No.: 35215

SUPREME COURT OF CANADA

(APPEAL FROM A JUDGMENT OF THE FEDERAL COURT OF APPEAL)

BETWEEN:

Luis Alberto HERNANDEZ FEBLES

APPELLANT
(Appellant)

AND:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

RESPONDENT
(Respondent)

- and –

AMNESTY INTERNATIONAL
UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES
CANADIAN ASSOCIATION OF REFUGEE LAWYERS
CANADIAN COUNCIL FOR REFUGEES
CANADIAN CIVIL LIBERTIES ASSOCIATION

INTERVENERS

RESPONDENT'S REPLY TO THE INTERVENERS' MEMORANDA

Counsel for the Respondent

WILLIAM F. PENTNEY
Deputy Attorney General of Canada
Per: **M^e François Joyal**
M^e Ian Demers
Department of Justice Canada
Quebec Regional Office
Guy-Favreau Complex
200 René Lévesque Blvd. West
East Tower, 12th floor
Montreal, Quebec H2Z 1X4
Tel.: 514 283-5880
514 496-9232
Fax: 514 496-7876
françois.joyal@justice.gc.ca
ian.demers@justice.gc.ca

Agent for the Respondent

M^e Christopher Rupar
Department of Justice Canada
50 O'Connor Street,
5th Floor, Room 557
Ottawa, Ontario K1A 0H8
Tel.: 613 670-6290
Fax: 613 954-1920
christopher.rupar@justice.gc.ca

ORIGINAL

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Quebec Regional Office
Guy-Favreau Complex
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Department of Justice Canada
50 O'Connor Street,
5th Floor, Room 557
Ottawa, Ontario K1A 0H8
Tel.: 613 670-6290
Fax: 613 954-1920
christopher.rupar@justice.gc.ca

Counsel for the Appellant

M^e Jared Will
M^e Peter Shams
305 de Bellechasse Street
Suite 400A
Montreal, Quebec H2S 1W9
Tel.: 514 439-0800
Fax: 514 439-0798
jared@jwavocat.ca
ps@shamslaw.ca

Agent for the Appellant

M^e Yavar Hameed
Hameed Farrokhza Elgazzar Brousseau
43 Florence Street
Ottawa, Ontario K2P 0W6
Tel.: 613 232-2688, ext. 228
Fax: 613 232-2680
yhameed@bellnet.ca

Counsel for Intervener
Amnesty International

M^e Jennifer Klinck
M^e Perri Ravon
M^e Justin Dubois
M^e Michael Sabet
Power Law
130 Albert Street, Suite 1103
Ottawa, Ontario K1P 5G4
Tel.: 613702-5560
Fax: 888 404-2227
jklinck@ juristespower.ca
pravon@ juristespower.ca
judubois@ juristespower.ca
msabet@ juristespower.ca

Counsel for Intervener
United Nations High Commissioner for Refugees

M^e John A. Terry
M^e T. Ryan Lax
M^e Rana R. Khan
Torys LLP
79 Wellington Street West Suite 3000
Toronto, Ontario M5K 1N2
Tel.: 416 865-0040
Fax: 416 865-7380
jterry@torys.com
rlax@torys.com
rkhan@unhcr.org

Agent for Intervener
United Nations High Commissione for Refugees

M^e Marie-France Major
Supreme Advocacy LLP
340 Gilmour Street, Suite 100
Ottawa, Ontario K2P 0R3
Tel.: 613 695-8855, ext. 102
Fax. 613 695-8580
mfmajor@supremeadvocacy.ca

Counsel for Intervener
Canadian Association of
Refugee Lawyers

M^e Aviva Basman
M^e Alyssa Manning
Refugee Law Office
20 Dundas Street West, Suite 202
Toronto, Ontario M5G 2H1
Tel.: 416 977-8111
Fax: 416 977-5567
basmana@lao.on.ca
manninga@lao.on.ca

Agent for Intervener
Canadian Association of
Refugee Lawyers

M^e Karima Karmali
Integrated Legal Services Office,
Legal Aid Ontario
73 Albert Street, Ground Floor
Ottawa, Ontario K1P 1E3
Tel.: 613 238-7931, ext. 59
Fax: 613 238-3410

M^e Barbara Jackman
Jackman Nazami & Associates
596 St. Clair Avenue West, Unit 3
Toronto, Ontario M6C 1A6
Tel.:416-653-9964
Fax:416-653-1036
barb@bjackman.com

Counsel for Intervener
Canadian Council for Refugees

M^e Catherine Dauvergne
M^e Angus Grant
M^e Pia Zambelli
University of British Columbia
Faculty Law
1822 East Mall
Vancouver, British Columbia V6T 1Z1
Tel.: 604 827-3055
Fax: 604 822-8108
dauvergne@law.ubc.ca
angusgrant@osgoode.yorku.ca
zambelli@videotron.ca

