Date: 20081217

Docket: A-140-08

Citation: 2008 FCA 404

CORAM: **LÉTOURNEAU J.A.**
SHARLOW J.A.
PELLETIER J.A.

BETWEEN:

RUWAN CHANDIMA JAYASEKARA

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard at Toronto, Ontario, on October 14, 2008.

Judgment delivered at Ottawa, Ontario, on December 17, 2008.

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: SHARLOW J.A.
PELLETIER J.A.

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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

The certified questions and whether they should be answered

[1] This is an appeal from a decision of Strayer J. of the Federal Court (judge) who dismissed the appellant's application for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board (Board). The judge certified the two following questions for analysis by this Court:

1. Does serving a sentence for a serious crime prior to coming to Canada allow one to avoid the application of Article 1F(*b*) of the *Convention relating to the Status of Refugees* (Convention)?

2. If the answer to question 1 is affirmative, if a person is forced to leave the country where the crime was committed prior to the completion of his sentence, does this have the effect of deeming the sentence to have been served?

In application of section 98 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) and the exclusion clause in Article 1F(*b*) of the Convention, the Board found that the appellant was not a Convention refugee or a person in need of protection. In addition, the Board ruled that the appellant was not credible and did not meet the criteria of the Convention. There is no appeal from this second finding of the Board. From that perspective, the appeal is moot.

[2] However, a person who, pursuant to section 98 of the IRPA, is excluded as a Convention refugee on the basis of Article 1F(*b*) of the Convention, cannot obtain refugee protection. This results from the combined effect of paragraphs 95(1)(*c*) and 112(3)(*c*) of the IRPA.

[3] Moreover, while that person can still apply to the Minister of Citizenship and Immigration (Minister) for protection if subject to a removal order, he or she cannot obtain permanent resident status. Pursuant to paragraph 114(1)(*b*) of the IRPA, the Minister's decision to allow the application for protection merely has the effect of staying the removal order. In view of these consequences on a claimant, I believe that this Court should address the certified questions.

[4] Section 98 of the IRPA and the interpretation to be given to the word “serious” in the terms “serious non-political crime” found in Article 1F(*b*) of the Convention carry with them an international dimension. As Lord Llyod of Berwick said in *T v. Secretary of State for the Home Department*, [1996] 2 All ER 865, at p. 891, “in a case concerning an international convention, it is obviously desirable that decisions in different jurisdictions should, so far possible, be kept in line with each other”. For this reason, we requested the parties provide us with additional submissions containing references to the international jurisprudence on this question.

[5] More specifically, the parties were asked to provide references:

a) as to whether the seriousness of a non-political crime within the meaning of Article 1F(*b*) of the Convention is determined solely by reference to the maximum sentence that can be imposed for the particular crime as provided in the domestic law of the country of refuge; or

b) whether, in making the determination, the facts relating to the nature and seriousness of the acts committed may or must be taken into account.

The parties were given until November 7, 2008 to complete their submissions.

[6] Before stating the facts, I reproduce the relevant provisions:

Convention

Article 1. Definition of the term “refugee”	**Article premier. -- Définition du terme « réfugié »**
F. The provisions of this Convention shall not apply to any person with respect to	F. Les dispositions de cette Convention ne seront pas applicables aux personnes dont

whom there are serious reasons for considering that:	on aura des raisons sérieuses de penser :
(*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;	*a*) Qu'elles ont commis un crime contre la paix, un crime de guerre ou un rime contre l'humanité, au sens des instruments internationaux élaborés pour prévoir des dispositions relatives à ces 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;	*b*) Qu'elles ont commis un crime grave de droit commun en dehors du pays d'accueil avant d'y être admises comme réfugiés;
(*c*) He has been guilty of acts contrary to the purposes and principles of the United Nations.	*c*) Qu'elles se sont rendues coupables d'agissements contraires aux buts et aux principes des Nations Unies.

[Emphasis added]

IRPA

PART 1 - IMMIGRATION TO CANADA	**PARTIE 1 - IMMIGRATION AU CANADA**
DIVISION 4 - INADMISSIBILITY	**SECTION 4 - INTERDICTIONS DE TERRITOIRE**
Serious criminality	**Grande criminalité**
36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	**36.** (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :
(*a*) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;	*a*) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;
(*b*) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a	*b*) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un

maximum term of imprisonment of at least 10 years; or

(*c*) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

emprisonnement maximal d'au moins dix ans;

c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.

