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INTRODUCTION

DETERMINATION

[4] The determinative issues in this appeal is whether the RPD erred in its decision to exclude the Principal Appellant and in rejecting the claims of the Associate Appellants.

BACKGROUND

- [5] As set out by the RPD in its reasons for decision: "The claimants allege that they cannot live safely in Mexico because they fear a criminal organization, La Linea, which operates in the State of Chihuahua and other northern Mexican states."³ They relocated on two occasions within Mexico. The adult Associate Appellant has also claimed persecution on the basis of her indigenous background and her gender. The Principal Appellant also claims persecution on the basis of his transitional gender identity. The Associate Appellants relocated to the USA in XXXX 2017 and later joined the Principal Appellant in Canada. The Appellants made refugee claims which were joined by the RPD. The Minister intervened at the RPD hearing on the issue of the exclusion of the Principal Appellant. The Appellants were not represented by counsel either before the RPD or the RAD. The Minister was represented before the RPD but has not participated in this appeal. RPD Findings
- [6] The RPD found that the Principal Appellant is excluded from refugee protection under Article 1F(b) of the Convention; that the female Associate Appellant and the minor Mexican Associate Appellant are neither Convention refugees nor persons in need of protection and; that the minor Associate Appellant who is a citizen of the USA and has not made out a claim against the USA. Appellant's Arguments
- [7] The Appellants argue that the RPD erred in considering their refugee claims; that there were interpreter and audio tape problems at the hearing and the RPD panel misconstrued their evidence.⁴ New Evidence and Oral Hearing
- [8] The Appellants have submitted several internet articles regarding organized criminal gangs in Mexico including an organization called "La Linea;" excerpts from the Chairpersons SOGIE Guidelines;⁵ a unnamed school card from 1997; photocopies of credit cards; human rights reports; and a medical note as new evidence.⁶ In examining these documents I find that the internet materials could have reasonably been available to the Appellants prior to the RPD decision and that they are not Appellant specific and not relevant to the appeal. I find the school card and credit card photos could have also reasonably been available for submission prior to the RPD decision. I do not find the medical report relevant to the appeal and it is not accepted. Given these findings I find that the new evidence submitted by the Appellants either does not meet the requirements of section 110(4) of IRPA, and if it does, it does not meet the Singh/ Raza factors.
- [9] Given I have not accepted new evidence in this appeal there is no reason for me to consider the conduct of an oral hearing pursuant to section 110(6).

ANALYSIS

- [10] With respect to questions of fact and mixed fact and law, I have applied the standard of correctness as per Huruglica.⁷ When reviewing the RPD decision, I am required to independently determine whether the RPD was correct in relation to each alleged error of law, fact or mixed fact and law. I may defer to the RPD's credibility assessment of oral

testimony, if I find that the RPD had a meaningful advantage in the circumstances. I do not find the RPD had a meaningful advantage and in assessing credibility in this case as provided for in the Huruglica, I have conducted my own analysis and made my independent findings.

- [11] It is the persons claiming refugee protection and not the RPD or the RAD that bears the onus of establishing the need for refugee protection. The onus in regard to establishing that the Principal Appellant is excluded pursuant to Article 1F(b) of the Convention rests with the Minister. It is the responsibility of the RPD or the RAD to consider the applicable case law and weigh the documentary and testimonial evidence and to draw conclusions as to whether the evidence is sufficient to establish the Appellants' allegations and the Minister's argument in regard to the RPD's exclusion finding.
- [12] In this case the RPD has set out its findings and conclusions for each of the Appellants separately and I will follow the same format in rendering my independent analysis. 1F(b) Exclusion of the Principal Appellant XXXX XXXX XXXX XXXX
- [13] The Appellants argue that the RPD erred in considering the past crimes of the Principal Appellant. They argue the RPD failed to give sufficient consideration to his age at the time of the crimes and other personal circumstances.⁸
- [14] Given the RPD has no advantage in regard to its mixed fact and law findings regarding exclusion, it is open to me to independently examine the issue of exclusion on the basis of Article 1F(b) of the Convention and section 98 of IRPA in accordance with the current case law and my own findings in regard to the evidence.
- [15] Section 98 of IRPA states: 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.
- [16] Article 1(F) of the Convention states: 1(F) that the provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee.
- [17] The standard of proof in determining on matters of exclusion is "serious reasons for considering" that a crime has been committed, which is less than the balance of probabilities. The principal respondent need not have been charged or convicted of a crime. The Minister's burden of proof is to demonstrate that there are serious reasons for considering that the adult Associate Appellant (respondent) committed a serious non-political crime outside of Canada prior to his entering Canada.⁹

