

**SUPREME COURT OF CANADA**  
(ON APPEAL FROM A JUDGMENT OF THE FEDERAL COURT OF APPEAL)

B E T W E E N:

**LUIS ALBERTO HERNANDEZ FEBLES**

APPELLANT  
(Appellant)

- and -

**MINISTER OF CITIZENSHIP AND IMMIGRATION**

RESPONDENT  
(Respondent)

- and -

**AMNESTY INTERNATIONAL, CANADIAN ASSOCIATION OF  
REFUGEE LAWYERS, CANADIAN CIVIL LIBERTIES ASSOCIATION,  
CANADIAN COUNSEL FOR REFUGEES, and UNITED NATIONS HIGH  
COMMISSIONER FOR REFUGEES**

INTERVENERS

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**FACTUM OF THE INTERVENER**

**UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES**  
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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## **PART I – OVERVIEW**

1. It is the United Nations High Commissioner for Refugees' ("UNHCR") position that the *1951 Convention relating to the Status of Refugees*<sup>1</sup> ("the 1951 Convention") allows for the consideration of expiation in an exclusion determination under Article 1F(b).<sup>2</sup>
2. As an exception to a treaty that establishes fundamental human rights protections, Article 1F must be interpreted restrictively and used with caution, yet it must be applied scrupulously to protect the integrity of the institution of asylum. This integrity would be jeopardized if international refugee protection were granted to persons who are deemed undeserving of such protection, either on account of having committed certain serious acts or heinous crimes, or because they seek to abuse asylum to escape accountability for serious common crimes.
3. A cautious approach to applying Article 1F(b), in light of its purposes and the human rights character of the 1951 Convention, limits exclusion under this provision to circumstances in which the integrity of the institution of asylum would be undermined by granting refugee protection, and requires a full individualized assessment in light of all relevant facts of the claim. This includes consideration of elements such as service of a sentence or other forms of rehabilitation or exoneration after the commission of the crime. This approach ensures that Article 1F(b) is not applied more broadly than necessary to fulfill its purpose.

## **PART II – POINTS IN ISSUE**

4. UNHCR's submissions are directed at the interpretation and application of the exclusion clause in Article 1F(b) of the 1951 Convention in cases where an applicant has committed a crime within the scope of that provision but has served a sentence for the crime committed or has been otherwise rehabilitated. UNHCR's submissions are strictly limited to questions of law.

## **PART III – ARGUMENT**

### **A. The views of UNHCR are persuasive**

5. UNHCR is mandated by the United Nations General Assembly to provide international protection to refugees and to supervise the application of international conventions for the

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<sup>1</sup> *1951 Convention relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137, Appellant's Book of Authorities ("ABOA") Vol. I, Tab 1, p. 1.

<sup>2</sup> Pursuant to Article 1F(b) of the 1951 Convention, "[t]he provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that [...] he [or she] has committed a serious non-political crime outside the country of refuge prior to his [or her] admission to that country as a refugee."

protection of refugees, pursuant to its 1950 Statute.<sup>3</sup> UNHCR's supervisory responsibility is also reflected, *inter alia*, in the Preamble and Article 35 of the 1951 Convention and Article II of its 1967 Protocol.<sup>4</sup> UNHCR, by virtue of its supervisory responsibility, is concerned to ensure a consistent and coherent interpretation and application of international refugee instruments.

6. The Supreme Court of Canada,<sup>5</sup> other Canadian courts,<sup>6</sup> and high courts internationally,<sup>7</sup> have endorsed UNHCR's views as persuasive authority in interpreting the 1951 Convention, its 1967 Protocol, and related international law.

**B. The human rights purpose of the 1951 Convention determines the overall approach to exclusion**

*i. Article 1F must be interpreted as part of a human rights instrument*

7. The Preamble to the 1951 Convention embeds the Convention within a broader human rights framework, grounded in the *Charter of the United Nations* and the *Universal Declaration of Human Rights*. It highlights the international community's profound concern for refugees and underscores its purpose of assuring refugees the widest possible exercise of their fundamental rights and freedoms.<sup>8</sup> In accordance with the rules of treaty interpretation set out in the *1969 Vienna Convention on the Law of Treaties* ("the Vienna Convention"), human rights considerations therefore need to inform the interpretation and application of its provisions.<sup>9</sup>

<sup>3</sup> United Nations General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), Annex, paragraph 8(a), UNHCR's Book of Authorities ("BOA"), Tab 15, p. 345.

<sup>4</sup> *1967 Protocol Relating to the Status of Refugees*, 31 January 1967, 606 UNTS 267, ABOA Vol. I, Tab 1, p. 47.

<sup>5</sup> *Ward v. Canada (Minister of Employment & Immigration)*, [1993] 2 S.C.R. 689 at para. 34, BOA, Tab 21, pp. 401-402; *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593 at para. 46, BOA, Tab 3, p. 40.

<sup>6</sup> *Varela v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 436 at para. 40, BOA, Tab 20, p. 397; *Hinzman, Re*, 2006 FC 420 at paras. 116-117, BOA, Tab 5, pp. 68-69; *Lebedev v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 728 at para. 28, BOA, Tab 9, pp. 199-200; *Hughey v. Canada*, 2006 FC 421 at para. 103, BOA, Tab 6, p. 110.