PART 2 - REFUGEE PROTECTION

DIVISION 1 - REFUGEE PROTECTION, CONVENTION REFUGEES AND PERSONS IN NEED OF PROTECTION

Conferral of refugee protection

95. (1) Refugee protection is conferred on a person when

(*a*) the person has been determined to be a Convention refugee or a person in similar circumstances under a visa application and becomes a permanent resident under the visa or a temporary resident under a temporary resident permit for protection reasons;

(*b*) the Board determines the person to be a Convention refugee or a person in need of protection; or

(*c*) except in the case of a person described in subsection 112(3), the Minister allows an application for protection.

…

Convention refugee

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

PARTIE 2 - PROTECTION DES RÉFUGIÉS

SECTION 1 - NOTIONS D'ASILE, DE RÉFUGIÉ ET DE PERSONNE À PROTÉGER

Asile

95. (1) L'asile est la protection conférée à toute personne dès lors que, selon le cas :

a) sur constat qu'elle est, à la suite d'une demande de visa, un réfugié ou une personne en situation semblable, elle devient soit un résident permanent au titre du visa, soit un résident temporaire au titre d'un permis de séjour délivré en vue de sa protection;

b) la Commission lui reconnaît la qualité de réfugié ou celle de personne à protéger;

c) le ministre accorde la demande de protection, sauf si la personne est visée au paragraphe 112(3).

[…]

Définition de « réfugié »

96. A qualité de réfugié au sens de la Convention – le réfugié – la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un

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

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

Person in need of protection

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

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

(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

Person in need of protection

(2) A person in Canada who is a member of a class of persons prescribed by the

groupe social ou de ses opinions politiques:

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

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

Personne à protéger

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

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

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Personne à protéger

(2) A également qualité de personne à protéger la personne qui se trouve au

regulations as being in need of protection is also a person in need of protection.

Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

Exclusion — Refugee Convention

Exclusion par application de la Convention sur les réfugiés

98. A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.

98. La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.

…

[…]

Ineligibility

Irrecevabilité

101. (1) A claim is ineligible to be referred to the Refugee Protection Division if

101. (1) La demande est irrecevable dans les cas suivants :

…

[…]

(*f*) the claimant has been determined to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality, except for persons who are inadmissible solely on the grounds of paragraph 35(1)(*c*).

f) prononcé d'interdiction de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux — exception faite des personnes interdites de territoire au seul titre de l'alinéa 35(1)*c*) – , grande criminalité ou criminalité organisée.

Serious criminality

Grande criminalité

(2) A claim is not ineligible by reason of serious criminality under paragraph (1)(*f*) unless

(2) L'interdiction de territoire pour grande criminalité visée à l'alinéa (1)*f*) n'emporte irrecevabilité de la demande que si elle a pour objet :

(a) in the case of inadmissibility by reason of a conviction in Canada, the conviction is for an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years and for which a sentence of at least two years was imposed; or

a) une déclaration de culpabilité au Canada pour une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans et pour laquelle un emprisonnement d'au moins deux ans a été infligé;

(*b*) in the case of inadmissibility by reason of a conviction outside Canada, the Minister is of the opinion that the person is a danger to the public in Canada and the

b) une déclaration de culpabilité à l'extérieur du Canada, pour une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable

conviction is for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament that is punishable by a maximum term of imprisonment of at least 10 years.

…

DIVISION 3 - PRE-REMOVAL RISK ASSESSMENT

Protection

Application for protection

112. (1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1).

…

Restriction

(3) Refugee protection may not result from an application for protection if the person

(*a*) is determined to be inadmissible on grounds of security, violating human or international rights or organized criminality;

(*b*) is determined to be inadmissible on grounds of serious criminality with respect to a conviction in Canada punished by a term of imprisonment of at least two years or with respect to a conviction outside Canada for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years;

(*c*) made a claim to refugee protection that

d'un emprisonnement maximal d'au moins dix ans, le ministre estimant que le demandeur constitue un danger pour le public au Canada.

