

CASE COMMENT

NO SECOND CHANCES: THE DEFAULT EXCLUSION OF REFUGEE CLAIMANTS ON GROUNDS OF SERIOUS CRIMINALITY A CASE COMMENT ON *FEBLES V CANADA*

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INTRODUCTION

Are rehabilitated criminals deserving of refugee protection? In the recent case of *Febles v Canada (Citizenship and Immigration)* (“*Febles*”), a majority of the Supreme Court of Canada answered that question in the negative.¹ According to the court, an asylum seeker who has committed a serious non-political crime outside the country of refuge is forever barred from obtaining refugee status by operation of Article 1F(b) of the *Convention Relating to the Status of Refugees* (“*Refugee Convention*”).² Such an individual can never be granted refugee protection, even if the offence is dated and the asylum seeker is presently rehabilitated. Prior to the decision, courts struggled to delineate the appropriate scope of Article 1F(b) and offered divergent interpretations as to its application. The majority judgment in *Febles* settled the issue: the only factors relevant to the application of Article 1F(b) are those related to the circumstances of the past offence. Post-offence circumstances, such as the expiation and rehabilitation of the claimant, are precluded from consideration.

The case of *Febles* raises the fundamental question of who deserves refugee status and who does not. If Article 1F(b), like Articles 1F(a) and 1F(c), was confined to crimes of a grave and heinous nature, the mandatory exclusion of individuals with a serious criminal past may perhaps be justifiable.³ However, Parliament and the courts have adopted a broad definition of what constitutes a serious crime. Under the *Immigration and Refugee Protection Act* (“*IRPA*”), serious criminality comprises offences that, if committed in Canada, could attract a term of ten years imprisonment, including, for example, non-violent property offences.⁴ Combined with the recent pronouncement of the Supreme Court of Canada in *Febles*, this definition casts too wide a net, excluding individuals who, despite their pasts, are deserving of protection. In this article, I argue that the majority’s interpretation of Article 1F(b) is contrary to the humanitarian goals that the *Refugee Convention* is purported to advance. Individuals who have taken positive steps to make reparations and reintegrate into society are automatically and unfairly excluded from refugee status.

In support of this argument, I first introduce Article 1F(b) and situate the exclusion clause within its statutory context in the *IRPA*. I then trace the Canadian jurisprudence on Article 1F(b) from its early interpretations to its current iteration in *Febles*. Next, I critically discuss the *Febles* case. I argue for an alternate interpretation of Article 1F(b) that considers the present deservingness of a refugee claimant together with the circumstances of his or her criminal past. I conclude by considering the broader implications of *Febles* with respect to the determination of refugee status under the *IRPA*.

1 *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68 (available on CanLII) [*Febles*].

2 *United Nations Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150 [*Refugee Convention*]; *Protocol Relating to the Status of Refugees*, 31 January 1967, Can TS 1969 No 29.

3 Article 1F(a) excludes claimants who have committed a crime against peace, a war crime, or a crime against humanity, and Article 1F(c) excludes claimants guilty of “serious, sustained or systemic violations of fundamental human rights”: *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 at para 64 (available on CanLII) [*Pushpanathan*].

4 *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]; see, for example, ss 98, 36(1), 101(2), 112(3), 113(3). These provisions make Article 1F(b) a more sweeping tool of exclusion than Articles 1F(a) and (c).

PART I. THE BASIC DEFINITION OF ARTICLE 1F(B)

Article 1F of the *Refugee Convention* excludes certain categories of individuals from refugee protection. It provides:

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

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.⁵

Article 1F is incorporated directly into Canadian domestic law through section 98 of the *IRPA*:

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.⁶

Articles 1F(a) and 1F(c) concern “international criminals,” who, because of their contribution to “serious, sustained or systemic violations of fundamental human rights,”⁷ are “rightly unable to claim refugee status.”⁸ Article 1F(b), by contrast, applies to individuals who have committed a serious ordinary crime prior to their arrival in the country of refuge. The seriousness of a crime under Article 1F(b) is determined in accordance with international norms, domestic legislation, and case law. According to the Federal Court of Appeal, factors relevant to the standard of seriousness include the following: the elements of the crime, the mode of prosecution, the penalty prescribed, the facts of the crime, and the mitigating and aggravating circumstances underlying the conviction.⁹ References to serious criminality in the *IRPA* provide “strong indication” of its meaning within Article 1F(b).¹⁰ As noted, the *IRPA* indicates that a serious crime is one that, if committed in Canada, constitutes an offence punishable by a maximum term of at least 10 years imprisonment. There is no minimum sentence that an individual must have served for a crime to be regarded as serious. In Canada, claimants have been excluded under Article 1F(b) for offences including bribery, possession of 0.9 grams of cocaine for the purpose of trafficking, using a false passport, falsifying business records, and driving while impaired.¹¹

5 *Refugee Convention*, *supra* note 2, art 1F.

6 *IRPA*, *supra* note 4, s 98.

7 *Pushpanathan*, *supra* note 3 at para 64.

8 *Sivakumar v Canada (Minister of Employment and Immigration)*, [1994] 1 FCR 433 at 445 (available on CanLII) (FCA); see also *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 at para 34 (available on CanLII) [Ezokola]; *Pushpanathan*, *supra* note 3 at para 63.

9 *Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404 at para 44 (available on CanLII) [Jayasekara].

10 *Ibid* at para 40.

11 *Febles*, *supra* note 1 (Factum of the Intervener Canadian Association of Refugee Lawyers at para 12), citing *Vlad v Canada (Minister of Citizenship and Immigration)*, 2007 FC 172 (bribery); *Abdi (Re)* (22 November 2012) Toronto TB1-10190 (RPD) (possession for the purpose of trafficking); *Durango v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1081 (using a false passport); *AP v Canada (Minister of Citizenship and Immigration)*, 2012 FC 494 (falsifying business records); *X (Re)*, 2010 CanLII 91951 (IRB) at para 23 (driving while impaired).

Given this broad standard of seriousness, the question turns to what Article 1F(b) is intended to achieve. Is Article 1F(b) intended to allow a country of refuge to exclude from refugee protection any individual with a serious criminal past? Or does the exclusion clause serve a more circumscribed role, limiting exclusion to the most egregious of crimes or in cases where the claimant's criminal character remains predominant? The following section considers, in chronological order, the development of the case law on Article 1F(b) leading up to *Febles*, where appellate courts have elaborated upon the purposes served by the exclusion clause and the circumstances relevant to its application.

PART II. THE JURISPRUDENCE ON ARTICLE 1F(B)

Febles reflects the culmination of two decades of jurisprudence on the interpretation of Article 1F(b). As will become evident, the case law proceeds in three distinct phases. In the first phase, the courts preferred a strict interpretation, finding that Article 1F(b) applies to criminals who claim refugee status as a means of avoiding prosecution in their country of origin. In the second phase, the courts broadened their approach, deciding that persons who have already served a criminal sentence may still be subject to exclusion under Article 1F(b). The third phase, as represented in *Febles*, interprets Article 1F(b) as necessarily excluding from refugee protection persons who have committed a serious non-political crime abroad, regardless of whether their sentence has already been served or whether they have been rehabilitated. As a corollary to these phases, the case law also develops the procedural and substantive distinction between exclusion from refugee status under Article 1F and removal from the country of refuge.¹² This distinction has justified interpretations of the *Refugee Convention* that deviate from its broad human rights objectives, and proved decisive in the *Febles* appeal at the Supreme Court of Canada.

