Federal Court  Cour fédérale

Date: 20180713

Docket: IMM-28-18

Citation: 2018 FC 733

Ottawa, Ontario, July 13, 2018

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

ABDOULKADER ABDI

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

and

CANADIAN CIVIL LIBERTIES ASSOCIATION

Intervener

JUSTICE FOR CHILDREN AND YOUTH

Intervener

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Abdoulkader Abdi, was 6 years old when he arrived in Canada in 2000 as a Somalian refugee. He came to Canada with his two aunts and his sister. Shortly after arriving in Canada, Mr. Abdi was placed in the care of the Nova Scotia Department of Community Services [DCS] and spent the rest of his youth in foster care and group homes. Despite efforts by DCS officials to "regularize" his status, Mr. Abdi never obtained Canadian citizenship.

[2] His lack of citizenship and trouble with the law put Mr. Abdi at risk of being removed from Canada. Mr. Abdi seeks judicial review of the decision of the Minister's Delegate [MD] of January 3, 2018. In that decision, the MD referred Mr. Abdi on to the next stage of the process which may ultimately see him removed from Canada. Mr. Abdi argues that his rights under the *Charter of Rights and Freedoms* [the *Charter*] have been infringed and he also argues that his treatment is not in keeping with Canada's international law obligations.

[3] Given the *Charter* and international law issues raised by Mr. Abdi and the impact of his past experiences on his future plight, the Court granted intervener status to the Canadian Civil Liberties Association [CCLA] and the Justice for Children and Youth [JFCY] who provided submissions on the balancing of constitutional rights and the risks faced by children-in-care like Mr. Abdi.

[4] The Respondent argues that the MD referral decision is a routine decision and is a direct result of Mr. Abdi's criminal conduct and the provisions of the *Immigration and Refugee Protection Act* [IRPA]. The Respondent argues that the MD has limited discretion in the circumstances and they argue that any *Charter* considerations were properly balanced.

[5] For the reasons that follow, I have concluded that the MD failed to properly consider the record before her and, in particular, she failed to properly assess the *Charter* arguments raised by Mr. Abdi. Under s.3(3) of the IRPA, which incorporates general principles of constitutional law, the MD was statutorily mandated to render a decision consistent with the *Charter.* The MD failed to consider any facts which would allow this Court to determine if the MD rendered a decision in keeping with the *Charter*. Accordingly, I am allowing this judicial review as the decision of the MD does not meet the test set out in *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*] of "justification, transparency, and intelligibility."

II. Background

[6] Mr. Abdi was born on September 17, 1993 in Saudi Arabia. His father was from Saudi Arabia and his mother was from Somalia. From the information on record, it appears that Mr. Abdi's father was never a part of his life.

[7] Mr. Abdi lived in Saudi Arabia for the first two years of his life then lived in a United Nations Refugee Camp in Djibouti for four years along with his mother, sister and two ants. Mr. Abdi and his family were recognized as Convention refugees by the United Nations.

[8] Sadly his mother died while at this refugee camp.

[9] Mr. Abdi has never lived in Somalia. He does not speak the language or know the culture or customs of either Somalia or Saudi Arabia. He has no family in either country.

[10] In August 2000, Mr. Abdi arrived in Canada from Djibouti with his aunts and sister as sponsored refugees. They were originally settled in Cape Breton, Nova Scotia but were later moved to Halifax to allow them to access additional services.

[11] Shortly after his arrival in Canada, in 2001, Mr. Abdi was taken into custody by the DCS. He spent the rest of his childhood in the care of the DCS. In 2003 the DCS was granted permanent care and custody of Mr. Abdi.

[12] During his time in the care of DCS, Mr. Abdi was placed in 31 different foster homes. Grade 6 was the highest level of education he obtained. By 13 years of age he started getting into trouble with the law and spent time in a number of group homes in various cities. Over time, he compiled a youth criminal record.

[13] In 2005 Mr. Abdi's aunt attempted to apply for citizenship for Mr. Abdi. However the DCS intervened on the basis that as a ward of the state only DCS could apply for citizenship. In 2008, Mr. Abdi's aunt unsuccessfully applied to the Nova Scotia courts for a variation of the permanent custody order. In this application she also raised the issue of Mr. Abdi's lack of citizenship.

[14] In 2008, the record shows concerns within the DCS about "regularizing" Mr. Abdi's status for which DCS retained external legal counsel. In 2010 legal counsel advised DCS that Mr. Abdi's youth criminal record could prohibit him from becoming a citizen.

[15] In July 2011, Mr. Abdi's social worker provided external legal counsel with the information to process his citizenship application.

[16] In May 2013, external legal counsel advised Mr. Abdi, who was then 19 years of age, that he was ineligible for citizenship because of his criminal record.