[…]

SECTION 3 - EXAMEN DES RISQUES AVANT RENVOI

Protection

Demande de protection

112. (1) La personne se trouvant au Canada et qui n'est pas visée au paragraphe 115(1) peut, conformément aux règlements, demander la protection au ministre si elle est visée par une mesure de renvoi ayant pris effet ou nommée au certificat visé au paragraphe 77(1).

[…]

Restriction

(3) L'asile ne peut être conféré au demandeur dans les cas suivants :

a) il est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée;

b) il est interdit de territoire pour grande criminalité pour déclaration de culpabilité au Canada punie par un emprisonnement d'au moins deux ans ou pour toute déclaration de culpabilité à l'extérieur du Canada pour une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;

c) il a été débouté de sa demande d'asile au

was rejected on the basis of section F of Article 1 of the Refugee Convention; or	titre de la section F de l'article premier de la Convention sur les réfugiés;
(*d*) is named in a certificate referred to in subsection 77(1).	*d*) il est nommé au certificat visé au paragraphe 77(1).
Consideration of application	**Examen de la demande**
113. Consideration of an application for protection shall be as follows:	**113.** Il est disposé de la demande comme il suit :
…	[…]
(*c*) in the case of an applicant not described in subsection 112(3), consideration shall be on the basis of sections 96 to 98;	*c*) s'agissant du demandeur non visé au paragraphe 112(3), sur la base des articles 96 à 98;
(*d*) in the case of an applicant described in subsection 112(3), consideration shall be on the basis of the factors set out in section 97 and (i) in the case of an applicant for protection who is inadmissible on grounds of serious criminality, whether they are a danger to the public in Canada, or (ii) in the case of any other applicant, whether the application should be refused because of the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of Canada.	*d*) s'agissant du demandeur visé au paragraphe 112(3), sur la base des éléments mentionnés à l'article 97 et, d'autre part : (i) soit du fait que le demandeur interdit de territoire pour grande criminalité constitue un danger pour le public au Canada, (ii) soit, dans le cas de tout autre demandeur, du fait que la demande devrait être rejetée en raison de la nature et de la gravité de ses actes passés ou du danger qu'il constitue pour la sécurité du Canada.
Effect of decision	**Effet de la décision**
114. (1) A decision to allow the application for protection has	**114.** (1) La décision accordant la demande de protection a pour effet de conférer l'asile au demandeur; toutefois, elle a pour effet, s'agissant de celui visé au paragraphe 112(3), de surseoir, pour le pays ou le lieu en cause, à la mesure de renvoi le visant.
(*a*) in the case of an applicant not described in subsection 112(3), the effect of conferring refugee protection; and	
(*b*) in the case of an applicant described in subsection 112(3), the effect of staying the removal order with respect to a country or place in respect of which the applicant was determined to be in need of protection.	

[Emphasis added]

The facts

[7] The facts can be summarized as follows. The appellant, Mr. Ruwan Chandima Jayasekara, is a Sri Lankan citizen of Sinahalese ethnicity. He was allegedly targeted in Sri Lanka by the Tamil Tigers. He arrived in the United States in 1998 and lived there without status until 2004.

[8] In January 2004, he was arrested in New York State on drug charges and pled guilty to the "criminal sale of the controlled substance opium in the third degree" and to criminal possession of marijuana. In March 2004, he was convicted and sentenced to 29 days in jail and a 5 year probation period.

[9] One month after completing his jail term, he attended an immigration hearing and was issued a voluntary departure order to leave the United States by October 2004.

[10] On July 5, 2004, he entered Canada and claimed refugee protection. He did not apply to his probation office to obtain permission to leave the jurisdiction of the United States and a warrant for his arrest as an absconder was issued on July 27, 2004.

The Board's decision

[11] The Board heard the appellant's refugee claim on April 12 and September 15, 2006. As previously mentioned, it found that he was excluded from refugee protection under section 98 of the

IRPA and Article 1F(*b*) of the Convention because there were serious reasons for considering that he had committed a serious non-political crime outside of Canada and that he had not completed his sentence as he fled the United States during his probation.

[12] Moreover, it found that, even if the appellant was not excludable under Article 1F(*b*) of the Convention, he did not meet the criteria for either Convention refugee status or as a person requiring protection. These findings based on credibility are not contested.

[13] The appellant sought judicial review before the Federal Court only of his exclusion under section 98 of the IRPA and Article 1F(*b*) of the Convention.