- [18] I am guided by the Supreme Court in *Febles*.¹⁰ I am also guided by the decision of *Jayasekara*.¹¹ which outlines the following factors to be considered in determining whether a crime is "serious:" (i) elements of the crime; (ii) mode of prosecution; (iii) penalty prescribed; (iii) facts surrounding the crime; (iv) and mitigating and aggravating circumstances underlying the conviction.
- [19] In examining the totality of the record I find that the RPD panel has made no errors in its assessment and reasons for decision regarding the 1 F (b) exclusion issue. The transcript does not indicate the Principal Appellant had any difficulties in understanding the hearing process or the interpreter. I find that the RPD panel carefully considered the documentary evidence brought forward by the Minister and the explanations provided by the Principal Appellant at the hearing.¹² I also find the RPD panel made no error in law and followed the jurisprudence in making its exclusion determination.
- [20] I find that the Minister has met the burden of establishing that there are serious reasons for considering that the Principal Appellant has committed serious non-political crimes prior to entering Canada. He was apprehended and charged in the USA and deported to Mexico. While the Principal Appellant denies some of the details in the charging documents from the USA, the RPD preferred the evidence submitted by the Minister which was produced by police authorities after carefully weighing the totality of the evidence. The RPD took the Principal Appellant's age into account when considering the crimes alleged.¹³
- [21] The crimes charged included violent assault, attempted murder and the use of deadly weapons including a knife and a handgun on separate occasions. There is also reliable evidence that the Principal Appellant has worn tattoos similar to those worn by violent criminal street gangs in the USA. The handgun incident involved an apparent altercation with a rival gang member. Since the Principal Appellant has not provided any documentary evidence to rebut the presumption of a fair and independent police and judiciary process in the USA, I find that he was legitimately charged for these crimes in the USA. The RPD made the following finding based on the evidence: The alley incident involved the pointing of a .357 revolver, which is either a restricted or prohibited firearm in Canada depending on the barrel length, and was done on behalf of the South Side Locos, which I consider to be a criminal organization based on the evidence before me.¹⁴
- [22] Based on the evidence adduced, I agree with the RPD that there are serious reasons for considering that the Principal Appellant committed a serious, non-political crime while he was in the USA prior to entering Canada. The crime includes an incident where the Principal Appellant pointed a deadly weapon at another person and pulled the trigger which could have caused death or serious injury. The issue as to whether the claimant has been convicted or served a sentence is not determinative as to the legal validity of his exclusion under Article 1 F(b) of the United Nations Convention to the status of the refugees. Exclusion remains a possibility even when no conviction has been served.

- [23] In Jayasekara, in order to rebut the presumption of "seriousness" of the crime the claimant is required to demonstrate with respect to the element of the crime, the mode of prosecution, the penalty prescribed and the facts and the mitigating and aggravated circumstances underlying the conviction, as to why exclusion should not apply to him/her. In this case, I find that the claimant was an adult when he committed the serious non-political crime in the USA. I have already found that the mode of prosecution in the USA was fair and judicious. In regard to the penalty prescribed, the male Associate Appellant had an earlier criminal record and he was deported. His deportation from the USA also indicates the gravity of the offences he committed. The only mitigating circumstance in this case is the Principal Appellant's relatively young age. However I note that the Principal Appellant did not accept full responsibility for his situation during his testimony which I found to be problematic in regard to credibility. I do not find that in this case the mitigating factor outweighs the aggravating circumstances.
- [24] The offences charged against the Principal Appellant in the USA are considered serious under the Criminal Code of Canada.¹⁵ The sentence for such crimes in Canada could have been up to 14 years imprisonment.¹⁶ Based on the totality of the evidence adduced, I find that there is serious reason to consider that the Principal Appellant committed serious, non-political crimes in the USA before coming to Canada and that he is excluded from Canada's protection pursuant to Section 98 of IRPA.
- [25] Given my decision that the Principal Appellant is excluded under section 98 of IRPA, there is no need for me to consider the merits, if any, of his inclusion allegations. Inclusion - Associate Appellant XXXX XXXX XXXX
- [26] The RPD considered the refugee claim of Ms. XXXX, the adult Associate Appellant, on the grounds of her race (indigenous appearance) and gender pursuant to section 96 of IRPA and on the basis of her fear of criminality and gang violence under section 97 (1) of IRPA.
- [27] The RPD found the Associate Appellant to be a reliable witness. The RPD found, and I agree, that there is evidence of the mistreatment of indigenous persons in Mexico.¹⁷ However the RPD found that while she may have experienced discrimination on the basis of her indigenous appearance and heritage, she has not established a profile of someone who would be persecuted on that basis.¹⁸ She has no problems with the Spanish language, she is not a political activist on indigenous rights, she does not pursue a traditional indigenous lifestyle nor live in traditional indigenous areas.
- [28] In my independent assessment I agree with the RPD that the evidence does not establish that the discrimination experienced by the Associate Appellant on the basis of race rises to the level of persecution.