Agent for Intervener
Canadian Council for Refugees

M^e Martine Cétoute
Clinique juridique francophone
de l'Est d'Ottawa
Vanier Community Service Centre
290 Dupuis Street
Ottawa, Ontario K1L 1A2
Tel.: 613 744-2892, ext. 1114
Fax: 613 744-3960
cetoutem@lao.on.ca

Counsel for Intervener
Canadian Civil Liberties Association

M^e Peter H. Edelmann
M^e Lorne Waldman
M^e Lobat Sadrehashemi
M^e Aris Daghighian
Edelmann & Co. Law Offices
207 West Hastings Street, Suite 905
Vancouver, British Columbia V6B 1H7
Tel.: 604 646-4684
Fax: 604 648-8043
peter@edelmann.ca
lorne@lornewaldman.ca
lobat@edelmann.ca
aris@edelmann.ca

Agent for Intervener
Canadian Civil Liberties Association

M^e Michael Bossin
Community Legal Services –
Ottawa Center
1 Nicholas Street, Suite 422
Ottawa, Ontario K1N 7B7
Tel.: 613 241-7008, ext. 224
Fax: 613 241-8680
bossinm@lao.on.ca

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OVERVIEW

1. Pursuant to the order of the Court (Abella, J.) on January 29, 2014, the Respondent presents the following in reply to the memoranda of Interveners Amnesty International (AI), the United Nations High Commissioner for Refugees (UNHCR), the Canadian Association of Refugee Lawyers (CARL), the Canadian Council for Refugees (CCR) and the Canadian Civil Liberties Association (CCLA).

1) Reply to UNHCR, AI and CCLA: Art. 1Fb) not limited to fugitives; sentence completion, rehabilitation or current dangerousness not pertinent

2. Like the Appellant, the Interveners have presented a position which fails to properly adhere to the principles of treaty interpretation as set out in the *Vienna Convention on the Law of Treaties*[1] and which would, ultimately, require this Court to cross the line between judicial interpretation and revision of a clear binding treaty provision.

3. The Interveners' positions regarding the purposes of Art. 1Fb) not only differ from the Appellant's own approach, but also differ amongst themselves. The Appellant argues that the "overriding purpose"[2] of Art. 1F(b) is to target fugitives, while admitting to some exceptions in *ad hoc* cases where necessary to protect the integrity of the *Refugee Convention*.[3] AI submits that Art. 1F(b) applies to fugitives only.[4] UNCHR contends that Art. 1F(b) aims to prevent serious criminals from escaping accountability for their crimes[5] and to safeguard the integrity of the institution of asylum, the latter category permitting exclusion of those who commit "truly heinous crimes" and those who raise a security risk to the host country even though they have served their sentence.[6]

4. It bears repeating that a treaty provision is to be interpreted by considering the ordinary meaning of its terms in its proper context and in light of its objectives and purposes.[7] This

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1 1155 U.N.T.S. 331 (Respondent's Book of Authorities ("R.B.A."), **Vol. I, Tab 14**).
2 Appellant's Factum, at paras. 4, 56-61.
3 *Idem*, at paras. 62-74.
4 AI's Factum, at paras. 20-21.
5 UNHCR's Factum, at paras. 16-19.
6 *Idem*, at paras. 20-24.
7 *Vienna Convention, supra*, Art. 31.

approach, consistent with the notion of state consent, justifiably places an important role on the terms chosen by Negotiating States to express their intentions.

5. In Art. 1F(b), the drafters used a language different than that found in other similar international instruments, which arguably applies only to fugitives[8] or in Art. 33(2), which specifically requires that the person concerned constitutes a "danger to the community", having been "convicted [...] of a particularly serious crime". [9] Their choice of different wording in Art. 1F(b) must be given effect. Neither do the words "prior to his admission to that country as refugee" have the meaning given to them by AI: rather, they distinguish Art. 1F(b) from Art. 33(2), which applies to those who commit serious crimes after they were recognized as refugees.[10]

6. Artificially restraining the application of Art. 1F(b) to "fugitives" would lead to absurd or unreasonable results which could not have been intended by Negotiating States.[11] Furthermore, equating serious non-political crimes with extraditable crimes would be particularly disadvantageous to refugee claimants.[12]

7. While Art. 1F(b) reflects a concern by Negotiating States to exclude fugitives from justice and those who constitute a threat to the maintenance of peace and public order from the definition of "refugee", the ordinary meaning of its terms confirm that its objective is broader: it is to protect the integrity and viability of the refugee determination system by excluding those who have rendered themselves undeserving because of their commission of a past serious crime ("grave" in the equally authoritative French version).