A. Phase One

i. *Ward* (1993)

The doctrinal origins of refugee law owe much of their precedential content to *Canada (Attorney General) v Ward* (“*Ward*”).¹³ In this case, Justice La Forest, speaking for the Supreme Court of Canada, had occasion to comment upon the nature of exclusion of criminals from Canada and the purpose of Article 1F(b) in particular. The court held that a refugee claimant must pass two preliminary hurdles to be granted refugee status in Canada. The first hurdle, section 19 of the old *Immigration Act*, provided a comprehensive framework for inadmissibility, including for reasons of serious criminality.¹⁴ The second hurdle was Parliament's incorporation of the exclusionary provisions of Refugee Convention Articles 1E and 1F into the legislative definition of “Convention refugee.”¹⁵ According to the court, the first hurdle was carefully drafted to exclude claimants who may pose a danger to Canada while still allowing the Minister to consider whether rehabilitation has occurred. The court held that “Parliament opted not to treat a criminal past as a reason to be estopped from obtaining refugee status.”¹⁶ Further, the court noted that while section 19 concerns itself with convictions, Article 1F(b) refers instead to the

12 Article 33(1) provides that no state party shall return a refugee to a territory in which he or she may be persecuted. However, Article 33(2) denies this right of non-*refoulement* where there “are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country”: *Refugee Convention*, *supra* note 2.

13 *Canada (AG) v Ward*, [1993] 2 SCR 689 (available on CanLII) [*Ward* cited to SCR].

14 *Ibid* at 741; see also *Immigration Act*, RSC 1985, c I-2, s 19.

15 *Ward*, *supra* note 13 at 741.

16 *Ibid* at 742.

commission of a serious crime.¹⁷ The court agreed with Professor James Hathaway that Article 1F(b) was intended to exclude claimants who, having committed a serious non-political crime abroad, evade prosecution by claiming refugee status.¹⁸ On the facts of the case, the court found that the respondent, Mr. Ward, would not be excluded under Article 1F(b), as he had already been convicted of his crimes and served his sentence.¹⁹ *Ward* thus viewed Article 1F(b) as operating to exclude current fugitives from justice, not rehabilitated individuals with a criminal past.

ii. *Pushpanathan* (1998)

The next decision of the Supreme Court of Canada to consider Article 1F(b) was *Pushpanathan v Canada (Minister of Citizenship and Immigration)* (“*Pushpanathan*”).²⁰ In this case, the appellant was convicted in Canada of conspiracy to traffic in heroin. After serving his sentence and facing deportation to his country of origin, the appellant made an application for refugee protection. The appellant’s application was denied on the basis of Article 1F(c), which applies where there are serious reasons for considering the person is “guilty of acts contrary to the purposes and principles of the United Nations.”²¹ While the case was decided on the basis of Article 1F(c), Justice Bastarache, speaking for the majority, had an opportunity to consider the purpose of Article 1F(b), finding that it is “generally meant to prevent ordinary criminals extraditable by treaty from seeking refugee status.”²² The Supreme Court of Canada in *Pushpanathan* thus appeared to be in agreement with its previous finding in *Ward*, that Article 1F(b) ensures that common criminals are not able “to avoid extradition and prosecution” by exploiting the refugee system.²³

iii. *Chan* (2000)

Two years after *Pushpanathan*, the Federal Court of Appeal ruled on the specific question of sentence completion in the decision of *Chan v Canada (Minister of Citizenship and Immigration)* (“*Chan*”).²⁴ In *Chan*, the appellant was convicted for an offence related to drug trafficking in the United States. After serving his sentence, the appellant was deported to his country of origin, China. The appellant then fled China and sought refugee status in Canada, but his claim was denied on the basis that the appellant’s drug offence constituted a serious non-political crime within the meaning of Article 1F(b). The court was tasked with the question of whether Article 1F(b) excluded the appellant even though he had already served his sentence. Justice Robertson, speaking for the court, found that Article 1F(b) does not exclude refugee claimants who, although convicted of a crime outside of Canada, have nonetheless served their sentence prior to arrival.²⁵ The court advanced two principal bases for this holding. First, it relied upon the aforementioned *obiter* in *Ward* and *Pushpanathan*. Second, the court found that a broad interpretation of Article 1F(b)—to exclude any person who had committed a serious non-political crime—was inconsistent with the scheme of the *Immigration Act* in force at the time. The legislation provided an exception to inadmissibility on grounds of serious criminality for persons who had satisfied the Minister of Employment

17 *Ibid* at 743, citing James Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991) at 221.

18 *Ibid.*

19 *Ibid.*

20 *Pushpanathan*, *supra* note 3.

21 *Refugee Convention*, *supra* note 2, art 1F(c).

22 *Pushpanathan*, *supra* note 3 at para 73.

23 *Ibid.*

24 *Chan v Canada (Minister of Citizenship and Immigration)*, [2000] 4 FCR 390 (available on CanLII) (FCA) [*Chan* cited to FCR].

25 *Ibid* at para 4.

and Immigration that they had rehabilitated themselves.²⁶ A broad interpretation of Article 1F(b) would deprive refugee claimants of this legislative scheme and divest the Minister of his discretionary power.²⁷ Further, the court noted that claimants with prior convictions would be denied refugee protection, regardless of whether they had rehabilitated themselves and no longer posed a danger to the public.²⁸

B. Phase Two

i. *Zrig* (2003)

Zrig v Canada (Minister of Citizenship and Immigration) (“*Zrig*”) marked the beginning of a shift in the judicial interpretation of Article 1F(b).²⁹ In that case, the appellant sought to rely upon *Pushpanathan* as standing for the proposition that Article 1F(b) is limited to crimes extraditable under treaty. Justice Nadon, speaking for the Federal Court of Appeal, rejected this argument, finding that such a limitation would lead to the “absurd” result that “extraditable criminals would be excluded from refugee protection whereas offenders whose crimes were not extraditable would not be excluded.”³⁰ The court went further, however, and went on to reject the interpretation in *Ward* and *Pushpanathan* that Article 1F(b) is limited to excluding fugitives from justice. The court preferred a plain reading interpretation of the broad language of Article 1F(b), finding that “the only question that must be answered is whether there are serious reasons for considering that a claimant committed a serious non-political crime.”³¹

In concurring reasons, Justice Décaré held that *Chan* only provides authority for the proposition that Canada is not *barred* from granting refugee status to individuals who have committed serious non-political crimes, but have already completed their sentence. However, he noted that this is distinct from Canada having a positive obligation to *grant* status to such individuals:

[U]nder Article 1F(b) it is possible to exclude both the perpetrators of serious non-political crimes seeking to use the Convention to elude local justice and the perpetrators of serious non-political crimes that a state feels should not be allowed to enter its territory, whether or not they are fleeing local justice, whether or not they have been prosecuted for their crimes, whether or not they have been convicted of those crimes and whether or not they have served the sentences imposed on them in respect of those crimes.³²

Thus, *Zrig* departs from *Chan*, *Pushpanathan*, and *Ward*. According to the court, Article 1F(b) is not necessarily inapplicable to a refugee claimant who has already completed his or her sentence for a serious non-political crime.³³

ii. *Xie* (2004)

In *Xie v Canada (Minister of Citizenship and Immigration)* (“*Xie*”), the Federal Court of Appeal drew a sharp distinction between the jurisdiction of the Refugee Protection

26 *Immigration Act*, *supra* note 14, s 19(1)(c.1). The provision also required that at least five years had elapsed since the expiration of the sentence.