[17] In July 2014 Mr. Abdi entered guilty pleas to charges of aggravated assault and assaulting a police officer with a weapon for which he was sentenced to a 4.5 year custodial sentence and a one year concurrent sentence. These are the offences which gave rise to inadmissibility proceedings under the IRPA.

[18] In 2016, a report was prepared pursuant to s.44(1) of the IRPA finding that there were reasonable grounds to believe that Mr. Abdi was inadmissible to Canada under s.36(1) of the IRPA. Subsequently, in 2016, a Canada Border Services Agency [CBSA] Manager and Delegate of the Minister of Public Safety and Emergency Preparedness referred Mr. Abdi to the Immigration Division [ID] pursuant to s.44(2) of the IRPA for an admissibility hearing.

[19] The 2016 referral decision was overturned by this Court in *Abdi v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 950 [*Abdi I*] in October 2017. The Court concluded that

the decision maker erred by relying on protected youth records under the *Youth Criminal Justice Act* [*YCJA*].

[20] In the redetermination decision of January 3, 2018, the MD again referred Mr. Abdi to the ID for an admissibility hearing.

III. Minister's Delegate Decision Under Review

[21] Mr. Abdi, through legal counsel, provided detailed submissions to the MD including submissions with respect to the impact of the *Charter* and international law. Mr. Abdi also argued that s.44(2) of the IRPA was unconstitutional.

[22] In her decision, the MD states that she considered the following factors in making her decision: length of residence; submitted humanitarian and compassionate [H&C] grounds; severity of crimes; current behaviour; and risk of re-offence and reintegration potential.

[23] The MD noted positive factors weighing in favour of Mr. Abdi, including that he has accepted responsibility for his crimes, completed recommended programs during his incarceration, was transferred from a maximum to a medium security facility, and has had no violent incidents since the transfer.

[24] The MD then considered the negative factors including Mr. Abdi's convictions for serious and violent crimes. Though the MD considered a report from Correctional Services Canada [CSC] which recommended supervised programs in the community, she noted a

community assessment by CSC which indicated that he had “high static and dynamic risk factors.” The MD also noted that Mr. Abdi’s potential for reintegration was assessed as low.

[25] Finally, the MD considered inconsistencies in Mr. Abdi’s application. In 2016 Mr. Abdi indicated that both of his parents were murdered. However, in a more recent affidavit, he stated that his parents divorced and his mother died in a refugee camp in Djibouti. This information was corroborated by an affidavit submitted by Mr. Abdi’s aunt. The aunt, and Mr. Abdi’s sister, also noted that Mr. Abdi and his sister have had no contact with their father.

[26] The MD concluded that based on the negative aspects of the case, the s.44(1) report was well-founded and she recommended that the case be referred to the ID for an admissibility hearing.

IV. Issues

[27] Based upon the submissions of the parties, the following issues arise:

A. Is the April 5, 2018 affidavit of Mr. Abdi admissible?

B. Are the expert affidavits admissible?

C. Did the redetermination process raise a reasonable apprehension of bias?

D. Was the redetermination process procedurally unfair?

E. Was the redetermination decision substantively reasonable?

F. Was the MD required to consider the *Charter*?

G. Is the MD decision inconsistent with international law and the *Charter*?

H. Is there a constitutional question?

I. Are there questions for certification?

V. Standard of Review

[28] The standard of review for the procedural fairness allegations in this case is correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43 [*Khosa*]*; Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 54-56).

[29] The standard of reasonableness applies to the MD's exercise of discretion on non-constitutional grounds (*Sharma v Canada (Public Safety and Emergency Preparedness),* 2016 FCA 319 at para 15 [*Sharma*]).

[30] With respect to the constitutional issues raised, in *Doré v Barreau du Québec*, 2012 SCC 12 at para 7 [*Doré*], the Court held that the standard of review is reasonableness as it relates to the decision-maker's balancing of constitutional rights.

[31] The constitutional challenges to the provisions of the IRPA are reviewable on a correctness standard (*Doré*, at para 43).

VI. Analysis

A. *Is the April 5, 2018 affidavit of Mr. Abdi admissible?*

[32] Mr. Abdi's Further Affidavit, affirmed on April 5, 2018, adds to his previous Supplemental Affidavit of January 25, 2018 and his original affidavit of December 6, 2017. At

paragraph 2 of his Further Affidavit, he states that the affidavit is to provide documents not included in the Certified Tribunal Record [CTR]. As well, he makes submissions regarding the continued reliance of the Respondent on protected youth records. He also seeks to replace an unsworn letter with a sworn affidavit. Finally he also seeks to introduce documents regarding access to information requests which relate to the breach of procedural fairness matters he raises.