8. The terms chosen by the Negotiating States, including the words "*has* committed", the geographical and temporal limitations in Art. 1F(b), and the word "shall", confirm that the inquiry is to focus on the circumstances surrounding the claimant's past commission of a serious

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[8] See Respondent's Factum, at para. 63.

[9] *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at paras. 58, 73 (R.B.A., **Vol. II, Tab 49**).

[10] Zimmermann, Andreas, Dörschner, Jonas & Machts, Felix, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol — A Commentary*, New York: Oxford University Press, 2011, at p. 602 (para. 82) (R.B.A., **Vol. V, Tab 141**); UNHCR, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses*, par. 44 (R.B.A., **Vol. V, Tab 133**).

[11] See Respondent's Factum, at paras. 82-84.

[12] See Respondent's Factum, at para. 64.

crime.[13] As they are relevant only to a claimant's present character, rehabilitation, expiation, and other such factors, do not enter into the picture, and should not properly be considered as "defences" to the application of Art. 1Fb).

9. Interpreting Art. 1F(b) as requiring refugee decision-makers to consider factors pertaining to expiation or rehabilitation, amounts to an indirect attempt to apply the principles of sentencing under Canadian criminal law to the context of Art. 1F(b) even though Art. 1F(b) plainly does not pursue the same objectives.[14] The Interveners' argument would transform the refugee decision-makers into a criminal sentencing court, which would be inconsistent with their role and the practical realities of refugee hearings or assessments[15] and would lead to inconsistent results at odds with the need to preserve the integrity of the refugee determination scheme.

10. Furthermore, the Interveners' proposed approaches lack workable and viable standards for assessing a claimant's expiation or rehabilitation. In some cases, they might actually work against the interests of claimants as decision-makers would then be required to take into account the totality of their circumstances, including any subsequent instance of re-offending.[16]

11. That said, it should not be forgotten that Art. 1F(b) does not apply to each and every criminal. It only applies to those whose actions constitute a "serious" and non-political crime committed before the claimant claimed protection in Canada. These built-in limitations prevent an overly broad interpretation of Art. 1F(b) and contribute to the humanitarian objectives of the *Refugee Convention*.

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[13] Federal Court of Appeal (FCA) Reasons, at para. 52; *BVerwG* (German Federal Administrative Court), Case 10C48.07, October 14, 2008, para. 29 (R.B.A., **Vol. III, Tab 83**); *S. v. Refugee Status Appeals Authority*, [1998] 2 N.Z.L.R. 291, 296 (C.A.) (R.B.A., **Vol. III, Tab 86**).

[14] Comp. with *Criminal Code*, s. 718 (Respondent's Supplemental Book of Authorities (R.S.B.A.), **Tab 142**); *R. v. Pham*, 2013 SCC 15, [2013] 1 S.C.R. 739, at para. 10 (R.S.B.A., **Tab 146**).

[15] See *Pushpanathan, supra*, at paras. 47, 58 (R.B.A., **Vol. II, Tab 49**); *Ezokola v. Canada (Minister of Citizenship and Immigration)*, 2013 SCC 40, at paras. 38 and 105 (R.B.A., **Vol. I, Tab 37**).

[16] See, *e.g.*, *Brzezinski v. Canada (Minister of Citizenship and Immigration)*, [1998] 4 F.C. 525 (T.D.), at paras. 28-32 (R.B.A., **Vol. I, Tab 27**).

2) Reply to CCR and CARL: the meaning of "serious" under Art. 1Fb)

12. Given that the Appellant has admitted that his crimes were presumptively "serious" for the purpose of Art. 1F(b),[17] there is no requirement for this Court to pronounce on the Interveners' arguments. Should the Court feel inclined to do so, the Respondent submits that the current approach followed by the Federal Court of Appeal in *Jayasekara*[18] should be confirmed as being appropriate.

13. It is plain that Art. 1F(b) is concerned with the commission of domestic criminal offences and, in that regard, leaves some discretion to domestic authorities to define what is a "serious" crime, consistent with the objectives of Art. 1F(b).[19] While domestic standards have an important role to play, the FCA has never held that international or foreign norms cannot be considered.[20]

14. Consistent with the FCA's jurisprudence, the notion of seriousness under Art. 1F(b) is not to be assessed mechanically. It requires an evaluation of such factors as the elements of the crime, the mode of prosecution, the penalty prescribed, the facts as well as the mitigating and aggravating circumstances underlying the conviction. The FCA has not indicated that these factors are exhaustive, nor should they be considered to be so. However, factors extraneous to the circumstances of commission of the crime are evidently not relevant.[21]

15. The Interveners do not seriously dispute that crimes punishable by a maximum term of 10 years or more under the *Criminal Code* constitute, *a priori,* an appropriate reference point for the purpose of assessing the "seriousness" or "gravity" of a crime under Art 1F(b).[22] It bears repeating that a considerably wider range of offences is covered under extradition law, including

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[17] FCA Reasons, at para. 26.