27 *Chan*, *supra* note 24 at para 15.

28 *Ibid.*

29 *Zrig v Canada (Minister of Citizenship and Immigration)*, 2003 FCA 178 (available on CanLII) [*Zrig*].

30 *Ibid* at para 67.

31 *Ibid* at para 79.

32 *Ibid* at para 129.

33 See also Martin Jones & Sasha Baglay, *Refugee Law* (Toronto: Irwin Law, 2007) at 162.

Division (“RPD” or the “Board”) in determining refugee status and the jurisdiction of the Minister in removing claimants from Canada.³⁴ While the case does not relate specifically to the question of rehabilitation, *Xie* is important in delineating the scope and role of Article 1F(b). The appellant, a Chinese citizen, was denied refugee status because she faced charges in China for the embezzlement of seven million yuan. The Board held that but for the appellant’s exclusion under Article 1F(b) the appellant would qualify as a person in need of protection under the *Refugee Convention*, because she risked torture if returned to China. The appellant sought judicial review of the Board’s decision, arguing that the assessment of exclusion under Article 1F(b) requires a balancing between the risk of torture and the seriousness of the crime. Justice Pelletier, speaking for the Federal Court of Appeal, held that, in applying Article 1F(b), the RPD is neither “required nor allowed” to consider a claimant’s risk of torture if returned to his or her country of origin.³⁵ The court found this conclusion to be justified by virtue of the scheme of the *IRPA*, which provides individuals with two avenues of protection. Persons excluded from refugee protection may still apply to the Minister for a Pre-Removal Risk Assessment (“PRRA”), whereby the Minister balances a claimant’s need for protection with the interests of public safety and national security.³⁶ These latter considerations, according to the court, are for the Minister to decide, not the RPD.

iii. *Jayasekara* (2008)

Zrig and *Xie* opened up the door to *Jayasekara v Canada (Minister of Citizenship and Immigration)* (“*Jayasekara*”), in which the Federal Court of Appeal had the opportunity to review the precedent in *Chan*.³⁷ In this case, the appellant, a Sri Lankan citizen, was convicted in the United States of selling opium and possessing marijuana. He was sentenced to 29 days in jail and a 5-year term of probation. After serving his jail sentence in full, the appellant was issued a voluntary departure order to leave the United States. The appellant received this order one month into his probation, so he entered Canada and filed a claim for refugee status. The appellant was held to be excluded on the basis of Article 1F(b). According to the Board, there were “serious reasons for considering that [the appellant] had committed a serious non-political crime outside of Canada” and, as the appellant fled during his probation, he had not completed his sentence in the United States.³⁸

Like *Chan*, the Federal Court of Appeal was faced with the question of whether serving a sentence for a serious non-political crime allows a claimant to avoid exclusion under Article 1F(b). While the appellant argued that *Chan* established a general principle that Article 1F(b) does not apply if the claimant has already served his or her sentence, Justice Létourneau, speaking for the court, disagreed. The court read down *Chan* as deciding only that claimants who have served their sentence prior to arriving in Canada were “not necessarily excluded from a refugee hearing or rendered ineligible to apply for the refugee protection afforded by the Convention.”³⁹ The court went on to elaborate upon four factors that may be considered in applying the exclusion clause in Article 1F(b): (1) the elements of the crime, (2) the mode of prosecution, (3) the penalty prescribed, and (4) the facts and the mitigating and aggravating circumstances underlying the conviction.⁴⁰ Accordingly, the court found that if a sentence is relevant to the application of Article

34 *Xie v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 250 at para 38 (available on CanLII).

35 *Ibid* at para 40.

36 *IRPA*, *supra* note 4, s 112.

37 *Jayasekara*, *supra* note 9.

38 *Ibid* at para 11.

39 *Ibid* at para 26 [emphasis added].

40 *Ibid* at para 44.

1F(b), it should only be considered in the context of the circumstances of the crime. The court excluded factors extraneous to the crime from the scope of analysis under Article 1F(b), such as the risk of persecution in the country of origin, per *Xie*.

iv. *Gavrila and Németh* (2010)

After *Jayasekara*, *Febles* was the next appellate court decision to consider the implication of rehabilitation on the application of Article 1F(b). It is nevertheless helpful to briefly reference the companion cases *Gavrila v Canada (Justice)* (“*Gavrila*”) and *Németh v Canada (Justice)* (“*Németh*”), decided in the interim by the Supreme Court of Canada.⁴¹ These cases considered Article 1F(b) in the context of extradition legislation. Of note is Justice Cromwell’s finding in *Németh* that Parliament, in enacting the *IRPA*, had decided that a crime punishable by at least 10 years imprisonment constitutes a “serious non-political crime” within the meaning of Article 1F(b).⁴² Like *Xie*, the court also showed deference to the procedural bifurcation of refugee status determination by the RPD and removal from Canada by way of Ministerial discretion. The court in *Németh* held that Canada could satisfy its non-*refoulement* obligations pursuant to either the *IRPA* or the *Extradition Act*.⁴³ As discussed below, this bifurcated approach has expanded significantly since the passage of Bill C-31, which greatly limits the rights of refugee claimants with serious criminal pasts by automatically diverting their asylum claims to the Minister.⁴⁴ It is important to keep this new legislative context in mind when considering the third phase of Article 1F(b)’s interpretation.

C. Phase Three

i. *Febles*—Facts

Luis Alberto Hernandez Febles is a Cuban citizen born in 1954. Opposed to his country’s political system, he fled Cuba for the United States in 1980 and was granted refugee protection. In 1984 and again in 1993, Mr. Febles committed violent crimes. In 1984, he attacked his roommate with a hammer. He turned himself in to the police and was charged with attempted murder. Mr. Febles pled guilty to the lesser offence of assault with a deadly weapon and served one year in jail and three years of probation. In 1993, Mr. Febles threatened to kill his roommate’s girlfriend at knifepoint. Again, he pled guilty to assault with a deadly weapon. He served two years in jail and an additional three years of probation.

Mr. Febles claims that he was under the influence of alcohol during the commission of both offences. He also claims that, since the offence in 1993, he has been sober and crime-free. Mr. Febles lost his refugee status because of his crimes and a warrant for his removal from the United States remains in effect today. From 1998 to 2002, the United States immigration authorities detained Mr. Febles, and during that time he completed an Alcoholics Anonymous course. From 2002 to 2008, Mr. Febles was gainfully employed in the United States. In 2008, facing deportation, Mr. Febles illegally crossed the Canada-US border and submitted a refugee claim in Montréal, Québec. Mr. Febles freely disclosed his criminal past to the Canadian authorities, who elected not to issue an

41 *Gavrila v Canada (Justice)*, 2010 SCC 57 (available on CanLII); *Németh v Canada (Justice)*, 2010 SCC 56 (available on CanLII) [*Németh*].

42 *Ibid* at para 120.