[33] The Respondent objects to this affidavit being considered by the Court because it presents new evidence not before the decision-maker. However, the Respondent submits that the affidavit should be considered to emphasize the inconsistency between Mr. Abdi's argument—that but for the acts and omissions of Nova Scotia, he would have obtained Canadian citizenship—and the evidence on the record, which shows that Nova Scotia took steps but Mr. Abdi did not cooperate with these steps.

[34] The general principle is that the record that was before the tribunal, being the CTR, is the record that the Court considers on judicial review. This record is comprised of the information in the decision-maker's possession at the time the decision is made (*Canada (Public Sector Integrity Commissioner) v Canada (Attorney General)*, 2014 FCA 270 at para 4 [*Public Sector Integrity Commissioner*]).

[35] An exception exists to allow a reviewing Court to consider documents outside those considered by the administrative decision-maker when an issue of procedural fairness is raised. In which case, the "relevant documents" may include documents that were not before the

decision-maker if they are related to an allegation of breach of procedural fairness or bias (*Nguesso v Canada (Citizenship and Immigration),* 2015 FC 102 at paras 88-90).

[36] However, these allegations must be supported by an adequate factual foundation (*Public Sector Integrity Commissioner*, at para 4; *Access Information Agency Inc. v Canada (Attorney General),* 2007 FCA 224 at paras 17-21).

[37] Here, Mr. Abdi relies on the Further Affidavit in support of his submissions relating to: (1) the ongoing possession, inclusion, and redaction of youth records; (2) the refusal to replace an unsworn letter with a sworn affidavit; and, (3) the decision of CBSA to arrest him.

[38] Regarding the youth records, the Court has the redacted records before it in the CTR. Mr. Abdi seeks to include correspondence which shows (i) that he requested the offending documents be removed and (ii) the Respondent's response. However these documents do not assist on the procedural fairness allegation because the existing record contains the information which form the basis of Mr. Abdi's allegations.

[39] On the refusal to replace an unsworn letter with a sworn affidavit, both submissions are in the CTR and the Supplemental Affidavit. The Court can consider whether it was procedurally fair for the MD to rely on the unsworn affidavit based upon the CTR as it is. The Court need not consider the Applicant's request and the Respondent's response to replace the unsworn material with the sworn material.

[40] Finally, the decision by the CBSA to arrest Mr. Abdi is a separate and reviewable administrative decision which is not relevant to the current judicial review. Any procedural impropriety in the arrest decision is therefore not at issue here.

[41] It is not necessary for the Court to consider the contents of Mr. Abdi's April 5, 2018 affidavit.

B. *Are the expert affidavits admissible?*

[42] Mr. Abdi filed two expert affidavits from social science experts. One, from Rebecca Bromwich, sworn to on April 1, 2018. Ms. Bromwich is the Director of the Graduate Diploma on Conflict Resolution Program at Carleton University, and a Member of the Ontario Youth Justice Advisory Panel. The other affidavit is from Kiaras Gharabaghi, sworn to on April 4, 2018 who is the Director of the School of Child & Youth Care and an Associate Professor in Immigration & Settlement Studies, at Ryerson University. Both affidavits speak to the plight of youth in care and their particular vulnerability in comparison to other children. They discuss the phenomenon of children in care "crossing-over" to the criminal justice system.

[43] The Respondent objects to these affidavits and argues that they do not meet the tests of reliability and necessity as outlined in *White Burgess Langille Inman v Abbott and Haliburton Co.*, 2015 SCC 23.

[44] The Applicant argues that these affidavits provide contextual evidence of Mr. Abdi's experience as a racialized immigrant in foster care and therefore are of assistance to the Court in the context of understanding Mr. Abdi's profile and experience.

[45] I have determined that these affidavits do not meet the reliability and necessity test. I also note that these affidavits were not before the MD. Therefore in the circumstances, I decline to receive these affidavits into evidence.

C. *Did the redetermination process raise a reasonable apprehension of bias?*

[46] Mr. Abdi argues that the communications between various CBSA officials in relation to his arrest by CBSA following the decision in *Abdi I* demonstrates a reasonable apprehension of bias. He submits that the decision-makers involved in the decision reviewed in *Abdi I* were also involved in his arrest and were involved in the redetermination decision under review. This, he argues, raises a reasonable apprehension of bias.

[47] The test for bias is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude" (*Committee for Justice and Liberty et al. v National Energy Board et al.*, [1978] 1 SCR 369 at 385 [*Committee for Justice and Liberty*]).

[48] The threshold to establish bias is high. The party alleging bias must do more than "hint" that the outcome is tainted (*Turoczi v Canada (Citizenship and Immigration)*, 2012 FC 1423 at paras 11-17 [*Turoczi*]). There must be an evidentiary foundation in support (*Zundel v Citron*,

[2000] 4 FC 225 (FCA) at para 36; *Southern Chiefs Organization Inc. v Dumas*, 2016 FC 837 at para 46).