<sup>7</sup> U.K.: *R v. Secretary of State for the Home Department (SSHD), Ex parte Adan, Ex parte Aitseguer*, [2000] UKHL 67, ABOA Vol. IV, Tab 90, p. 267; *R v. Uxbridge Magistrates Court, Ex parte Adimi*, [1999] EWHC Admin 765, BOA, Tab 10, p. 234; *Al-Sirri (Appellant) v SSHD (Respondent); DD (Afghanistan) (Appellant) v Secretary of State for the Home Department (Respondent)*, [2012] UKSC 54 at para. 36, ABOA Vol. IV, Tab 88, p. 198; *Sepet (FC) and Another (FC) v. SSHD*, [2003] UKHL 15 at para. 12, BOA, Tab 11, pp. 270-271; U.S.: *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421 (1987) at para. 22, BOA, Tab 7, pp. 157-158.

<sup>8</sup> See preambular paragraphs 1 and 2 of the *1951 Convention*, *supra* note 1, ABOA Vol. I, Tab 1, p. 1. See also, UNHCR, *Note on International Protection*, 28 June 2011, A/AC.96/1098, at paras. 2-4, BOA Tab 19, p. 371; UNHCR, *Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees*, 16 January 2002, HCR/MMSF/2001/09, at para. 2, BOA, Tab 16, p. 350; also *Ezokola v. Canada (Minister of Citizenship and Immigration)*, 2013 SCC 40 at paras. 31-32, ABOA Vol. II, Tab 31, p. 98.

<sup>9</sup> *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, ABOA Vol. I, Tab 9. See, in particular, Article 31(1) and Article 31(2), ABOA Vol. I, Tab 9, p. 200. See also, UNHCR, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees* (2001), at paras. 2-4, ABOA Vol. XI, Tab 161, p. 186.

8. This human rights purpose is reflected in the jurisprudence of this Court, including in cases raising questions related to Article 1F of the 1951 Convention. In *Canada (Attorney General) v. Ward*, this Court held that “[u]nderlying the Convention is the international community’s commitment to the assurance of basic human rights without discrimination”.<sup>10</sup> In *Pushpanathan v. Canada (MEI)*, this Court noted “[t]he human rights character of the Convention” and held that “[t]his overarching and clear human rights object and purpose is the background against which interpretation of individual provisions must take place.”<sup>11</sup>

9. This approach was affirmed by this Court again in *Ezokola v. Canada (MCI)*<sup>12</sup> and in *Németh v. Canada (Justice)*.<sup>13</sup> In the latter case, this Court also addressed the requirement that the *Immigration and Refugee Protection Act*, which expressly incorporates certain provisions of the 1951 Convention, be construed and applied in a manner that is consistent with Canada’s obligations under international treaties and principles of international law, including international human rights law.<sup>14</sup>

***ii. As an exception to a human rights protection, exclusion by application of Article 1F requires a cautious approach***

10. The exclusion clauses contained in Article 1F of the 1951 Convention form part of the normative framework determining eligibility for international protection as a refugee. They exclude from refugee status persons who would otherwise meet the criteria of the refugee definition set out in Article 1A(2) (the so-called “inclusion” criteria), but who are considered undeserving of refugee status.

11. The rationale behind the exclusion clauses in Article 1F is twofold. First, they provide for the denial of international refugee protection to those who, on account of having committed certain serious acts or heinous crimes, are deemed unworthy of refugee status. Second, they are intended to ensure that serious criminals do not abuse the institution of asylum and escape accountability for their crimes.<sup>15</sup>

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<sup>10</sup> *Ward v. Canada (MEI)*, *supra* note 5, at para. 34, BOA Tab 21, p. 405.

<sup>11</sup> *Pushpanathan v. Canada (Minister of Employment and Immigration)*, [1998] 1 S.C.R. 982, at para. 57, ABOA Vol. II, Tab 35, p. 235.

<sup>12</sup> *Ezokola v. Canada (MCI)*, *supra* note 8, at para. 32, ABOA Vol. II, Tab 31, p. 98.

<sup>13</sup> *Németh v. Canada (Minister of Justice)*, 2010 SCC 56 at para. 86, ABOA Vol. II, Tab 32, p. 150.

<sup>14</sup> *Ibid* at paras. 21, 34, ABOA Vol. II, Tab 32, pp. 123-124, 129.

<sup>15</sup> See UNHCR, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* (“*Guidelines on Exclusion*”) HCR/GIP/03/05, 4 September 2003, at para. 2, ABOA Vol. XI, Tab 159, p. 171, and its accompanying *Background Note on the Application of the*

12. While the exclusion clauses of Article 1F must be applied scrupulously to protect the integrity of the institution of asylum,<sup>16</sup> they must be viewed in the context of the overriding humanitarian objective and human rights purpose of the 1951 Convention. As with any exception to human rights guarantees, they should always be interpreted in a restrictive manner, and in line with their underlying purposes, highlighted above. Given the very grave consequences which may result from exclusion, the provisions of Article 1F must also be applied with great caution, and only after a full assessment of all individual circumstances.<sup>17</sup>

13. In *Pushpanathan v. Canada (MEI)*, this Court examined the interpretation of Article 1F of the 1951 Convention in light of the human rights aims of the treaty and held that the “*a priori* denial of the fundamental protections of a treaty whose purpose is the protection of human rights is a drastic exception to the purposes of the Convention [...] and can only be justified where the protection of those rights is furthered by the exclusion.”<sup>18</sup> Recognizing the tension between the purpose of the 1951 Convention and the exclusion clauses, this Court held in *Ezokola v. Canada (MCI)*, with reference to UNHCR’s *Guidelines on Exclusion*, that “a strict reading of Article 1F[(a)] arguably best promotes the humanitarian aim of the Refugee Convention.”<sup>19</sup>