43 *Ibid* at para 51; *Extradition Act*, SC 1999, c 18, s 44(1)(b). The right of non-*refoulement* is contained in Article 33(1) of the *Refugee Convention*, *supra* note 2 (“no state party shall return a refugee to a territory in which he or she may be persecuted”).

44 Bill C-31, *An Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act, the Marine Transportation Security Act and the Department of Citizenship and Immigration Act*, 1st Sess, 41st Parl, 2012 (assented to 28 June 2012).

opinion that he was dangerous. Nonetheless, an inadmissibility report was issued against Mr. Febles on the grounds of serious criminality. As a result, the Board's Immigration Division concluded that Mr. Febles was inadmissible to Canada pursuant to section 36(1)(b) of the *IRPA* and issued a deportation order against him.⁴⁵

Concurrent to the administrative process ordering the deportation of Mr. Febles, the RPD evaluated his refugee claim. Prior to the hearing, the Minister of Public Safety and Emergency Preparedness filed a Notice of Intervention, alleging that Article 1F(b) applied to exclude Mr. Febles. On October 14, 2010, the Board conducted a hearing to assess whether Mr. Febles was ineligible for refugee protection. While the Board member ultimately determined that the offence from 1984 excluded Mr. Febles, the Board member made reference to Mr. Febles' past struggles with alcoholism and the fact that he served his sentences in full. According to the Board member, Mr. Febles "took the second chance that life was offering him 17 years ago and chose to follow a straighter path."⁴⁶ However, despite Mr. Febles' efforts towards rehabilitation, the Board member concluded that it must "respect the legislation and the current jurisprudence that require that a person who has been convicted of a serious non-political crime, as is the case here, must be excluded from the application of the Convention."⁴⁷ Mr. Febles sought judicial review of the decision at the Federal Court.

ii. *Febles*—Federal Court (2011)

Justice Scott, the applications judge, first turned his mind to the appropriate standard of review of the RPD decision. He found that the Board's interpretation of the *IRPA* and Article 1F(b) was not a constitutional question, not of central importance to the legal system, and not in relation to the Board's jurisdiction. Instead, he found that the Board was interpreting its "home statute," which accordingly attracts a reasonableness standard of review.

More importantly, the court found that all factors arising subsequent to the commission and completion of a crime are irrelevant to the application of Article 1F(b). According to the court, the only task of the Board is to determine whether the refugee claimant committed a serious non-political crime.⁴⁸ The court found support for this position in *Jayasekara*, and quoted the following passage from the decision:

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 [...]. 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

45 *IRPA*, *supra* note 4. Section 36(1)(b) is a general inadmissibility provision and is distinct from Article 1F(b):

36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for [...]

(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 maximum term of imprisonment of at least 10 years.

46 *Hernandez Febles v Canada (Citizenship and Immigration)*, 2011 FC 1103 at para 21 (available on CanLII) [*Febles FC*], citing para 24 of the Board's decision.

47 *Ibid.*

48 *Febles FC*, *supra* note 46 at para 51.

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 [...].⁴⁹

As such, Justice Scott concluded that the fact that a refugee claimant has completed his or her sentence in full is relevant only to the determination of whether the claimant in fact committed a serious non-political crime. Completion is not relevant to anything “extraneous to the facts and circumstances underlying the conviction,” such as whether the claimant is remorseful or has turned his or her life around.⁵⁰ Rehabilitation and expiation are thus precluded from consideration. Justice Scott nonetheless went on to certify the following question for the Federal Court of Appeal:

When applying Article 1F(b) of the [*Refugee Convention*], is it relevant for the Refugee Protection Division of the Immigration and Refugee Board to consider the fact that the refugee claimant has been rehabilitated since the commission of the crime at issue?

iii. *Febles*—Federal Court of Appeal (2012)

Justice Evans, speaking for the Federal Court of Appeal, answered the certified question in the negative.⁵¹ The court disagreed with Justice Scott’s decision that the standard of reasonableness applied in this case, finding instead that a correctness standard is necessary to achieve a uniform interpretation of Article 1F(b).⁵² On this standard, the court found that it is incorrect in law to apply Article 1F(b) with reference to factors such as rehabilitation and present dangerousness.⁵³ According to the court, balancing such factors with the seriousness of the crime “would likely lead to a lack of consistency in RPD decision-making bordering on arbitrariness.”⁵⁴ Further, the court found that this interpretation was inconsistent with *Zrig* and *Jayasekara*, which were found to have overruled *Chan*.

The court then went on to conduct its own analysis of the interpretation of Article 1F(b). Mr. *Febles* argued that Article 1F(b) is principally intended to exclude fugitives from using refugee status to evade prosecution for serious non-political crimes committed in their country of origin. In exceptional cases, Mr. *Febles* argued that Article 1F(b) applies to claimants who have completed their sentence for a serious non-political crime but nonetheless continue to pose a danger to the state of asylum. The court, however, rejected this interpretation. The court supported its conclusion through an analysis of the text of Article 1F(b), the purpose of the provision, and the statutory context in which the provision is incorporated into domestic law. First, with respect to the text, the court noted that Article 1F(b) is broadly worded in the *Refugee Convention*, and the *IRPA* does not expressly limit its application to claimants who pose a danger to the Canadian public.

Second, as for the purpose of Article 1F(b), the court struggled to arrive at a determinative conclusion. The court began by citing the concurring reasons of Justice Décaré in *Zrig*, who found that Article 1F(b) ensures, *inter alia*, “that the country of refuge can protect its own people by closing its borders to criminals whom it regards as undesirable because

49 *Ibid* at para 49, citing *Jayasekara*, *supra* note 9 at para 44.

50 *Febles FC*, *supra* note 46 at para 50.

51 *Hernandez Febles v Canada (Citizenship and Immigration)*, 2012 FCA 324 at para 74 (available on CanLII) [*Febles FCA*].

52 *Ibid* at para 24.

53 *Ibid* at para 5.

54 *Ibid* at para 34.

of the seriousness of the ordinary crimes which it suspects such criminals of having committed.”⁵⁵ The court continued as follows:

[It] 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 ... 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.⁵⁶

Justice Evans was cognizant that *Zrig* was concerned not with the question of rehabilitation, but with the question of whether Article 1F(b) was confined to crimes extraditable by treaty. Despite Justice Décary’s references to security and social peace as relevant to the purposes of Article 1F(b), the court found that it was unclear whether Justice Décary was of the view that a serious crime, by its nature, automatically excluded a claimant. Ultimately, the court found that while Article 1F(b) was clearly not confined to fugitives from justice, any discerned purpose to protect the state from dangerous criminals was insufficiently clear to “warrant an interpretation that is markedly narrower than the ordinary meaning of the text.”⁵⁷

Third, the court considered the interpretation of Article 1F(b) within the overall statutory context of the *IRPA*. Mr. Febles argued that the general scheme of the *IRPA* mitigates the negative consequences of a finding of serious criminality if the claimant satisfies the Minister of his or her rehabilitation. As such, interpreting Article 1F(b) to automatically exclude claimants from refugee protection, without considering factors such as rehabilitation, would be inconsistent with the scheme of the *IRPA*. The court did not find this argument persuasive. Like *Xie* and *Németh*, the court drew the distinction between exclusion from refugee status pursuant to a decision of the RPD and removal from Canada pursuant to a decision of the Minister. The court found that dangerousness is only relevant to the latter process, where, as in the case of the *PRRA*, the Minister of Citizenship and Immigration determines whether interests of safety and security trump a claim for protection. This bifurcated approach to protection is key to Justice Evans’ analysis:

Applying for and obtaining a stay of removal from the [Minister of Citizenship and Immigration] under the *PRRA* provisions may not be as satisfactory to Mr Febles on grounds of process and substance as an application to the RPD for the grant of refugee protection and the rights attached to that status. Nonetheless, protection would comply with the non-*refoulement* principle for those who are excluded from refugee status for serious criminality, but if removed are at risk of death, torture, cruel and unusual treatment or punishment, or the deprivation of other rights guaranteed by section 7 of the Charter.⁵⁸

The court found that the availability of the *PRRA* “goes a long way” to addressing the unfairness of denying refugee status to claimants such as Mr. Febles who, although having committed a serious non-political crime, have since completed their sentence and made attempts at rehabilitation.⁵⁹ The court concluded by remarking that exclusion

55 *Ibid* at para 41, citing *Zrig*, *supra* note 29 at paras 118-19.

56 *Ibid*.

57 *Febles* FCA, *supra* note 51 at para 63.

58 *Ibid* at para 69.

59 *Ibid* at para 70.

under Article 1F(b) is intended to protect the integrity of refugee status, and extending protection to serious criminals would degrade this integrity.⁶⁰

iv. *Febles*—Supreme Court of Canada (2014)

a. Majority

In a five against two decision, the Supreme Court of Canada agreed with the conclusion of the RPD Board, upheld the decisions of the lower courts, and dismissed Mr. Febles' appeal. Chief Justice McLachlin, speaking for the majority, found that the phrase “has committed a serious non-political crime” as found in Article 1F(b) only refers to “the crime at the time it was committed.”⁶¹ Consequently, Article 1F(b) does not exempt individuals who, while having committed a serious crime in their past, are presently rehabilitated, expiated, or no longer dangerous. Nor, according to the majority, should Article 1F(b) be confined to exclude only fugitives from justice.

In reaching this conclusion, Chief Justice McLachlin found that Article 1F(b) must be interpreted in accordance with the principles of treaty interpretation as set out in the *Vienna Convention on the Law of Treaties* (“*Vienna Convention*”).⁶² She noted that Article 31 of the *Vienna Convention* provides that interpretation of a treaty is determined with reference to the ordinary meaning of its terms, its context, and its object and purposes. Further, where uncertainty remains even after the interpretive principles of Article 31 are applied, Article 32 provides that recourse may be had to supplementary means of interpretation.

With this interpretive framework in mind, Chief Justice McLachlin noted that Article 1F(b) of the *Refugee Convention* refers only to a serious crime having been committed; it does not reference acts or circumstances subsequent to the crime itself. She concluded that the ordinary meaning of Article 1F(b) “refers only to the crime at the time it was committed.”⁶³ Further, she held that there is nothing in the plain language of Article 1F(b) that limits the exclusion clause to fugitives from justice or presently dangerous individuals, and there is no mention of factors such as expiation or rehabilitation. Next, Chief Justice McLachlin addressed the treaty provision in the schematic context of Article 1F and the *Refugee Convention* as a whole. She found nothing in the scheme of the Article or the *Refugee Convention* to support Mr. Febles' proffered interpretation.

Lastly, with respect to the object and purposes of the *Refugee Convention* and Article 1F(b) in particular, Chief Justice McLachlin found that the *Refugee Convention* is intended to strike a balance between helping refugees and protecting the interests of host states.⁶⁴ She wrote that the *Refugee Convention* is not an “abstract principle” but “an agreement among sovereign states in certain specified terms, negotiated by them in consideration of the entirety of their interests.”⁶⁵ In a telling part of the judgment, she wrote as follows:

While exclusion clauses should not be enlarged in a manner inconsistent with the *Refugee Convention's* broad humanitarian aims, neither should overly narrow interpretations be adopted which ignore the contracting states need to control who enters their territory.

60 *Ibid* at para 72.

61 *Febles*, *supra* note 1 at para 15.

62 *Vienna Convention on the Law of Treaties*, 23 May 1969, Can TS 1980 No 37 (entered into force 27 January 1980, assent by Canada 14 October 1970) [*Vienna Convention*], cited in *Febles*, *supra* note 1 at para 11.

63 *Ibid* at para 17.

64 *Ibid* at para 30.

65 *Ibid* at para 29.

Finding that her preferred interpretation strikes this balance, Chief Justice McLachlin rejected the contention that Article 1F(b) is “directed solely at some subset of serious criminals who are undeserving at the time of the refugee application.”⁶⁶ Rather, she went on to find that Article 1F(b) serves only one main purpose: “to exclude persons who have committed a serious crime.”⁶⁷ In forever excluding *all* claimants who have, at some point in their lives, committed serious non-political crimes, Chief Justice McLachlin found that Article 1F(b) reflects “the contracting states’ agreement that such persons by definition would be underserving of refugee protection by reason of their serious criminality.”⁶⁸

The majority also found support in the *Travaux Préparatoires*—a record of the preparatory materials preceding the *Refugee Convention*—as well as international case law.⁶⁹ With respect to the former, Chief Justice McLachlin first noted that the meaning of Article 1F(b) is sufficiently clear such that recourse to extrinsic materials is unnecessary. Notwithstanding, Chief Justice McLachlin found that the *Travaux Préparatoires*, even if considered, lend support to the interpretation arrived at in her reasons. Moreover, with respect to international case law, she concluded that the dominant tide of authority in other jurisdictions supports the conclusion that the seriousness of the crime is not to be balanced against factors extraneous to the commission of the crime, such as present dangerousness, expiation, or rehabilitation.⁷⁰ With respect to the prior findings of the Supreme Court of Canada in *Ward* and *Pushpanathan*, Chief Justice McLachlin dismissed the comments in these cases as *obiter dicta*. She stated that these comments find little support in the international case law and should no longer be followed in Canada.⁷¹

Finally, Chief Justice McLachlin went on to consider the question of how a crime’s seriousness should be assessed:

While consideration of whether a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada is a useful guideline, and crimes attracting a maximum sentence of ten years or more in Canada will generally be sufficiently serious to warrant exclusion, the ten-year rule should not be applied in a mechanistic, decontextualized, or unjust manner.⁷²

Chief Justice McLachlin’s comments on this point will prove decisive moving forward. Because post-offence conduct is now irrelevant to the application of Article 1F(b), refugee claimants with a criminal history will no longer have the opportunity to argue that their present individual circumstances merit consideration. The principal task of refugee claimants will now be to prove that their criminal history is not “serious”.

Applying these principles to the facts of Mr. Febles’ refugee claim, the majority of the court ultimately found that the Board was correct to conclude that Mr. Febles was ineligible for refugee protection.⁷³ Chief Justice McLachlin noted that while Mr. Febles may prefer to be granted refugee protection, he is excluded from the *Refugee Convention*

66 *Ibid.*

67 *Ibid* at para 35.

68 *Ibid.*

69 United Nations, *Collected Travaux Préparatoires of the 1951 Geneva Convention Relating to the Status of Refugees*, vol III, *The Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons* (Amsterdam: Dutch Refugee Council, 1989).