The Federal Court decision

[14] The judge reviewed the Board's decision on the standard of reasonableness because, at the core of it, the question of the exclusion under section 98 of the IRPA and Article 1F(*b*) of the Convention was one of mixed fact and law which involved some degree of discretion: see paragraph 10 of the reasons for judgment.

[15] He was also of the view that it was reasonable for the Board to conclude that the appellant's conviction in the United States gave it a serious reason to believe that he had committed a serious non-political crime outside the country. He found that conclusion to be reasonable because the

offence committed by the appellant would carry a maximum sentence of life imprisonment in Canada. At paragraph 11 of the reasons for judgment he wrote:

> It was perfectly reasonable for the Board to use as a measurement of a "serious" crime the view which Canadian law takes of that offence, not the seriousness of the penalty imposed in the United States.

[16] With respect to the certified questions, the judge ruled that the appellant had not completed his sentence in the United States as he voluntarily left that country with most of his five years probation unserved.

[17] Finally, addressing the appellant's contention that Article 1F(*b*) of the Convention is inapplicable to persons who have served their sentence abroad before coming to Canada, the judge reviewed the decisions of our Court in *Chan v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1180 and *Zrig v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 565. He concluded that the Board was still right to have excluded the appellant under Article 1F(*b*) of the Convention, even if he were deemed to have constructively served his sentence in the United States.

The purpose of Article 1F(*b*) of the Convention

[18] The purpose of Article 1F(*b*) of the Convention was considered by our Court in the *Chan* and *Zrig* decisions. Counsel for the appellant submits that *Chan* is still good and applicable law. He

argued that *Chan* established a general principle that a person who has served his sentence should not be excluded under Article 1F(*b*) of the Convention.

[19] The appellant relies upon the following statement of Robertson J.A., at paragraph 4 of the reasons for judgment in *Chan*:

> Assuming without deciding that the appellant's conviction qualifies as a serious non-political crime, it is clear to me that Article 1F(*b*) cannot be invoked in cases where a refugee claimant has been convicted of a crime and served his or her sentence outside Canada prior to his or her arrival in this country. I rest this conclusion on two grounds. First, *obiter* comments of Justice Bastarache in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 (writing for the majority) and Justice La Forest in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, fully support this interpretation of Article 1F(*b*), as do the writings of academic commentators. Second, any other interpretation is in conflict with the statutory scheme set out in the *Immigration Act*.

[20] In that case, our Court had to reconcile the terms of Article 1F(*b*) of the Convention with then subparagraphs 46.01(1)(*e*)(i) and 19(1)(*c*.1)(i) of the former *Immigration Act*, R.S.C. 1985, c. I-2, as amended (former Act).

[21] These provisions of the former Act read:

Access Criteria	**Critères de recevabilité**
46.01 (1) A person who claims to be a Convention refugee is not eligible to have the claim determined by the Refugee Division if the person	**46.01** (1) – La revendication de statut n'est pas receivable par la section du statut si l'intéressé se trouve dans l'une ou l'autre des situations suivantes :
…	[…]
(*e*) has been determined by an adjudicator	(*e*) L'arbitre a décidé, selon le cas :

to be (i) a person described in paragraph 19(1)(*c*) or subparagraph 19(1)(*c*.1)(i) and the Minister is of the opinion that the person constitutes a danger to the public in Canada,	(i) qu'il appartient à l'une des catégories non admissibles visées à l'alinéa 19(1)*c*) ou au sous-alinéa 19(1)*c*.1)(i) et, selon le ministre, il constitue un danger pour le public au Canada,
19. (1) Inadmissible Persons – No person shall be granted admission who is a member of any of the following classes:	**19.** (1) Personnes non admissibles – Les personnes suivantes appartiennent à une catégorie non admissible :
…	[…]
(*c*.1) persons who there are reasonable grounds to believe (i) have been convicted outside Canada of an offence that, if committed in Canada, would constitute an offence that may be punishable under any Act of Parliament by a maximum term of imprisonment of ten years or more, or	*c*.1) celles dont il y a des motifs raisonnables de croire qu'elles ont, à l'étranger : (i) soit été déclarées coupables d'une infraction qui, si elle était commise au Canada, constituerait une infraction qui pourrait être punissable, aux termes d'une loi fédérale, d'un emprisonnement maximum égal ou supérieur à dix ans, sauf si elles peuvent justifier auprès du ministre de leur réadaptation et du fait qu'au moins cinq ans se sont écoulés depuis l'expiration de toute peine leur ayant été infligée pour l'infraction ou depuis la commission du fait;
…	
except persons who have satisfied the Minister that they have rehabilitated themselves and that at least five years have elapsed since the expiration of any sentence imposed for the offence or since the commission of the act or omission as the case may be;	