14. Similarly, when examining the meaning of the phrase “serious reasons for considering”, the Supreme Court of the United Kingdom noted, in *Al-Sirri v. SSHD*, that “we do so in light of the UNHCR view, with which we agree, that the exclusion clauses in the Refugee Convention must be restrictively interpreted and cautiously applied.”<sup>20</sup>

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*Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees (“Background Note”),* 4 September 2003, at para. 4, ABOA Vol. XI, Tab 157, pp. 124-125. UNHCR issues “Guidelines on International Protection” pursuant to its mandate, as contained in its Statute, *supra* note 3, BOA Tab 15, p. 337, in conjunction with Article 35 of the *1951 Convention*, *supra* note 1, ABOA Vol. I, Tab 1, p. 32. The Guidelines complement the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (“Handbook”),* 1 January 1992, reissued December 2011, HCR/IP/4/ENG/REV.3, BOA Tab 18, p. 355 and are intended to provide guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff.

<sup>16</sup> UNHCR’s Executive Committee in Conclusion No. 82 (XLVIII), 1997, para. (d)(v), BOA, Tab 17, pp. 353-354; UNHCR, *Background Note*, *supra* note 15, at para. 2, ABOA Vol. XI, Tab 157, p. 124.

<sup>17</sup> See UNHCR, *Guidelines on Exclusion*, *supra* note 15, at para. 2, ABOA Vol. XI, Tab 159, p. 124; and UNHCR, *Background Note*, *supra* note 15, at paras. 3-4, ABOA Vol. XI, Tab 157, pp. 124-125.

<sup>18</sup> *Pushpanathan v. Canada (MEI)*, *supra* note 11, at paras. 51-57, ABOA Vol. II, Tab 35, pp. 230-235.

<sup>19</sup> *Ezokola v. Canada (MCI)*, *supra* note 8, at para. 35, ABOA Vol. II, Tab 31, p. 99.

<sup>20</sup> *Al-Sirri (Appellant) v SSHD*, *supra* note 7, at para. 75, ABOA Vol. IV, Tab 88, p. 210.

*iii. Key principles that ensure the cautious application of Article 1F*

15. In light of the overriding human rights purpose of the 1951 Convention, certain key principles are applicable in all cases and procedures where exclusion from international refugee protection based on a person's criminal conduct is at issue:

- (i) Article 1F exhaustively enumerates the acts which may give rise to exclusion.<sup>21</sup>
- (ii) Article 1F requires a finding that there are serious reasons for considering that the person concerned has incurred individual responsibility for acts within its scope.<sup>22</sup>
- (iii) A proportionality assessment, in which the seriousness of the applicant's criminal conduct is weighed against the consequences of exclusion, must be conducted as part of an individualized assessment of all relevant facts. This allows consideration of mitigating or aggravating circumstances as well as factors relevant to the effect of exclusion for the individual, such as the absence in some States of human rights guarantees as an accessible "safety valve" against *refoulement*.<sup>23</sup> The drafters of the 1951 Convention expressly noted the need for a proportionality test in considering exclusion under Article 1F(b).<sup>24</sup>
- (iv) The burden of proof to justify exclusion lies with the decision-making authority.<sup>25</sup> The standard of proof ("serious reasons for considering") requires clear and credible evidence.<sup>26</sup> While proof of guilt in the sense of a criminal conviction is not required,<sup>27</sup> the

<sup>21</sup> UNHCR, *Guidelines on Exclusion*, *supra* note 15, at para. 3, ABOA Vol. XI, Tab 159, p. 171; UNHCR, *Background Note*, *supra* note 15, at para. 7, ABOA Vol. XI, Tab 157, p. 125. For an overview of the international instruments which provide for the definition of acts which fall within the scope of Article 1F(a), see UNHCR, *Background Note*, *supra* note 15, at paras. 23-25, ABOA Vol. XI, Tab 157, pp. 129-131.

<sup>22</sup> UNHCR, *Background Note*, *supra* note 15, at paras. 50-75, ABOA Vol. XI, Tab 157, pp. 140-148.

<sup>23</sup> UNHCR, *Guidelines on Exclusion*, *supra* note 15, at para. 24, ABOA Vol. XI, Tab 159, p. 176; UNHCR, *Background Note*, *supra* note 15, at paras. 76-78, ABOA Vol. XI, Tab 157, pp. 148-150.

<sup>24</sup> United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 24th Mtg., 27 November 1951, A/CONF.2/SR.24, BOA Tab 13, pp. 305-306, 308; United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 29th Mtg., 28 November 1951, A/CONF.2/SR.29, BOA, Tab 14, p. 325.

<sup>25</sup> UNHCR, *Background Note*, *supra* note 15, at paras. 105-106, ABOA Vol. XI, Tab 157, p. 159. See also below at paragraphs 18-21.

<sup>26</sup> UNHCR, *Guidelines on Exclusion*, *supra* note 15, at para. 35, ABOA Vol. XI, Tab 159, p. 178; UNHCR *Background Note*, *supra* note 15, at paras. 108-111, ABOA Vol. XI, Tab 157, at pp. 160-161. See also Council of Europe, Committee of Ministers, Recommendation Rec(2005)6 of the Committee of Ministers to Member States on Exclusion From Refugee Status in the Context of Article 1 F of the Convention Relating to the Status of Refugees of 28 July 1951, 23 March 2005, BOA, Tab 4, pp. 44-45.