70 *Febles*, *supra* note 1 at para 59.

71 *Ibid.*

72 *Ibid* at para 62.

73 *Ibid* at para 70.

as a result of his commission of serious crimes in his past.⁷⁴ His alternative recourse is to seek a stay of removal from the Minister.

b. Dissent

In dissenting reasons, Justice Abella referred to the *Refugee Convention* as the “Rosetta Stone” of refugee protection under international law and emphasized the significant consequences that result when an individual is excluded from status.⁷⁵ She noted that the humanitarian protections provided by the *Refugee Convention* are denied altogether when Article 1F is applied, including the right of non-*refoulement* under Article 33. In light of the human rights purposes of the *Refugee Convention*, Justice Abella found that Article 1F(b) requires a “less draconian” interpretation than that offered by the majority.⁷⁶ Further, she found that the interpretive approach to Article 1F(b) must proceed with caution, given the dramatic consequences of exclusion.⁷⁷

In the opinion of the dissent, refugee claimants should not be automatically excluded from the *Refugee Convention* except in the case of very serious crimes.⁷⁸ Rather, Justice Abella was of the view that circumstances subsequent to the offence are relevant to a refugee claim and should be taken into account. In support, Justice Abella found that the territorial limitation of Article 1F(b)—which confines the provision to crimes committed “outside the country of refuge prior to his [or her] admission to that country of refuge”—as a “strong textual indication” that Article 1F(b) was intended to exclude from protection those who seek to exploit the refugee system.⁷⁹ This interpretation, according to Justice Abella, is supported by the surrounding context of the provision, its drafting history, previous international agreements, as well as in the interpretations of Article 1F(b) adopted in other jurisdictions and by the United Nations High Commission for Refugees (“UNHCR”).⁸⁰ Contrary to the reasons of Chief Justice McLachlin, Justice Abella held that the negotiations surrounding Article 1F(b) only concerned individuals who, having committed a crime outside the country of refuge, “*had not been convicted or served a sentence for that crime.*”⁸¹

Justice Abella noted that other jurisdictions widely accept that the original purpose of Article 1F(b) was to deny refugee status to fugitives. She found that while “there is little doubt” that the original purpose of Article 1F(b) was to exclude individuals who attempt use the refugee system as a means to evade justice in another jurisdiction, there is likewise “little agreement” as to other circumstances in which Article 1F(b) applies.⁸² She then went on to reject the majority’s suggestion that recent international jurisprudence indicates that persons who have committed a serious crime are by definition undeserving of protection.⁸³ Indeed, Justice Abella found little or no authority for the majority’s proposition that *everyone* who has committed a serious non-political crime, regardless of their personal circumstances, remains “permanently undeserving” of refugee protection.⁸⁴ She characterized such an approach as “relentlessly exclusionary.”⁸⁵

74 *Ibid* at para 68.

75 *Ibid* at paras 72, 87.

76 *Ibid* at para 78.

77 *Ibid* at para 92.

78 *Ibid* at para 74.

79 *Ibid* at para 101.

80 *Ibid*.

81 *Ibid* at para 116 [emphasis in original].

82 *Ibid* at paras 101, 118.

83 *Ibid* at para 129.

84 *Ibid* at para 131.

85 *Ibid*.

Instead, applying the requisite good faith approach to treaty interpretation as mandated by the *Vienna Convention*, Justice Abella held that the meaning of Article 1F(b) must not be divorced from its human rights purpose.⁸⁶ Consequently, except in the case of very serious crimes, Justice Abella was of the opinion that individuals should not be automatically disqualified from refugee status. Further, she found that the goals of exclusion under Article 1F(b) can be satisfied where “the individual’s circumstances reflect a sufficient degree of rehabilitation or expiation.”⁸⁷ Justice Abella specifically noted that the completion of a sentence, along with factors such as the passage of time since the commission of the offence, the age at which the crime was committed, and the individual’s rehabilitative conduct, will all be relevant.⁸⁸

On the facts of this case, Justice Abella found that Mr. Febles had expressed remorse, turned himself into the police, pled guilty, and served his time. She further noted that Mr. Febles had taken steps to address his problems with alcohol. In the result, Justice Abella would have remitted the matter back to the Board for reconsideration of the seriousness of the offences in light of Mr. Febles’ post-offence conduct. She found that it had yet to be determined whether Mr. Febles’ crimes were so serious that his subsequent personal circumstances ought to be disregarded in considering his claim for refugee status. Justice Cromwell concurred with Justice Abella in the dissent.

PART III. ANALYSIS

A. *Febles* Overextends the Application of Article 1F(b)

As the history of the case law illustrates, the interpretation of Article 1F(b) has expanded dramatically between *Ward* and *Febles*. The clause, which was originally held to apply to fugitives from justice, has broadened to exclude any asylum seeker who has at some point in his or her lifetime committed a serious criminal offence, no matter how dated or what steps the individual has taken towards rehabilitation.

The majority judgment in *Febles*, however, creates a false dichotomy between a plain meaning interpretation of Article 1F(b), where the commission of a serious non-political crime excludes claimants *ab initio*, and a purposive interpretation of Article 1F(b), where exclusion is limited by implication to fugitives or currently dangerous criminals. There is another option. In my view, the text and purposes of Article 1F(b) all derive from the same principle. Whether condemning prior heinous acts, preventing fugitives from evading justice, or protecting the public from present danger, Article 1F(b), like Article F generally, is intended to exclude claimants *undeserving of protection*.⁸⁹ In failing to appreciate the potential relevance of expiation and rehabilitation, the Supreme Court of Canada in *Febles* overextends the application of Article 1F(b) to exclude claimants whom the *Refugee Convention* should protect. This becomes evident when considering the full context of the *Refugee Convention* and Article 1F(b) in particular.

B. Reinterpreting the *Refugee Convention*

The ratification and implementation of the *Refugee Convention* requires courts to strive for interpretations of domestic law that are consistent with Canada’s international obligations. Accordingly, in the recent decision of *Ezokola v Canada (Citizenship and*

86 *Ibid* at para 130.

87 *Ibid* at para 132.

88 *Ibid*.

89 See, for example, Hathaway, *supra* note 17 at 214; see also Asha Kaushal & Catherine Dauvergne, “The Growing Culture of Exclusion: Trends in Canadian Refugee Exclusions” (2011) 23 Int’l J Refugee L 54 (“[t]he primary, overarching rationale [of the exclusion clauses] is that the perpetrators of these acts are *undeserving of protection as refugees*” at 57).