[Emphasis added]

[22] Pursuant to section 46.01, a person who was inadmissible to Canada could not have his or her claim determined by the Refugee Division. In other words, he or she was excluded from a refugee hearing before the Refugee Division.

[23] However, subparagraph 19(1)(*c*.1)(i) created an exception to the inadmissibility to Canada of persons convicted outside of Canada for a crime that could be punishable in Canada by a maximum term of imprisonment of ten (10) years or more.

[24] As a matter of fact, a person convicted of such crimes could still be eligible for refugee protection and have his or her claim determined by the Refugee Division if the Minister was satisfied that that person had rehabilitated himself or herself and that five years had elapsed since the expiration of the sentence imposed or since the commission of the act or omission.

[25] In order to give meaning to the rehabilitation provisions of the former Act, Robertson J.A. found in *Chan* that Article 1F(*b*) of the Convention could not be given an interpretation which would have resulted in a blanket exclusion of those who had been found guilty of serious crimes as defined in the Act. Such interpretation would have deprived a claimant of the protection offered by the exception to the inadmissibility rule. I should add, it would have also divested the Minister of his discretionary power under paragraph 19(1)(*c*.1) of that Act.

[26] In my respectful view, the decision in *Chan* stands for the proposition that, under the existing law at the time, which, as we will see, has now been modified by the IRPA, a claimant who was convicted of a serious non-political crime and who served his sentence was not necessarily excluded from a refugee hearing or rendered ineligible to apply for the refugee protection afforded by the Convention. He or she remained entitled to have their refugee claim determined by the

Refugee Division if the Minister concluded that the claimant was rehabilitated and was not a danger to the public.

[27] While the decision in *Chan* afforded some protection to a claimant and safeguarded the Minister's discretion, it did not then, nor does it now, in my respectful view, stand for the proposition that, whatever the circumstances, a country cannot exclude an applicant who was convicted and served his sentence.

[28] The purpose stated in *Chan* is neither the only nor, as contended by the appellant, necessarily the primary purpose sought by the exclusion contained in Article 1F(*b*) of the Convention. This is made clear by the subsequent decision of our Court in *Zrig*. In this respect, our colleague Décary J. wrote at paragraphs 118 and 119 of that decision:

> **Purposes of Article 1F of the Convention in general, and Article 1F(*b*) in particular**
>
> [118] My reading of precedent, academic commentary and of course, though it has often been neglected, the actual wording of Article 1F of the Convention, leads me to conclude that the purpose of this section is to reconcile various objectives which I would summarize as follows: ensuring that the perpetrators of international crimes or acts contrary to certain international standards will be unable to claim the right of asylum; ensuring that the perpetrators of ordinary crimes committed for fundamentally political purposes can find refuge in a foreign country; ensuring that the right of asylum is not used by the perpetrators of serious ordinary crimes in order to escape the ordinary course of local justice; and 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. It is this fourth purpose which is really at issue in this case.
>
> [119] These purposes are complementary. The first indicates that the international community did not wish persons responsible for persecution to profit from a convention designed to protect the victims of their crimes. The second indicates that the signatories of the Convention accepted the fundamental rule of international law that the perpetrator of a political crime, even one of extreme seriousness, is entitled to elude the authorities of the State in which he committed his crime, the premise being that such a person would not be

> tried fairly in that State and would be persecuted. The third indicates that the signatories did not wish the right of asylum to be transformed into a guarantee of impunity for ordinary criminals whose real fear was not being persecuted, but being tried, by the countries they were seeking to escape. The fourth indicates that while the signatories were prepared to sacrifice their sovereignty, even their security, in the case of the perpetrators of political crimes, they wished on the contrary to preserve them for reasons of security and social peace in the case of the perpetrators of serious ordinary crimes. This fourth purpose also indicates that the signatories wanted to ensure that the Convention would be accepted by the people of
>
> the country of refuge, who might be in danger of having to live with especially dangerous individuals under the cover of a right of asylum.
>
> [Emphasis added]