<sup>27</sup> See, for example, in the U.K.: *Al-Sirri v. SSHD*, *supra* note 7, at para. 75(4), ABOA Vol. IV, Tab 88, p. 210; in Germany: *Bundesverwaltungsgericht*, BVerwG 10 C 24.08, 24 November 2009, at para. 35, BOA, Tab 2, pp. 32-33;

standard must be sufficiently high to ensure that refugees are not erroneously excluded. The “balance of probabilities” is too low a threshold.<sup>28</sup> In *Al Sirri v. SSHD*, the Supreme Court of the United Kingdom examined relevant international jurisprudence, including Canada, and found, *inter alia*, that “[...] if the decision-maker is satisfied that it is more likely than not that the applicant has not committed the crimes in question [...], it is difficult to see how there could be serious reasons for considering that he had done so.”<sup>29</sup>

- (v) The exceptional nature and inherent complexity of exclusion requires that the applicability of Article 1F be examined within a regular refugee status determination procedure offering proper procedural safeguards, rather than in admissibility or accelerated procedures.<sup>30</sup> A holistic approach to determining eligibility for international refugee protection, whereby both exclusion and inclusion issues are examined, is best suited to ensure a full assessment of the factual and legal issues arising in cases where the application of Article 1F is considered.<sup>31</sup>

**C. In order to apply Article 1F(b) solely to cases that are in line with its purposes, service of a sentence and other factors relevant to expiation must be considered**

16. A cautious approach to applying Article 1F(b), in light of the nature of the 1951 Convention as a human rights instrument, requires that exclusion be applied only in cases that are in line with the specific purposes of this provision, and thus to protect the integrity of the institution of asylum from being undermined. In order to ensure that Article 1F(b) is not applied more broadly than necessary to fulfill this purpose, service of a sentence, or other forms of rehabilitation, must be considered. Where these elements exist, decision-makers must consider whether an applicant, whose previous involvement in the commission of a crime brings him or her within the scope of Article 1F(b), may nevertheless be considered eligible for refugee status, or whether granting protection may undermine the integrity of the institution of asylum.<sup>32</sup>

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and in Belgium: *Le Commissaire général aux réfugiés et aux apatrides c. XXX*, Arrêt no. 200.321, Belgium, Conseil d’Etat, 13 July 2012, at p. 8, BOA Tab 18, p. 188.

<sup>28</sup> UNHCR, *Background Note*, *supra* note 15, at para. 107, ABOA Vol. XI, Tab 157, pp. 159-160.

<sup>29</sup> *Al-Sirri v. SSHD*, *supra* note 7, at paras. 69-75, ABOA Vol. IV, Tab 88, pp. 208-211.

<sup>30</sup> UNHCR, *Guidelines on Exclusion*, *supra* note 15, at para. 31, ABOA Vol. XI, Tab 159, p. 133; and UNHCR, *Background Note*, *supra* note 15, at paras. 98-99, ABOA Vol. XI, Tab 157, p. 157.

<sup>31</sup> UNHCR, *Guidelines on Exclusion*, *supra* note 15, at para. 31, ABOA Vol. XI, Tab 159, pp. 177-178; and UNHCR, *Background Note*, *supra* note 15, at paras. 99-100, ABOA Vol. XI, Tab 157, pp. 157-158.

<sup>32</sup> For an overview of the criteria for exclusion under this provision, see UNHCR, *Background Note*, *supra* note 15, at paras. 37-45, 73, ABOA Vol. XI, Tab 157, pp. 135-137.

*i. Service of sentence or exoneration by other means in principle removes the basis for exclusion of persons seeking to escape accountability for their crimes*

17. Article 1F(b) is primarily intended to prevent serious criminals from abusing the institution of asylum to escape accountability for their crimes. This clause does not merely exclude persons seeking to avoid extradition or a prosecution which is already underway. Article 1F(b) may also apply where no prosecution for the crime committed is conducted in the country of commission, or where no extradition treaty exists between the countries concerned. This view is held by UNHCR, as well as numerous commentators,<sup>33</sup> and supported by the drafting history of the 1951 Convention.<sup>34</sup> The Federal Court of Appeal adopted this view in *Zrig v. Canada (MCI)* by reading this Court's decision in *Pushpanathan v. Canada (MEI)* to say that the purpose of Article 1F(b) is "to prevent non-political criminals" who have committed "serious crimes to which the extradition treaties might be fully applicable" from seeking refugee status, regardless of whether there is an applicable extradition treaty or the individual was charged for the crime.<sup>35</sup>

18. Where an applicant has committed a crime within the scope of Article 1F(b) but has since served a sentence commensurate with the criminal conduct or has been otherwise rehabilitated, exclusion from international refugee protection would, in principle, no longer be required to serve the purpose of precluding serious criminals from evading justice. This determination must be made as part of a holistic, individualized assessment in light of all relevant factors.

19. UNHCR's *Background Note* sets out relevant factors to be considered where a sentence has been served in respect of a crime within the scope of Article 1F: "issues such as the passage of time since the commission of the offence, the seriousness of the offence, the age at which the

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<sup>33</sup> See, for example, W. Kälin and J. Künzli, Article 1F(b): "Freedom Fighters, Terrorists, and the Notion of Serious Non-Political Crimes," *Int J Refugee Law* (2000) 12 (suppl 1), at pp. 69-71, ABOA Vol. VII, Tab 129, pp. 345-347; "Current issues in the application of the exclusion clauses", Feller, E., Türk, V. & Nicholson, F., eds, *Refugee Protection In International Law: UNHCR's Global Consultations on International Protection*, (Cambridge: Cambridge University Press, 2003), at pp. 447-448, ABOA Vol. VI, Tab 118, pp. 275-276; G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3d ed, (Oxford: Oxford University Press, 2007), at p. 174, ABOA Vol. VI, Tab 120, p. 325; A. Zimmermann and P. Wennholz, "Article 1F" in Zimmermann, A., Dörschner, J. and Machts, F., eds, *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford: Oxford University Press: 2011) at pp. 596-597, ABOA Vol. IX, Tab 139, pp. 111-112.