Immigration) (“*Ezokola*”), the Supreme Court of Canada relied upon the purpose of the *Refugee Convention* together with the purpose of Article 1F(a) to guide its analysis in delineating the scope of exclusion of international criminals.⁹⁰ It is appropriate to interpret the scope of Article 1F(b) with respect to serious criminality under the same analytical framework. The Preamble of the *Refugee Convention* provides a starting point for interpreting Article 1F(b) and the Convention generally:

CONSIDERING that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,

CONSIDERING that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms [...].⁹¹

In *Ezokola*, Justice LeBel and Justice Fish, speaking for a unanimous court, emphasized the intent of the international community “to assure refugees the widest possible exercise of ... fundamental rights and freedoms.”⁹² The court also cited with approval its own finding in *Pushpanathan* that individual provisions of the *Refugee Convention* must be interpreted in the context of the “overarching and clear human rights object and purpose” of the document as a whole.⁹³ The inclusion of Article 1F in the *Refugee Convention* indicates that refugee protection is not an unqualified status available to everyone. According to the court in *Ezokola*, Article 1F(a) “guards against abuses of the *Refugee Convention*” by denying protection to individuals who “exploit the system to their own advantage.”⁹⁴ Article 1F(b), by extension, should similarly apply to exclude individuals who seek to exploit refugee status. This is consistent with the Supreme Court of Canada’s previous comments on the purpose of Article 1F(b) in *Pushpanathan* and *Ward*.

Analogous to *Ezokola*, Article 1F(b) must be interpreted in a way that both promotes the “broad humanitarian goals” of the *Refugee Convention* and protects “the integrity of international refugee protection.”⁹⁵ Contrary to the majority reasoning in *Febles*, excluding claimants who, despite their criminal past, have satisfactorily rehabilitated themselves would denigrate rather than protect the integrity of refugee status. The default exclusion of any person who commits a serious offence, regardless of the present circumstances of the individual, is overbroad in application and antithetical to the *Refugee Convention*’s fundamental humanitarian purpose. Article 1F(b) should not exclude individuals who, through their post-offence conduct of expiation and rehabilitation, have demonstrated their deservingness of international protection.

As the UNCHR, academic commentators, and previous courts have noted, there is no principled reason why circumstances subsequent to the commission of the offence are necessarily precluded from consideration.⁹⁶ Support for a contextualized rather than default application of Article 1F(b) is found in the UNCHR’s “Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention

90 *Ezokola*, *supra* note 8 at para 31; see also *Vienna Convention*, *supra* note 62, art 31.

91 *Refugee Convention*, *supra* note 2.

92 *Ezokola*, *supra* note 8 at para 32.

93 *Ibid*, citing *Pushpanathan*, *supra* note 3 at para 57.

94 *Ibid* at paras 33, 36.

95 *Ibid* at para 36.

96 See, for example, *Chan*, *supra* note 24 at para 11; *Hathaway*, *supra* note 17 at 282.

relating to the Status of Refugees” (“UNCHR Guidelines”),⁹⁷ which the Supreme Court of Canada used as an interpretive aid in *Ezokola*.⁹⁸ The UNHCR Guidelines state the following regarding the purposes underlying Article 1F:

The rationale for the exclusion clauses, which should be borne in mind when considering their application, is that certain acts are so grave as to render their perpetrators undeserving of international protection as refugees. Their primary purpose is to deprive those guilty of heinous acts, and serious common crimes, of international refugee protection and to ensure that such persons do not abuse the institution of asylum in order to avoid being held legally accountable for their acts. The exclusion clauses must be applied “scrupulously” to protect the integrity of the institution of asylum [...]. At the same time, given the possible serious consequences of exclusion, it is important to apply them with great caution and only after a full assessment of the individual circumstances of the case. The exclusion clauses should, therefore, always be interpreted in a restrictive manner.⁹⁹

The UNHCR Guidelines go on to further consider the question of rehabilitation and expiation. They state that the application of Article 1F(b) may no longer be justified “where expiation of the crime is considered to have taken place.”¹⁰⁰ Evidence of expiation may include the claimant serving his or her penal sentence in full, the passage of time, the claimant expressing regret for his or her actions, and the claimant taking positive steps towards rehabilitation.¹⁰¹ However, as stated above and as noted in the dissenting reasons of Justice Abella in *Febles*, some crimes may be so “grave and heinous” that circumstances of expiation are trumped by the severity of the offence.¹⁰² According to the Background Note accompanying the UNHCR Guidelines, “this is more likely to be the case for crimes under Article 1F(a) or (c), than those falling under Article 1F(b).”¹⁰³ The Background Note adds further clarity to the position of the UNHCR, noting that the rationale behind the exclusion clauses is twofold: first, that “certain acts are so grave that they render their perpetrators undeserving” of refugee status; and second, that refugee protection should not “stand in the way of serious criminals facing justice.”¹⁰⁴ The Background Note stipulates that these purposes must be applied in the context of the “overriding humanitarian objective” of the *Refugee Convention* and, likewise, interpreted restrictively.¹⁰⁵

On the subject of expiation, the UNHCR’s *Handbook on Procedures and Criteria for Determining Refugee Status* adopts a test of whether or not the criminal character of the claimant still predominates:

The fact that an applicant convicted of a serious non-political crime has already served his sentence or has been granted a pardon or has benefited from an amnesty is also relevant. In the latter case, there is a presumption

97 *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, UNHCR, HCR/GIP/03/05, 4 September 2003 [UNHCR Guidelines].

98 *Ezokola*, *supra* note 8 at paras 35, 76.

99 UNHCR Guidelines, *supra* note 97 at para 2 [emphasis added].

100 *Ibid* at para 23.

101 *Ibid*.

102 *Ibid*.

103 *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, UNHCR, 4 September 2003, at para 73.

104 *Ibid* at para 3.

105 *Ibid* at paras 3-4.

that the exclusion clause is no longer applicable, unless it can be shown that, despite the pardon or amnesty, the applicant's criminal character still predominates.¹⁰⁶

This test can be subsumed under a test for deservingness, as current serious criminals are presumptively undeserving of refugee protection. Interpretive aids to the *Refugee Convention* thus add further support to the argument that the application of Article 1F(b) may involve considerations beyond the circumstances of the offence itself. Only then can fair consideration be given to claimants whose post-offence acts have demonstrated their present deservingness.

It requires no stretch of the imagination to recognize that the *Febles* interpretation would exclude persons who deserve compassion rather than condemnation. Part of the problem is the general definition that Parliament and the courts have set for serious criminality. As Justice Cromwell noted in *Németh*, Parliament has indicated that “a crime punishable by at least 10 years imprisonment constitutes a serious non-political crime within the meaning of Article 1F(b).”¹⁰⁷ In Canada, indictable offences punishable by a maximum of at least ten years include non-violent property offences where loss is valued at over \$5000, such as theft, possession of stolen property, fraud, and mischief.¹⁰⁸ This rule also captures drug-related offences, such as the trafficking or possession of certain controlled substances for the purpose of trafficking.¹⁰⁹ There is no requirement that the claimant in fact served any time in prison, leaving the definition of serious criminality open to considerable discretion. However, by not extending this discretion to circumstances of rehabilitation, claimants may be denied refugee protection because of a single mistake in their distant past, a mistake which need not be grave or violent. This approach ignores the intersection of common criminality with the circumstances of poverty and marginalization that many persecuted groups experience.

In addition, the *Febles* interpretation is inconsistent with the forward-looking nature of refugee status. The Supreme Court of Canada has consistently held that the purpose of Article 1F is to “exclude *ab initio* those who are not *bona fide* refugees at the time of their claim for refugee status.”¹¹⁰ The interpretation of Article 1F(b) in *Febles*, however, limits consideration of the *bona fide* status of a refugee claimant to the time of the offence itself. While Chief Justice McLachlin is correct to point out there is no express language in Article 1F(b) that confines the provision to fugitives, presently dangerous claimants, or otherwise undeserving individuals, there is similarly nothing in the language of Article 1F(b) that confines application of the provision to the time of the offence itself.