[29] I agree with this well documented statement of our colleague Décary J.A.: see also on the existence and scope of this fourth purpose *Minister for Immigration and Multicultural Affairs v. Singh*, [2002] HCA 7, at paragraphs 94-95 (High Court of Australia); *Tenzin Dhayakpa v. The Minister of Immigration and Ethnic Affairs*, [1995] FCA 1653 (Fed. Ct. Australia) at paragraphs 27 to 29; *Igor Ovcharuk v. Minister for Immigration and Multicultural Affairs*, [1998] FCA 1314 (Fed. Ct. Australia). The purposes are complementary and, in my view, there is no ranking among them.

[30] Some elements of the reasoning in *Chan* are still relevant under the IRPA because of the ineligibility rule applicable to refugee claimants under Part 2 of the IRPA, such as ineligibility for serious criminality: see subsections 101(1) and (2) of the IRPA.

[31] There is, however, a notable difference between the IRPA and the former Act. Under paragraph 46.01(1)(*e*) and subparagraph 19(1)(*c*.1)(i) of the former Act, a claimant was ineligible for a refugee hearing if he was inadmissible to Canada on account of serious criminality unless, as

previously stated, the Minister was satisfied that the claimant had rehabilitated himself or herself and five years had elapsed since the expiration of any sentence imposed for the offence or since the commission of the act or omission (emphasis added).

[32] Under the IRPA, the rule as to ineligibility has changed. By virtue of subsections 101(2), a claimant, who is inadmissible by reason of serious criminality, now remains eligible for a refugee hearing unless the "Minister is of the opinion that the person is a danger to the public in Canada and the conviction is for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament that is punishable by a maximum term of imprisonment of at least 10 years" (emphasis added).

[33] In other words, under the former Act, there was a rule of ineligibility for a refugee hearing if a claimant was inadmissible on account of serious criminality. That rule operated unless the exception applied. Under the IRPA the rule is reversed. A claimant remains eligible unless the exception applies.

[34] The concept of "sentence served" remains relevant to the issue of admissibility to Canada by reason of paragraph 36(3)(*c*) of the IRPA which deals with rehabilitation.

[35] This brings me now to the determination of the first certified question and the role that domestic law plays or should play in the interpretation of the exclusion clause contained in Article 1F(*b*) of the Convention.

Does serving a sentence for a serious crime prior to coming to Canada allow one to avoid the application of Article 1F(*b*) of the Convention

[36] Central to the exclusion clause of Article 1F(*b*) of the Convention is the commission of a "serious" non-political crime. What does "serious" mean in that clause? What are the criteria for determining whether a claimant's crime is serious within the meaning of Article 1F(*b*) of the Convention? What standards are applicable to that determination? International or local standards or both? Was the crime in the present instance serious enough to justify the application of the exclusion clause? These questions must now be addressed in the context of Article 1F(*b*) of the Convention.

a) The standards applicable to the determination of the gravity of a crime

[37] The UNHCR-issued *Guidelines on International Protection* (The UN Refugee Agency), at paragraph 38, suggest that the gravity of a crime be "judged against international standards, not simply by its characterization in the host State or country of origin". This is, of course, to avoid the profound disparities which may exist between countries with respect to the same behaviour. As Branson J. wrote in *Igor Ovcharuk v. Minister for Immigration and Multicultural Affairs, supra*, at page 15 of his reasons for judgment, "one needs only to bring to mind regimes under which conduct such as peaceful political dissent, the possession of alcohol and the "immodest" dress of women is regarded as seriously criminal".

[38] The UNHCR Guidelines propose, at paragraph 39, the following factors as relevant in determining the seriousness of a crime for the purpose of Article 1F(*b*) of the Convention:

- the nature of the act;
- the actual harm inflicted;
- the form of procedure used to prosecute the crime;
- the nature of the penalty for such a crime; and
- whether most jurisdictions would consider the act in question as a serious crime.