<sup>34</sup> Rather than replicating the explicit references to extraditable crimes contained in its forerunner provisions in earlier instruments, the drafters of the *1951 Convention* defined the scope of Article 1F(b) in terms of the gravity of the crimes, their character, as well as the place and time of their commission. See *United Nations Declaration of Human Rights* article 14(2), U.N. Doc. A/RES/217(A)(III) (1948), ABOA Vol. 1, Tab 2, p. 112; UN Doc. A/Conf.2/SR.29, *supra* note 24, BOA, Tab 14, pp. 325, 326, 327, 330, 332-333, 334-335; U.N. Doc. A/CONF.2/SR.24, *supra* note 24, BOA, Tab 13, pp. 305-306, 308-309.

<sup>35</sup> *Zrig v. Canada*, 2003 FCA 178, at paras. 65-68, ABOA Vol. III, Tab 63, pp. 220-222.

crime was committed, the conduct of the individual since then, and whether the individual has expressed regret or renounced criminal activities”.<sup>36</sup>

*ii. Exclusion may nevertheless apply where it is necessary to safeguard the integrity of the institution of asylum*

20. *Persons responsible for truly heinous crimes:* Article 1F(b) is also intended to exclude persons who, on account of having committed certain serious acts or heinous crimes, are deemed unworthy of refugee status. As can be seen from the drafting history of the 1951 Convention, there was consensus that ordinary criminals were among those who should be kept outside the international refugee protection regime as a matter of “international morality”,<sup>37</sup> and that they should be distinguished from *bona fide* refugees not only in provisions on expulsion but also in the definition of the term “refugee”, of which exclusion is a part.<sup>38</sup> It would undermine the integrity of the institution of asylum to protect such persons.

21. Therefore, in cases involving crimes of a truly heinous nature, the applicant may be considered undeserving of international refugee protection even if elements of expiation are present. This applies where the crimes committed are of a similar egregiousness as those covered by Article 1F(a) or Article 1F(c) of the 1951 Convention.<sup>39</sup> An applicant who is determined to have committed, or been guilty of, crimes of a comparable nature and gravity may be excluded from protection even if he or she has served a sentence or has otherwise been rehabilitated.<sup>40</sup>

22. *Persons raising a security risk to the receiving country:* The *travaux préparatoires* demonstrate that the drafters of the 1951 Convention were also concerned to incorporate provisions enabling States to address legitimate concerns about threats to their public order, security or community. They did so expressly through the provisions on expulsion contained in Articles 32 and 33(2),<sup>41</sup> rather than in the clauses providing for exclusion from refugee status.

<sup>36</sup> UNHCR, *Background Note*, *supra* note 15, at para. 73, ABOA Vol. XI, Tab 157, p. 148.

<sup>37</sup> Statements to this effect were made, for example, by France during the discussion of the draft Convention in the Economic and Social Council (ECOSOC, Official Records, 11th Session, 406th Meeting, 11. Aug. 1950, 276, para. 47), in the United Nations Ad Hoc Committee on Refugees and Stateless Persons, 33rd Mtg., 14 August, 1950, E/AC.32/SR.33, BOA, Tab 12, p. 295.

<sup>38</sup> See the statements of the French delegate during the drafting of the 1951 Convention, in response to the views of the United Kingdom that the expulsion provisions were sufficient for States to deal with such persons. UN Doc. A/CONF.2/SR.24, *supra* note 24, BOA, Tab 13, pp. 303-304.

<sup>39</sup> Article 1F(a) excludes persons responsible for “a crime against peace, a war crime, or a crime against humanity”. Article 1F(c) excludes persons responsible for “acts contrary to the purposes and principles of the United Nations”.

<sup>40</sup> UNHCR, *Handbook*, *supra* note 15, at para. 157, BOA, Tab 18, p. 366.

<sup>41</sup> Article 32 and Article 33(2) of the *1951 Convention* specify the circumstances under which international refugee law permits the expulsion of a refugee, including in certain exceptional circumstances permitting his or her return to

This distinction between Article 1F and Article 33(2) of the 1951 Convention was recognized by this Court in *Pushpanathan v. Canada (MEI)*.<sup>42</sup>

23. However, the concern about possible security threats resulting from the presence of dangerous criminals was nevertheless part of the context in which the drafters discussed the exclusion criteria.<sup>43</sup> Thus, as stated in the UNHCR *Handbook*, insofar as it applies to persons responsible for serious non-political crimes who constitute a threat to others, Article 1F(b) also serves to “protect the community of a receiving country from the danger of admitting a refugee who has committed a serious common crime” as part of the exclusion analysis.<sup>44</sup>

24. Where an applicant, whose criminal past that brings him or her within the scope of Article 1F(b), poses a threat to the community or the security of the receiving State, exclusion may apply from protection even if the person concerned has served a sentence and the possibility of expiation is raised.<sup>45</sup> What is at issue here, however, is not the application of an exclusion clause based on security grounds: this is not a criterion for the applicability of Article 1F(b) under the text of this provision, and therefore it cannot be invoked as the basis for excluding an applicant who has not committed a crime that meets the criteria under Article 1F(b). To do so would be to expand the scope of Article 1F(b) and thus would not be in keeping with the human rights purpose of the 1951 Convention. Legitimate concerns arising from security risks to the receiving State may only be invoked in the context of considering the possibility of expiation, as part of the holistic, individualized assessment of all relevant circumstances.<sup>46</sup>

