1) ensuring that the perpetrators of international crimes or acts contrary to certain international standards will be unable to claim the right of asylum; and (4) ensuring that the country of refuge can protect its own people by closing its borders to criminals whom it regards as undesirable because of the seriousness of the ordinary crimes which it suspects such criminals of having committed.

[67] As demonstrated by this claimant's serial and predatory behaviour towards at least three women, and his reasons for that behaviour, there is no evidence before me that should this claimant again experience marital turmoil or alleged cultural misunderstandings here in Canada, women in Canada would not be subjected to similar or escalating unwanted sexual touching. In view of all of the evidence, I find the sentencing imposed on the claimant by U.S. authorities does not rebut the presumption of seriousness attached to sexual assaults in Canada.

[68] I therefore find the claimant has committed serious crimes, the circumstances of which suggest the possibility of repetition, and he therefore should be excluded from the definition of a Convention refugee pursuant to Article 1F(b) of the Convention.

[69] In light of my finding that he is excluded under 1 F(b), it is not necessary to deal with 1E.

[70] I find the claimant is a person referred to under section 98 of the *Act* and therefore do not need to consider inclusion for this claimant.

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43 *Jayasekara* v. *Canada (Minister of Citizenship & Immigration)* 2008 FCA 404, at paragraph 28.
44 *Zrig v. Canada (Minister of Citizenship and Immigration)* 2001 FCT 1043 September 24, 2001.

INCLUSION - Allegations

Maral[45]

[71] While in university, **XXXXX** became politically active due to the restrictions and limitations on rights and freedoms, especially for women. She was arrested twice by the school disciplinary committee for **XXXXX XXXXX**. In 1996 she actively supported the **XXXXX** who were running for the **XXXXX XXXXX**.

[72] In 1999 **XXXXX XXXXX** became the **XXXXX XXXXX** of the university. Together they worked on **XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX**. The two developed a personal and professional relationship which carried on after the completion of the principal claimant's Master's degree.

[73] In 2009, **XXXXX XXXXX.**

[74] After the **XXXXX** were announced, the principal claimant participated in demonstrations and marches between **XXXXX** and **XXXXX** squares, accompanied by **XXXXX** and **XXXXX** on most of the occasions, and they would meet **XXXXX** along the way.

[45] Exhibit 1.1, and hearing testimony.

[75] On **XXXXX**, 2009, the principal claimant, armed with banners, went to meet her husband **XXXXX**, who came with two of his friends: **XXXXX XXXXX** and **XXXXX XXXXX**. They made banners and joined the crowd. The police attacked the demonstrators and **XXXXX XXXXX** was arrested. The family was sure that after **XXXXX** arrest the authorities would come after them. A friend of **XXXXX XXXXX**, offered his house in **XXXXX** for them to stay, and they took the offer.

[76] On **XXXXX**, 2009, **XXXXX** told them he was trying to access their home and the neighbours there told him that two days prior plainclothes agents buzzed their door, broke the door, the children's computer and a bag of materials was removed from the residence. The agents told the neighbours that this was evidence of the crime that **XXXXX** and the principal claimant were planning as a "soft coup" and that their accomplices had been arrested and confessed. The neighbours were to alert the authorities if they saw the claimants. The neighbours refused to take the telephone numbers. The family knew they could not be safe and had to flee Iran.

[77] **XXXXX** found someone to help them leave Iran and come to Canada. They left Iran on **XXXXX** or **XXXXX** 2009, obtained false passports in Dubai, and then went to Greece, then France where they stayed for 27 days, and made their way to Canada. They arrived in Montreal on **XXXXX**, 2009 and claimed refugee protection on November 19, 2009.

[78] She wanted to claim asylum in Greece but the smuggler said they had to go to Canada. She also wanted to claim asylum in France, but the smuggler said they would be returned to the Revolutionary Guard. They did not claim refugee protection immediately upon arrival in Canada because they were waiting for their Iranian identity documents to arrive so that they would not be arrested by Canadian Immigration. They were also trying to determine **XXXXX** criminality in the U.S. before initiating a refugee claim.

[79] **XXXXX** maintains contact with her mother and only communicated once with her sister since fleeing Iran. To her knowledge, neither her mother nor her sister has been contacted by the Iranian authorities concerning **XXXXX**. Since leaving Iran, they learned that

XXXXX was still detained and someone had tried to serve **XXXXX** sister with a document, but she refused the service, and a letter was delivered to their landlord.

XXXXX [46]

[80] After the Iranian revolution during most of the 1980's, the associate claimant was active in **XXXXX** and **XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX**.

[81] In 2008, **XXXXX** and **XXXXX** were actively involved in **XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX**.