The majority in *Febles* characterizes the interpretive divergence of Article 1F(b) as between, on the one hand, a broad interpretation excluding all serious criminals *ab initio*, versus a narrow interpretation on the other hand, which excludes only those who are dangerous, evading justice, or otherwise undeserving of protection. However, another way of characterizing the divergence is between an interpretation which limits consideration to the time of the offence itself, versus an interpretation that takes into account the full context of the offence and the offender. Viewed in this light, the majority interpretation may be seen as a restrictive construction of the treaty provision.

106 *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, UNHCR, HCP/IP/4/Eng/REV.1, January 1992 at para 157, cited in *Pushpanathan*, *supra* note 3, at para 53.

107 *Németh*, *supra* note 41 at para 120.

108 *Criminal Code*, RSC 1985, c C-46, ss 334(a), 355(a), 380(1)(a), 430(3).

109 *Ibid*, ss 348-49; *Controlled Drugs and Substances Act*, SC 1996, c 19, ss 5(1)-(2).

110 *Pushpanathan*, *supra* note 3 at para 58 [emphasis added] (with respect to Article 1F(c)), cited in *Ezokola*, *supra* note 8 at para 38 [emphasis added] (with respect to Article 1F(a)).

Further, this restrictive interpretation is inconsistent with previous jurisprudence on how the exclusion clause of Article 1F ought to be applied. With respect to Article 1F(c), the Supreme Court of Canada has held that “any act performed before a person has obtained that status must be considered relevant.”¹¹¹ Relevant to the determination of whether a claim for refugee status is *bona fide* might very well include acts subsequent to the offence itself, such as circumstances of rehabilitation. Of course, an offence may be so severe that no subsequent act could justify the commission of the serious crime itself. Given the text of Article 1F(b), the seriousness of the offence is obviously central to the application of the clause. However, an exclusive focus on the offence, and not the offender, fails to fully capture the purpose that Article 1F(b), and the *Refugee Convention* as a whole, seek to achieve. In balancing the nature and severity of the offence with the overall circumstances of the claimant, it stands to reason that some individuals, despite a criminal past, are worthy of refugee status.

PART IV. PROCEDURAL BIFURCATION AND BILL C-31

Leaving aside the majority interpretation of Article 1F(b) in *Febles*, a claimant with a serious criminal background faces an additional, perhaps impassable, legislative hurdle. As a result of the passage of Bill C-31 in 2012, an increasingly broad class of “serious criminals” is now deemed ineligible to be referred to the RPD.

Subsection 101(1)(f) of the *IRPA*, unchanged by the amendments, reads as follows:

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

[...]

(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).¹¹²

Therefore refugee claimants falling within subsection 101(1)(f) are denied the procedural right to an oral hearing before the RPD, and are instead automatically diverted to the discretionary PRRA process of the Minister.¹¹³

Bill C-31 expands the category of claimants falling within subsection 101(1)(f) by deleting the requirement that a person is a danger to the public to constitute “serious criminality” [amended text italicized]:

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

[...]

(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 conviction is 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.¹¹⁴

¹¹¹ *Pushpanathan*, *supra* note 3 at para 58.

¹¹² *IRPA*, *supra* note 4.

¹¹³ Bill C-31, *supra* note 44.

¹¹⁴ *IRPA*, *supra* note 4, s 101(2), as amended by Bill C-31, *supra* note 44.

Consequently, even if the dissent's interpretation of Article 1F(b) had been adopted in *Febles*, any individual who meets the statutory definition of serious criminality would still be disqualified from refugee status determination before the RPD, regardless of whether the individual otherwise meets the criteria of exclusion under Article 1F(b). Parliament has attempted to avoid this seeming breach of its international obligations through a saving clause in the PRRA provisions of the *IRPA*. Section 113, as amended, provides the following [amended text italicized]:

113. Consideration of an application for protection shall be as follows:

[...]

(d) in the case of an applicant described in subsection 112(3) — *other than one described in subparagraph (e)(i) or (ii)* — consideration shall be on the basis of the factors set out in section 97 [insert title] 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

[...]

(e) *in the case of the following applicants, consideration shall be on the basis of sections 96 to 98 and subparagraph (d)(i) or (ii), as the case may be:*

[...]

(i) *an applicant who is determined to be inadmissible on grounds of serious criminality with respect to a conviction of an offence outside Canada 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, unless they are found to be a person referred to in section F of Article 1 of the Refugee Convention.*¹¹⁵

Accordingly, the Minister under the PRRA scheme has taken on the obligation of evaluating the refugee claim of any claimant with a serious criminal past. Depending on the application of Article 1F, the evaluation for removal from Canada is assessed under either section 97 or sections 96 – 98. Interestingly, this regime seems to go against the interpretation in *Febles* that the mere fact of serious criminality, at least to the extent that serious criminality is defined in the *IRPA*, excludes a claimant *ab initio*. Regardless, Bill C-31 extinguishes the right of individuals with a serious criminal past to a hearing before the RPD, even if the claimant is rehabilitated and poses no present danger to Canada.

Further, section 112(3) of the *IRPA* precludes the granting of refugee protection from a PRRA application on grounds of serious criminality:

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

[...]

(b) is determined to be inadmissible on grounds of serious criminality [...] with respect to a conviction outside Canada for an offence that, if committed in Canada, would constitute an offence under an Act of

115 *IRPA*, *supra* note 4, s 113, as amended by Bill C-31, *supra* note 44.

Parliament punishable by a maximum term of imprisonment of at least 10 years [...].¹¹⁶

The question of exclusion under Article 1F(b), especially if circumstances of rehabilitation are relevant, should be evaluated on its merits before the RPD, where credibility can be fully assessed during an oral hearing. A claimant should be not barred from refugee status at the eligibility stage. However, as evidenced in the *Németh* decision, the courts are not willing to interfere with this administrative trend. As long as the wording of the legislation satisfies the minimum standard of Canada's international obligations, the courts have little incentive to interfere. This trend represents an unfortunate and significant step backwards from the fundamental principle that a claim to persecution must be given full and fair consideration in the country of refuge.¹¹⁷

CONCLUSION

The jurisprudence from *Ward* to *Febles* is a troubling path to follow. With respect, *Febles* exemplifies how Canada's international obligations risk being interpreted through the lens of domestic policy rather than precedent and principle. I have argued that if serious criminality is defined broadly, then Article 1F(b) must be applied with restraint. Excluding *ab initio* any individual with a "serious" criminal past ignores post-offence conduct that may demonstrate the individual deserves refugee protection. Without considering the present circumstances of refugee claimants, the default exclusion rule in *Febles* ignores the values behind the concepts of expiation and rehabilitation and, likewise, undermines Canada's humanitarian obligations in implementing the *Refugee Convention*. Further, Bill C-31, together with *Febles*, deprives any individual with a serious criminal background of the opportunity to have their refugee claim considered fully and fairly. With *Febles*, the Supreme Court of Canada had the opportunity to advance a flexible and just interpretation of Article 1F(b). Instead, the strictly literal interpretation of the majority leaves no room for second chances.

116 *IRPA*, *supra* note 4, s 112(3).

117 See *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177 (available on CanLII) [cited to SCR].