**iii. *Canadian and international jurisprudence supports the consideration of service of a sentence and other factors relevant to expiation***

25. In Canada, the concurring opinion of Décaré J.A. in the Federal Court of Appeal’s decision in *Zrig v. Canada (MCI)* examined the purposes of Article 1F(b) and held that the

a country where there is a risk of persecution. UNHCR, *Background Note*, *supra* note 15, at paras. 10, 44, ABOA Vol. XI, Tab 157, pp. 126, 137.

<sup>42</sup> *Pushpanathan*, *supra* note 11, at para. 58, ABOA Vol. II, Tab 35, pp. 235-236.

<sup>43</sup> On several occasions during the discussions on exclusion, the drafters referred to the expulsion provisions which were to become Article 33(2) of the 1951 Convention, indicating that the two issues were intricately linked. For example, UN Doc. A/CONF.2/SR.24, *supra* note 24, BOA, Tab 13, pp. 303, 309; UN Doc. A/CONF.2/SR.29, *supra* note 24, BOA, Tab 14, pp. 326, 328, 329, 331.

<sup>44</sup> UNHCR, *Handbook*, *supra* note 15, at paras. 151, 157, BOA, Tab 19, pp. 365, 366.

<sup>45</sup> G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (3<sup>rd</sup> ed., 2007), at pp. 175-176, ABOA Vol. VI, Tab 120, pp. 326-327.

<sup>46</sup> The examination of expiation would be relevant only if it has already been determined, in the first and second stages of the analysis set out above at paras. 17-24, that there are serious reasons for considering that the applicant committed crimes within the scope of Article 1F.

country of refuge could “certainly decide not to exclude the perpetrator of a serious non-political crime who has already been convicted and has served his sentence.”<sup>47</sup>

26. In Belgium, the *Conseil du Contentieux des Étrangères* considers that elements such as service of a sentence or expressions of remorse are relevant and need to be considered, even if they may not be sufficient to remove the grounds for exclusion under Article 1F(b).<sup>48</sup> Similarly, in the opinion of the Swiss *Federal Administrative Tribunal*, partial service of a sentence is relevant and should be considered alongside possible security concerns related to his excludable activities.<sup>49</sup> In France, the *Conseil d’Etat*, has held that expiation may apply based on the service of a sentence, except if the host State considers that the applicant, on account of the serious non-political crimes committed previously, poses a danger or risk.<sup>50</sup> The *United Kingdom Upper Tribunal (Immigration and Asylum Chamber)* has recognized, in light of the purposes of Article 1F(b), that “events in the supervening passage of time may be relevant to whether exclusion is justified”.<sup>51</sup>

#### **PARTS IV AND V – STATEMENT ON COSTS AND ORDER SOUGHT**

27. UNHCR seeks no costs and respectfully asks that no costs are awarded against them.

28. UNHCR seeks leave to present oral argument before the Court based on these submissions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of March, 2014.

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<sup>47</sup> *Zrig v. Canada (MCI)*, *supra* note 35, at paras. 122–128, ABOA Vol. III, Tab 63, pp. 240-242.

<sup>48</sup> See, eg, *Arrêt n° 27.479*, Belgium: *Conseil du Contentieux des Étrangères*, 18 May 2009, at paras. 3.9-3.10, ABOA Vol. V, Tab 103, pp. 284-285; *Arrêt n° 69656*, Belgium: *Conseil du Contentieux des Étrangères*, 8 November 2011, at p. 3, ABOA Vol. V, Tab 104, p. 289.

<sup>49</sup> *Arrêt du 4 mai 2009*, Suisse: *Tribunal administratif fédéral*, E-3549/2006, at para. 5, BOA, Tab 1, pp. 13-14 with reference to UNHCR’s *Guidelines on Exclusion*. In Switzerland, considerations of this nature are examined as part of the proportionality assessment required for determining whether an applicant is undeserving of refugee status.

<sup>50</sup> *Conseil d’État*, 4 May 2011, OFPRA, c./M.H. n° 320910 B, France, ABOA Vol. V, Tab 106; The Conclusions of the Public Rapporteur in that matter, ABOA Vol. V, Tab 107.

<sup>51</sup> *AH v. Algeria*, [2013] UKUT 00382 (IAC), at para. 97, ABOA Vol. IV, Tab 87, p. 178.