[82] After the election results they participated in demonstrations and **XXXXX XXXXX** and **XXXXX XXXXX** until some of their friends were arrested, who remain in prison as far as they know. **XXXXX** fears they have been tortured and revealed information about the claimants; otherwise, he questions how would the authorities have obtained their address? He had written the slogan on the banner that **XXXXX** had with him when he was arrested, which said, "**XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX**."

[83] He feared claiming asylum in Greece because he knew of Iranians who had claimed asylum in Greece and Turkey who were sent back, one in 1997 and one in 2008. And they could not speak French so they did not claim in France, believing the smuggler that they would be turned over to the Revolutionary Guard.

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46 Exhibit 1.2, Personal Information Form and hearing testimony.

XXXXX[47]

[84] **XXXXX** is currently 19 years old. At the time of filing her PIF, she relied on the narrative of her mother, **XXXXX**. Her father provided a letter stating that he allowed her to go to Canada with his ex-wife, the principal claimant, who has custody of her.[48] Since filing her PIF, she filed evidence regarding her political activities in Canada, thus giving rise to a possible *sur place* claim.

[85] Four months after arriving in Canada, **XXXXX** met Iranian activists, specifically **XXXXX XXXXX**, whom she met via Facebook. This is when she started to become politically active in Canada because he had asked her to start a new **XXXXX XXXXX**.[49] As of **XXXXX** 2010, **XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX**. She was motivated to get active partially because her friend's brother was arrested at one of the demonstrations and has been sentenced to six years in prison, and also because she has determined that it is her duty to spread the news now that she is free to express her opinion. She has over **XXXXX** "friends" on her Facebook[50] page where she posts **XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX**.[51]

[86] She also participated at the demonstration at the **XXXXX XXXXX XXXXX XXXXX** and co-organized a **XXXXX XXXXX XXXXX XXXXX** which took place in **XXXXX XXXXX** 2011 with panellists discussing the situation in Iran and Arab countries.

[87] She sometimes maintains contact with her extended family, maybe once or twice a month with her biological father via internet. She has not heard from anyone whether anyone

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47 Exhibit 1.4, PIF – summary of and hearing testimony
48 Exhibit 11, Item 2, **XXXXX XXXXX** consent and authorization letter for **XXXXX XXXXX**.
49 Exhibit 13.1, Audio file of the radio program with interviews of a former political prisoner from Iran.
50 Exhibit 6.1, Item 5, Political Activities of **XXXXX XXXXX**, pages 45 to 59.
51 Exhibit 8, Letter from **XXXXX XXXXX** re: **XXXXX XXXXX**, not dated. Received by the Board on May 5, 2011.

has been looking for either her, her brother, or her parents in Iran. Her last contact with her biological father was two to three weeks prior to the hearing.

XXXXX[52]

[88] **XXXXX** is currently 19 years old and was a minor at the time of filing his PIF. **XXXXX** was his designated representative for the filing of the PIF only. **XXXXX** claim depends on the claims of **XXXXX** and **XXXXX**.

[89] **XXXXX** believes that because of his parents' political activities he will be arrested if returned to Iran. He candidly stated that because of his age, they (the authorities) might not be interested in him, but because of his parents' activities they might arrest him. He participated in the protests in **XXXXX** in **XXXXX**, 2009 and fled the demonstration site with his parents.

[90] **XXXXX** has occasionally been in touch with his Iranian friends on Facebook since leaving Iran. He has not had news that anyone has been looking for him or any of his relatives.

[91] As for his political activities in Canada, initially he participated in Facebook commentaries around the end of 2009, but since his mother told him not to do it, he has not done it. Although he is a "friend" of his **XXXXX** on Facebook, he has not seen any of her activities because he does not visit her page.

ANALYSIS

[92] The determinative issues are subjective fear and a well founded fear of persecution. I found the claimants to be credible regarding their testimony on the inclusion part of the hearing. However, I do not accept their reasons for not claiming asylum in Greece, France or immediately upon arrival in Canada. They are educated people and could have found a means

to seek asylum at the first available opportunity. This demonstrates a lack of subjective fear and asylum shopping. However, this is not determinative in the claim.

[52] Exhibit 1.2, PIF – summary of and hearing testimony.

[93] I accept that **XXXXX** has had a longstanding connection, both personal and professional to **XXXXX** and a political connection to **XXXXX XXXXX**, and therefore the **XXXXX XXXXX**. I also accept **XXXXX XXXXX** testimony and evidence regarding her political activities in Canada, and that she participated in the **XXXXX** of **XXXXX** 2009. I further accept that **XXXXX** and **XXXXX** participated in the **XXXXX XXXXX XXXXX XXXXX** in **XXXXX** 2009.