- [29] In regard to the issue of persecution on the basis of her gender, the RPD notes that she does not fear domestic violence from her own partner. The RPD panel undertook an extensive analysis of the objective evidence regarding the situation for women fearing violence based on their gender in Mexico and considered this in its decision.¹⁹
- [30] I have also considered this evidence in addition to the objective evidence contained on the record. I find no value in my repeating the objective information contained in these documents in these reasons for decision. I adopt the reasoning of the RPD in this regard and I do not find that the Associate Appellant has established that she has or would be persecuted in Mexico on the basis of her gender.
- [31] In regard to the Associate Appellant's fear of a criminal gang under section 97(1) of IRPA, I adopt the following finding of the RPD at para 131 of its reasons: Having read through the objective documents, the panel finds that the evidence is insufficient to show that La Linea has the capacity to find the claimants everywhere in Mexico, or that its current powers, rivalries, associations, and tendencies indicate that it has the power or intent to prevent the claimants from obtaining a reasonable level of state protection from this gang outside of, perhaps, Chihuahua state.²⁰ Once again, like the RPD I have relied on the testimony of the Appellants and the objective documentation available on the record to support this finding. This evidence sets out that on a balance or probabilities, the La Linea gang, if it remains a player in the Mexican cartel landscape, does not have an independent interest in the Associate Appellant nor does it have the capacity or motivation to track down and harm the Associate Appellant throughout Mexico.²¹
- [32] I find no errors in the RPD decision in regard to the Associate Appellant's risks and I find that she is neither a Convention refugee nor a person in need of protection. Inclusion - minor Associate Appellant XXXX XXXX
- [33] This minor Associate Appellant is a US citizen by birth and has made no claim against the United States. I find no evidence to support that he is either a Convention Refugee or a person in need of protection. Inclusion - minor Associate Appellant XXXX XXXX XXXX XXXX
- [34] There has not been specific evidence submitted on behalf of the minor Appellant XXXX XXXX either before the RPD or the RAD. I agree with the RPD that if returned to Mexico, his situation would be similar to that of his mother who has not made out that she requires refugee protection. There is also no persuasive evidence that this Associate Appellant requires protection under IRPA.

CONCLUSION

- [35] The RAD dismisses the appeal and confirms the decision of the RPD that the Principal Appellant, XXXX XXXX XXXX XXXX is neither a Convention Refugee under Section 96 of IRPA nor a person in need of protection under section 97 of IRPA because he is a person to whom Section 98 of IRPA and Article 1F(b) applies.
- [36] The RAD also dismisses the appeal and confirms the decision of the RPD that the Associate Appellants XXXX XXXX XXXX XXXX, XXXX XXXX and XXXX XXXX XXXX Hinojos are neither Convention refugees nor persons in need of protection, pursuant to section 111(1)(a) of the Immigration and Refugee Protection Act (IRPA). (signed) "Richard Jackson" Richard Jackson April 17, 2019 Date 1 1951 Convention Relating to the Status of Refugees: Office of the United Nations High Commissioner for Refugees, "Handbook on Procedures and Criteria for Determining Refugee Status", under the 1951 Convention. 2 Article 1F(b) of the Convention Relating to the Status of Refugees: The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee. 3 RPD Record (RPDR), RPD Reasons for Decision, paragraph 6. 4 Appellant's Record (AR), page 39. 5 Chairperson's Guideline 9 - SOGIE guidelines : Chairperson's Guideline 9: Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression, Guidelines issued by the Chairperson pursuant to paragraph 159(1)(h) of the Immigration and Refugee Protection Act, May 1, 2017 6 AR pages 3-36. 7 Canada (Citizenship and Immigration) v. Huruglica, 2016 FCA 93. 8 AR, pages 40 and 41. 9 Sivakumar v. Canada (Minister of Employment and Immigration), 1993 CanLII 3012 (FCA), [1994] 1 F.C. 433 (C.A.); Zrig v. Canada (Minister of Citizenship and Immigration), 2003 FCA 178 (CanLII); and, Moreno v. Canada (Minister of Employment and Immigration), 1993 CanLII 2993 (FCA), [1993] F.C.J. No. 912 (FCA). 10 Febles v. Canada (Minister of Citizenship and Immigration), [2014] 3 SCR 431. 11 Jayasekara (Jayasekara v. Canada (Citizenship and Immigration), 2008 FCA 404 (CanLII)). 12 Transcript of Proceedings, pp. 18-39. 13 RPDR, RPD Reasons for Decision, p. 21, para 84. 14 RPDR, Reasons for Decision, p. 20, para 81. 15 Criminal Code (R.S.C., 1985, c. C-46). 16 RPDR, Reasons for Decision, paras 80-82. 17 RPDR, National Documentation Package (NDP), Mexico, September 28, 2018, item 2.2 and item 4.1. 18 NDP, item 2.2. 19 NDP, Mexico, 28 September 2018, item 5.2, 5.3, 5.10 Response to Information Request (RIR) MEXl 05952.E. 20 RPDR, Reasons for Decision, p. 28, para 131. 21 NDP, item 7.13, item 7.2.

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