## PART VI - TABLE OF AUTHORITIES

<b>Tab</b>	<b>Authority</b>	<b>Reference in Argument</b>
-	<i>1951 Convention relating to the Status of Refugees</i> , 28 July 1951, 189 United Nations Treaty Series 137 <b>ABOA Vol. I, Tab I</b>	1
-	<i>1967 Protocol Relating to the Status of Refugees</i> , 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267 <b>ABOA Vol. I, Tab I</b>	5
-	A. Zimmermann and P. Wennholz, "Article 1F" in Zimmermann, A., Dörschner, J. and Machts, F., eds, <i>The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary</i> (Oxford: Oxford University Press, 2011) <b>ABOA Vol. IX, Tab 139</b>	17
-	<i>Al-Sirri (Appellant) v SSHD (Respondent); DD (Afghanistan) (Appellant) v Secretary of State for the Home Department (Respondent)</i> , [2012] UKSC 54 <b>ABOA Vol. IV, Tab 88</b>	6, 14
-	<i>Arrêt n° 27.479</i> , Belgium: Conseil du Contentieux des Étrangères, 18 May 2009 <b>ABOA Vol. V, Tab 103</b>	26
-	<i>Arrêt n° 69656</i> , Belgium: Conseil du Contentieux des Étrangères, 8 November 201 <b>ABOA Vol. V, Tab 104</b>	26
1	<i>Arrêt du 4 mai 2009</i> , Suisse: Tribunal administratif fédéral, E-3549/2006	26
2	Bundesverwaltungsgericht, BVerwG 10 C 24.08, 24 November 2009	15
3	<i>Chan v. Canada (Minister of Employment and Immigration)</i> , [1995] 3 S.C.R. 593	6
-	Conseil d'État, 4 May 2011, OFPRA, c./M.H. n° 320910 (France) <b>ABOA Vol. V, Tab 106</b>	26
4	Council of Europe, <i>Committee of Ministers, Recommendation Rec(2005)6 of the Committee of Ministers to Member States on Exclusion From Refugee Status in the Context of Article 1 F of the Convention Relating to the Status of Refugees of 28 July 1951</i> , 23 March 2005	15(iv)

- *Ezokola v. Canada (Minister of Citizenship and Immigration)*, 2013 SCC 40 7, 9, 13  
**ABOA Vol. II, Tab 31**
  
- Feller, E., Türk, V. & Nicholson, F., eds, "Current Issues in the Application of the Exclusion Clauses", *Refugee Protection In International Law: UNHCR's Global Consultations on International Protection*, (Cambridge: Cambridge University Press, 2003) 17  
**ABOA Vol. VI, Tab 118**
  
- Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3d ed, (Oxford: Oxford University Press, 2007) 17  
**ABOA Vol. VI, Tab 120**
  
- *H v. Algeria*, [2013] UKUT 00382 (IAC) 26  
**ABOA Vol. IV, Tab 87**
  
- 5 *Hinzman, Re*, 2006 FC 420 (TD) 6
  
- 6 *Hughey v. Canada*, 2006 FC 421 (TD) 6
  
- 7 *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (USSC) 6
  
- 9 *Lebedev v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 728 (TD) 6
  
- *Németh v. Canada (Minister of Justice)*, 2010 SCC 5 9  
**ABOA Vol. II, Tab 32**
  
- *Pushpanathan v. Canada (Minister of Employment and Immigration)*, [1998] 1 S.C.R. 982 8, 13, 17, 22  
**ABOA Vol. II, Tab 35**
  
- *R v. Secretary of State for the Home Department (SSHD), Ex parte Adan, Ex parte Aitseguer*, [2000] UKHL 67 6  
**ABOA Vol. IV, Tab 90**
  
- 10 *R v. Uxbridge Magistrates Court and Another, Ex parte Adimi*, [1999] EWHC Admin 765 6
  
- 11 *Sepet (FC) and Another (FC) v. SSHD*, [2003] UKHL 15 6

- United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331  
**ABOA Vol. I, Tab 9** 7
- 12 United Nations Ad Hoc Committee on Refugees and Stateless Persons, 33rd Mtg., 14 August, 1950, E/AC.32/SR.33 20
- 13 United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 24th Mtg., 27 November 1951, A/CONF.2/SR.24 15(iii), 17, 20, 23
- 14 United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 29th Mtg., 28 November 1951, A/CONF.2/SR.29 15(iii), 17, 20, 23
- *United Nations Declaration of Human Rights*, U.N. Doc. A/RES/217(A) (III) (1948)  
**ABOA Vol. 1, Tab 2** 17
- 15 United Nations General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V) 5
- 16 United Nations High Commissioner for Refugees, *Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees*, 16 January 2002, HCR/MMSP/2001/09 7
- United Nations High Commissioner for Refugees, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003  
**ABOA Vol. XI, Tab 157** 11, 12, 15, 16, 19, 22,
- 17 United Nations High Commissioner for Refugees, *Executive Committee, Conclusion No. 82 (XLVIII)*, 1997 12
- United Nations High Commissioner for Refugees, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, HCR/GIP/03/05  
**ABOA Vol. XI, Tab 159** 11, 12, 15, 26
- 18 United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 1 January 1992, reissued December 2011, HCR/1P/4/ENG/REV.3 11, 21, 23
- 19 United Nations High Commissioner for Refugees, *Note on International Protection*, 28 June 2011, A/AC.96/1098 7

- 20 *Varela v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 436 (TD) 6
- *W. Kälin and J. Künzli, Article 1F(b): “Freedom Fighters, Terrorists, and the Notion of Serious Non-Political Crimes,” Int J Refugee Law* (2000) 12 (suppl 1) 17  
**ABOA Vol. VII, Tab 129**
- 21 *Ward v. Canada (Minister of Employment & Immigration)*, [1993] 2 S.C.R. 689 6, 8
- *Zrig v. Canada*, 2003 FCA 178 17  
**ABOA Vol. III, Tab 63**

**PART VII - STATUTES OR REGULATIONS**

*Rules of the Supreme Court of Canada (SOR/2002-156)*  
*Règles de la Cour suprême du Canada (DORS/2002-156)*

**English**

Factum on Appeal

42. (1) [Repealed, SOR/2011-74, s. 21]

(2) The factum shall be bound and consist of the following parts:

(a) Part I consisting of

(i) in the appellant's factum, a concise overview of their position and a concise statement of the facts,

(ii) in the respondent's factum, a concise overview of their position and a concise statement of their position with respect to the appellant's statement of facts, including a concise statement of any other facts that the respondent considers relevant, and

(iii) in the intervener's factum, a concise overview of their position with respect to the questions on which they have intervened, including a concise statement of the facts relevant to the questions on which they have intervened;

(b) Part II consisting of

(i) in the appellant's factum, a concise statement of the questions in issue in the appeal,

(ii) in the respondent's factum, a concise overview of their position with respect to the appellant's questions, and

(iii) in the intervener's factum, a concise overview of their position with respect to the appellant's questions on which they have intervened;

**French**

Mémoire d'appel

42. (1) [Abrogé, DORS/2011-74, art. 21]

(2) Le mémoire est relié et comporte les parties suivantes :

a) partie I :

(i) dans le cas de l'appellant : exposé concis de sa position et des faits,

(ii) dans le cas de l'intimé : exposé concis de sa position, notamment sur les faits exposés par l'appellant, et des autres faits qu'il estime pertinents,

(iii) dans le cas de l'intervenant : exposé concis de sa position relativement aux questions visées par son intervention, y compris un exposé concis des faits pertinents quant à ces questions;

b) partie II :

(i) dans le cas de l'appellant : exposé concis des questions en litige,

(ii) dans le cas de l'intimé : exposé concis de sa position relativement aux questions soulevées par l'appellant;

(iii) dans le cas de l'intervenant : exposé concis de sa position relativement aux questions soulevées par l'appellant et visées par son intervention.

c) partie III : exposé des arguments énonçant succinctement les questions de droit ou de fait à débattre, avec renvoi à la page du dossier ainsi qu'à l'onglet, à la page et au paragraphe des

(c) Part III consisting of a statement of argument setting out concisely the questions of law or fact to be discussed, with reference to the page of the record and to the tab, page and paragraph number of the authorities being relied on;

(d) Part IV consisting of submissions, if any, not exceeding one page in support of the order sought concerning costs;

(e) Part V consisting of

(i) in the appellant's factum and the respondent's factum, a concise statement of the order or orders sought, and

(ii) in the intervener's factum, if not yet determined in the order granting the intervention, any request for permission to present oral argument at the hearing of the appeal;

(f) Part VI consisting of a table of authorities, arranged alphabetically and setting out the paragraph numbers in Part III where the authorities are cited; and

(g) Part VII consisting of a photocopy, or a printout from an electronic database, of those provisions of any statute, regulation, rule, ordinance or by-law directly at issue, in both official languages if they are required by law to be published in both official languages, but lengthy statutes shall be bound in a separate volume, and statutes not directly at issue shall be included in the book of authorities.

(3) Part V of the intervener's factum shall not consist of any statement with respect to the outcome of the appeal unless otherwise ordered by a judge.

(4) Parts I to V of the factum of any appellant or respondent shall not exceed 40 pages, unless a judge or the Registrar, on motion, otherwise orders.

sources invoquées;

d) partie IV : arguments, le cas échéant, d'au plus une page à l'appui de l'ordonnance demandée au sujet des dépens;

e) partie V :

(i) dans le cas de l'appellant et de l'intimé : exposé concis des ordonnances demandées,

(ii) dans le cas de l'intervenant : toute demande en vue de présenter une plaidoirie orale lors de l'audition de l'appel, si cette question n'est pas déjà tranchée dans l'ordonnance autorisant l'intervention;

f) partie VI : table alphabétique des sources, avec renvoi aux paragraphes de la partie III où elles sont citées;

g) partie VII : extraits des lois, règlements, règles, ordonnances ou règlements administratifs directement en cause, présentés sous forme de photocopies ou d'imprimés tirés d'une base de données électronique et reproduits dans les deux langues officielles si la loi exige la publication de ces textes dans les deux langues officielles, les textes volumineux étant reliés dans un volume distinct et ceux qui ne sont pas directement en cause étant inclus dans le recueil de sources.

(3) La partie V du mémoire de l'intervenant ne comporte aucun énoncé quant à l'issue de l'appel, sauf ordonnance contraire d'un juge.

(4) Les parties I à V des mémoires d'un appellant et d'un intimé comptent au plus quarante pages, sauf ordonnance contraire d'un juge ou du registraire, sur requête.

(5) Les parties I à V du mémoire du procureur général visé au paragraphe 61(4), comptent au plus vingt pages, sauf ordonnance contraire d'un juge ou du registraire, sur requête.

(6) Les parties I à V du mémoire de

(5) Parts I to V of the factum of an attorney general referred to in subrule 61(4) shall not exceed 20 pages, unless a judge or the Registrar, on motion, otherwise orders.

(6) Parts I to V of the factum of an intervener, other than an attorney general referred to in subrule 61(4), shall not exceed 10 pages, unless a judge or the Registrar, on motion, otherwise orders.

(7) The appellant shall include a copy of any order stating a constitutional question referred to in subrule 61(1) as an appendix to their factum.

SOR/2006-203, s. 17;SOR/2011-74, s. 21;

l'intervenant autre que le procureur général visé au paragraphe 61(4) comptent au plus dix pages, sauf ordonnance contraire d'un juge ou du registraire, sur requête.

(7) L'appelant joint en annexe à son mémoire une copie de toute ordonnance formulant une question constitutionnelle en vertu du paragraphe 61(1).

DORS/2006-203, art. 17;DORS/2011-74, art. 21;DORS/2013-175, art. 29.