[94] In relation to the **XXXXX** 2009 elections, documentary evidence indicates that in **XXXXX** 2009, the Tehran Revolutionary Court convened the first of a series of televised mass trials for more than 100 opposition politicians and activists detained after the **XXXXX** 2009 election; the opposition referred to them as show trials. The prosecution accused the defendants of fomenting a "velvet revolution," acting against national security, and having ties to British spies. Authorities did not permit any of the defendants access to legal counsel prior to the trial. Some of those charged read aloud "confessions" in which they denounced former colleagues and declared there had been no fraud in the election. There were allegations that several defendants, including **XXXXX** and opposition candidate **XXXXX** supporters underwent "massive interrogation" in **XXXXX** Prison.

[95] At least 4,000 opposition supporters, probably many more, were arbitrarily arrested during the unrest that swept Iran after the election. Protests continued throughout the summer and into the winter, demonstrators flooded the streets on remembrance days, and the security forces continued to brutally suppress all expressions of dissent. Objection to alleged fraudulent elections gradually developed into broader expressions of dissatisfaction with the government.... Most of those detained were released within days but many hundreds were held incommunicado for weeks. Possibly as many as 200 remained in jails in mid-November 2009, including some who were arrested after the unrest died down. Those arrested included many senior political figures associated with the campaign teams of presidential candidates

Mir Hossein Mousavi and Mehdi Karroubi, as well as journalists, students, human rights defenders, women's rights activists and lawyers.[53]

[96] Based on independent evidence, I accept that **XXXXX** supporters, in particular those involved in leading, campaigning and organizing, are subjected to a heightened risk of targeting of persecution based on their political opinion. As such, and based on my acceptance of her evidence, I find that there is more than a mere possibility that **XXXXX** would be persecuted for her political opinion if returned to Iran.

[97] Non-governmental organizations reported that the Iranian government monitored internet communications, especially via social networking sites such as Facebook, Twitter and YouTube. Authorities threatened, harassed and arrested individuals who posted comments critical of the government on the internet and in some cases confiscated their passports or arrested their family members. In 2009 the government arrested persons peacefully expressing dissenting views via the internet, with several bloggers remaining detained.[54]

[98] Given my acceptance of **XXXXX** evidence and based on the independent documentary evidence, I find that she faces more than a serious possibility of persecution based on her political opinion if returned to Iran.

[99] The Director of the International Campaign for Human Rights in Iran (ICHRI) stated that "[t]he relatives of post-election protestors have been heavily targeted, [including] those of persons residing inside Iran, those who have left and are seeking asylum, and those who were already abroad and engaged in protests outside Iran" . Amnesty International (AI) reports that following the protests against the June 2009 election, harassment of clerics, political leaders and journalists became an integral component of the government's response to political dissent. During student protests in December 2009, Gholam-Hossein Mohseni-Ejei, the government's chief prosecutor, reportedly stated, "'[f]rom now on, we will show no mercy' to

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[53] Exhibit 3, National Documentation Package (NDP) Iran, March 17, 2010, Item 2.3, United Kingdom (UK). October 2010. Home Office. *Operational Guidance Note: Iran*, page 5, para 3.75.

[54] Exhibit 6.2, Item 1, 2009 Human Rights Report: Iran, 2009 Country Reports on Human Rights Practices, March 11, 2010, U.S. Department of State, Diplomacy in Action, pages 20-21.

protesters or their families". The Professor of Political Science stated that a senior security official announced that they would target those outside Iran who criticize the government.[55]

[100] Given my findings that **XXXXX** and **XXXXX** face a more than a serious possibility of persecution if returned to Iran due to their political activism, as **XXXXX** is a member of the family unit, I find that he faces more than a serious possibility of persecution based on his membership in a particular social group, namely a family member of political activists.

[101] Because the claimants face more than a serious possibility of persecution from government officials, on a balance of probabilities I find that they would not be able to get protection from the state and that this lack of protection and possibility of persecution exists throughout the country, making an internal flight alternative not a viable option.

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55 NDP, Item 2.5, IRN103327.E. January 4, 2010. Treatment by Iranian authorities of relatives of persons who have left Iran and claimed refugee status, including former members of the Bureau of National Security (SAVAK), of a Fedayeen organization, or opposition protestors.

CONCLUSION

[102] I find that **XXXXX XXXXX** is excluded from the definition of Convention Refugee or a person in need of protection pursuant to Article 1F(b) of the Convention and I therefore reject his claim.

[103] I find that **XXXXX XXXXX**, **XXXXX XXXXX** and **XXXXX XXXXX** face a well founded fear of persecution based on the Convention grounds of political opinion and membership in a particular social group. Therefore, I accept the claims of **XXXXX XXXXX**, **XXXXX XXXXX** and **XXXXX XXXXX**.

"Colleen Zuk"

(signed) ______________________________

Colleen Zuk

08 December 2011

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Date