[18] *Jayasekara v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404, [2009] 4 F.C.R. 164, at para. 44 (R.B.A., **Vol. II, Tab 41**).

[19] Goodwin-Gill, Guy S., *The Refugee in International Law*, 3rd ed., Oxford: Oxford University Press, 2007, at p. 176 (R.B.A., **Vol. IV, Tab 116**).

[20] *Jayasekara*, *supra*, at paras. 37, 43 and 49-52 (R.B.A., **Vol. II, Tab 41**). See, for instance, the *United Nations Convention against Transnational Organized Crime*, 2225 U.N.T.S. 209, Art. 2(b), which defines a "serious crime" as "conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty" (R.S.B.A., **Tab 143**).

[21] *Jayasekara*, *supra*, at para. 44 (R.B.A., **Vol. II, Tab 41**).

[22] *AH (Algeria) v Secretary of State for the Home Department*, [2012] EWCA Civ 395, at para. 40 (AI Book Authorities); Gilbert, Geoff, *Current Issues in the Application of the Exclusion Clauses*, *supra*, at p. 449 (R.B.A., **Vol. IV, Tab 115**) See also: Rikhof, Joseph, *The Criminal Refugee: The Treatment of Asylum Seekers with a Criminal Background in International and Domestic Law*, Dordrecht: Republic of Letters, 2012, at p. 316 and ff. (R.B.A., **Vol. IV, Tab 124**) for an exhaustive and balanced treatment of the Canadian caselaw on this issue.

offences which would not be considered "serious" under Art. 1F(b).[23] While the Interveners argue that there should not be a "presumption" of seriousness attached to such offences, the FCA did not intend to set up an intractable standard in that regard.[24] The length of the potential period of imprisonment certainly constitutes a more reliable guide to assessing the "seriousness" of a crime than its formal characterization, which may vary from one country to another.[25]

16. In any event, the use of a presumption is consistent with the practical realities of refugee proceedings, which tend to be less formal than criminal trials. There is also nothing inappropriate in requiring a claimant to adduce some evidence in order to satisfy the decision-maker that his crime is not "serious" despite the fact that it can potentially attract a severe penalty. After all, much of the relevant evidence in this regard can only come from the claimant.

17. Depending on the facts, a non-violent crime may be considered "serious" under Art. 1F(b). For example, there is no doubt that defrauding more than 9,000 investors for an amount of $115,000,000 (for which a five-year term of imprisonment and substantial fines were imposed) is a serious crime.[26] In brief, the characterization of what is a serious crime will depend on the facts of each case and, as such, the Court should not accede to the Interveners' invitation to attempt to draw rigid distinctions in this regard, especially without the benefit of a proper factual record.

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Montreal, March 17, 2014

François Jòyal
Counsel for Respondent

Ian Demers
Counsel for the Respondent

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[23] See Respondent's Factum, at para. 64, citing, inter alia, *Extradition Act*, S.C. 1999, c. 18, s. 3(1)(*a*), which requires only that the crime in question be punishable by a maximum penalty of 2 years or more.

[24] *Jayasekara, supra*, at paras. 40, 55. See also: *Németh v. Canada (Minister of Justice)*, 2010 SCC 56, [2010] 3 S.C.R. 281, at para. 45 (citing *IRPA*, s. 105) (R.B.A., **Vol. II, Tab 46**).

[25] Gilbert, Geoff, *Current Issues in the Application of the Exclusion Clauses*, UNHCR Background Paper, 2002, at p. 449 (R.B.A., **Vol. IV, Tab 115**).

[26] *Autorité des marchés financiers v. Lacroix*, 2009 QCCA 1559, [2009] R.J.Q. 2202 (R.S.B.A., **Tab 144**). See also *Xie v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 250, [2005] 1 F.C.R. 304, leave denied [2005] 1 S.C.R. xvii (R.B.A., **Vol. II, Tab 64**); *Lai v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 125 (R.S.B.A., **Tab 146**).

SUPPLEMENTARY AUTHORITIES

LEGISLATION

Criminal Code, R.S.C. 1985, c. C-46, Section 718, February 27, 2014 (extracts)

United Nations Convention against Transnational Organized Crime. New York, 15 November 2000, 2225 UNTS 209 (extracts)

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R. v. Pham, 2013 SCC 15, [2013] 1 S.C.R. 739 (extracts)