The Guidelines go on to give as examples of serious crimes the crimes of murder, rape, arson and armed robbery. They also refer to other offences which could be deemed to be serious "if they are accompanied by the use of deadly weapons, involve serious injury to a person or there is evidence of serious habitual criminal conduct and other similar factors": *ibidem*, at paragraph 40. Reference here is clearly made to circumstances surrounding the commission of the crime which, the Guidelines submit, should be taken into account in assessing the seriousness of the crime.

[39] The UNHCR Guidelines are not binding. Nor is the *UN Handbook on Procedures and Criteria for Determining Refugee Status* (under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees), Geneva, January 1988, although the Handbook can be relied upon by the courts for guidance: see *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, at pages 713-714; *Tenzin Dhayakpa*, *supra*, at paragraph 27; *Igor Ovcharuk*, *supra*, at page 8; *INS v. Aguirre-Aguirre*, U.S. 1999, 1, at pages 10 and 11 (U.S. Supreme Court). I also agree that the Handbook cannot override the functions of the Court in determining the words of the Convention: see the reasons for judgment of Henry J. in *S. v. Refugee Appeals Authority*, [1998] 2 NZLR 291, at paragraph 20 (N.Z. C.A.).

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

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

[42] Further, in many countries, sentencing for criminal offences takes into account factors other than the seriousness of the crime. For example, a player in a prostitution ring may, out of self-interest, assist the prosecuting authorities in the dismantling of the ring in return for a light sentence.

Or an offender may seek and obtain a more lenient sentence in exchange for a guilty plea that relieves the victim of the ordeal of testifying about a traumatic sexual assault. Costly and time-consuming mega-trials involving numerous accused can be avoided in the public interest through the negotiation of guilty pleas and lighter sentences. The negotiations relating to sentences may involve undertakings of confidentiality, protection of persons and solicitor-client privileges. Access to the confidential, secured and privileged information may not be permitted, so that a look at the lenient sentence in isolation by a reviewing authority would provide a distorted picture of the seriousness of the crime of which the offender was convicted.

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

[44] I believe there is a consensus among the courts that the interpretation of the exclusion clause in Article 1F(*b*) of the Convention, as regards the seriousness of a crime, requires an evaluation of the elements of the crime, the mode of prosecution, the penalty prescribed, the facts and the mitigating and aggravating circumstances underlying the conviction: see *S v. Refugee Status Appeals Authority*, (N.Z. C.A.), *supra*; *S and Others v. Secretary of State for the Home Department*, [2006] EWCA Civ 1157 (Royal Courts of Justice, England); *Miguel-Miguel v. Gonzales*, no. 05-15900, (U.S. Ct of Appeal, 9th circuit), August 29, 2007, at pages 10856 and 10858. In other words, whatever presumption of seriousness may attach to a crime internationally or under the legislation

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

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

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

b) Whether the crime in the present instance is serious and justified the application of the exclusion clause

[47] It should be recalled that the appellant was convicted in the United States for trafficking a hard drug, namely opium.

[48] It is not disputed that trafficking in narcotics and psychotropic substances can entail both human and economic consequences for society. As the evidence reveals, drug trafficking is treated as a serious crime across the international spectrum. In their book on *The Refugee in International Law*, 3rd ed., Oxford University Press, 2007, at page 179, G.S. Goodwin-Gill and J. McAdam mention that the UNHCR, with a view to promoting consistent decisions "proposed that, in the absence of any political factors, a presumption of serious crime might be considered as raised by evidence of commission of any of the following offences: homicide, rape, child molesting, wounding, arson, drugs traffic, and armed robbery" (emphasis added).

[49] In accordance with the three *United Nations Drug Conventions*, i.e. the *1961 Single Convention on Narcotic Drugs* (amended by the Protocol of 25 March 1972), 976 U.N.T.S. 105; the *1971 Convention Against Psychotropic Substances*, 1019 U.N.T.S. 175; and the *1988 Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, E/Conf. 82/15, signatory nations are required to coordinate preventive and repressive action against drug trafficking, including the imposition of penal provisions as necessary. The choice of penal provisions remains at the discretion of the Member State and may exceed those provided by the Conventions if the Member States deem them desirable or necessary for the protection of public health and welfare.

[50] As reflected by the penal provisions enacted, most signatory states define and treat drug trafficking as a serious crime. In contrast to mere possession, drug trafficking is usually punishable by a period of incarceration. In this country, the sentence imposed for a drug trafficking offence carries a maximum time of 18 months for a summary conviction and up to a maximum of life imprisonment for an indictable offence depending on the substance trafficked: see the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, s. 5.

[51] In other countries, the punishment is equal to or greater than ours and can include both incarceration and the imposition of fines. The United States also provides for a range of sentences depending on the substance trafficked, whether the consequence of trafficking included serious injury or death, and whether there were prior convictions. Overall, sentences can range from a minimum of one year to a life sentence and fines can be imposed from $100,000 to $20,000,000, depending on, as per the wording of the article, whether the offender is an individual or other than an individual: see 21 U.S.C. §841. In a recent case comparable to ours where the accused pleaded guilty to selling .26 grams of rock cocaine for $20, the US Court of Appeal for the 9th circuit upheld, in August 2007, the presumption that the accused had committed a particularly serious crime. The accused had been sentenced to the time served (36 days), a fine of $200 and a five-year probation period: see *Miguel-Miguel v. Gonzales*, *supra*.

[52] Less severe, but similar punishment is legislated in England, Australia, New Zealand and France. Drug trafficking in the United Kingdom can lead to a maximum sentence of 3 to 12 months

for summary conviction offences or a 400 to 2,500 pound fine or both. For indictable offences, the penalty is increased, ranging from 5 years to life imprisonment or a fine or both: see the *Misuse of Drugs Act*, 1971 (U.K.), 1971, c. 38, s. 4 and Schedule 4. Similarly, Australia permits a ten-year period of imprisonment or 2,000 penalty units or both: see *Criminal Code Act*, 1995 (Cth.), s. 302.4(1). New Zealand sets a range for indictable trafficking offences of a maximum of 8 years to life imprisonment depending on the substance and up to one year imprisonment or a fine of up to $1,000 for summary conviction offences: see *Misuse of Drugs Act*, 1975 (N.Z.), 1975/116, s. 6. Finally, France allows for 10 years of imprisonment and fines of 7.5 million euros when the trafficked drug is for resale as opposed to individual consumption: see the French *Code Pénal*, sections 222-237.

[53] In this country, opium is classified in Schedule 1 and, according to paragraph 5(3)(*a*) of the *Controlled Drugs and Substances Act*, *supra*, a person who sells that substance is liable to imprisonment for life. There is no doubt that Parliament considers the trafficking of opium as a serious crime.

[54] In the United States, the behaviour of the appellant was classified a class B felony. The appellant, although a first offender, received a sentence of 29 days in jail and a five year probation period. A probation order, especially one of five years, is not necessarily a light sentence as it entails restrictions which can be severe on one's liberty as well as conditions leading to penal consequences in case of breaches: see *R. v. B. (M.)*, [1987] O.J. No. 726 (Ont. C.A.).

[55] In determining whether the appellant had been convicted of a serious crime, the Board looked at:

a) the gravity of the crimes (trafficking in opium and criminal possession of marijuana) under New York legislation which, even for a first offender, resulted in a jail term as well as a five year probation period;

b) the sentence imposed by the New York court;

c) the facts underlying the conviction, namely the nature of the substance trafficked and possessed, a traffic of opium in three parts, the quantity of drugs possessed and trafficked;

d) the finding of this Court in *Chan* that a crime is a serious non political crime if a maximum sentence of ten years or more could have been imposed if the crime had been committed in Canada;

e) the objective gravity of a crime of trafficking in opium in Canada which carries a possible penalty of life imprisonment; and

f) the fact that the appellant violated his probation order by failing to report three times to his probation officer and eventually absconded.

[56] I believe that the judge committed no error when he concluded that it was reasonable for the Board to conclude on these facts that the appellant's conviction in the United States gave it a serious reason to believe that he had committed a serious non political crime outside the country.

c) The answer to the first certified question

[57] The answer to the following question:

> Does serving a sentence for a serious crime prior to coming to Canada allow one to avoid the application of Article 1F(b) of the Convention relating to the Status of Refugees (Convention)?

is no.

[58] In view of the conclusion that I have reached on the first certified question, it is not necessary to answer the second question.

Conclusion

[59] For these reasons, I would dismiss the appeal. I am indebted to both counsel for their assistance in resolving the issues before us.

"Gilles Létourneau"
J.A.

"I agree
Karen Sharlow J.A."

"I agree
J.D. Denis Pelletier J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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