[49] Here, Mr. Abdi's arguments are largely speculative, pointing only to perceived associations between the MD and CBSA officials. While the MD and the CBSA officials share a common employer, there is no evidence that the MD consulted with others before rendering her decision.

[50] As noted above, the decision by CBSA to arrest Mr. Abdi is not at issue in this judicial review. Further, the actions of CBSA in taking Mr. Abdi into custody, without more, does not provide an objective indication of bias, sufficient to meet the high threshold set out in *Committee for Justice and Liberty.*

[51] I conclude that there is insufficient evidence to support a reasonable apprehension of bias finding.

D. *Was the redetermination process procedurally unfair?*

[52] Mr. Abdi raises two issues with respect to procedural fairness: (1) the inclusion of redacted materials in the CTR is prejudicial; and, (2) the MD made negative credibility findings and should have convoked an oral hearing.

[53] The duty of fairness in a redetermination consideration is “not at the high end of the spectrum in the context of decisions made pursuant to subsections 44(1) and (2)” (*Sharma*, at para 29).

(1) Redacted Material in the CTR

[54] In *Abdi I*, the Court found that information protected by the provisions of the *YCJA* should not have been relied upon by the decision-maker. In this judicial review, Mr. Abdi submits that the CTR should not contain any *YCJA* material with or without redactions. Mr. Abdi argues that the presence of even redacted material is prejudicial because the decision-maker is aware of existence of the material and that alone may have had an impact on the decision. Further, he argues that he could not meaningfully respond to this material since it was redacted.

[55] To succeed on a prejudice argument Mr. Abdi must demonstrate that the MD’s decision was influenced by the redacted material—and he must be able to show an evidentiary basis for this assertion.

[56] There is no indication that the redacted *YCJA* material influenced the MD’s decision. Further, the *YCJA* material was redacted because of the Court’s holding in *Abdi I*. Mr. Abdi need not be afforded the opportunity to respond to these redactions because they are not material—and in fact, are irrelevant and improper—in the MD’s assessment. They did not form the “case to be met” (*Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 57), and therefore it was not prejudicial to Mr. Abdi for the CTR to include these materials.

[57] Furthermore, the issue of the purging or the destruction of *YCJA* materials is beyond the scope of this judicial review.

[58] I conclude that there was no violation of Mr. Abdi's procedural fairness rights with the inclusion of redacted materials in the record.

(2) Oral Hearing

[59] Mr. Abdi argues that he should have been afforded an oral hearing to address the credibility issue regarding his parents referenced by the MD in her decision. He relies upon the Supreme Court's decision in *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177 at para 59 [*Singh*], where the Court indicated that where a "serious issue" of credibility arises, it is a principle of fundamental justice that an oral hearing be convoked.

[60] However the context was different in *Singh*, where the issue was not a referral, but rather a constitutional challenge to provisions of the former *Immigration Act* relating to procedures for determination of Convention refugee status.

[61] In my view, the more relevant decision, in the context of a referral case, is the Federal Court of Appeal decision in *Canada (Minister of Public Safety and Emergency Preparedness) v Cha,* 2006 FCA 126 at para 52, where the Court detailed the participatory rights which apply, as follows:

- provide a copy of the immigration officer's report to the person

- inform the person of the allegation(s) made in the immigration officer's report, of the case to be met and of the nature and possible consequences of the decision to be made
- conduct an interview in the presence of the person, be it live, by videoconference or by telephone
- give the person an opportunity to present evidence relevant to the case and to express his point of view

[62] Applying those considerations here, Mr. Abdi did receive disclosure, and he was interviewed by the officer who completed the s.44(1) report for the first referral decision. He was interviewed again for the second referral decision, though he notes that this interview was short. He was aware that his submissions including the unsworn letter and his affidavit were before the decision-maker, and he had the opportunity in his submissions to explain the discrepancy and to correct the record. The fact that he MD noted the inconsistency does not amount to a "serious credibility" finding against Mr. Abdi.

[63] Overall I find that Mr. Abdi was afforded the necessary procedural fairness rights as prescribed by *Sharma* and *Cha*. Accordingly, and considering the relaxed procedural fairness obligations which apply in a referral case, I see no error warranting the intervention of the Court.

E. *Was the redetermination decision substantively reasonable?*

[64] Mr. Abdi raises two main issues with the substantive reasonableness of the MD's decision. First, he argues that the MD failed to consider the totality of a CSC report. Secondly, Mr. Abdi submits that the MD failed to give proper weight to H&C factors.

[65] These arguments amount to a request for this Court to reweigh the evidence, which the Court cannot do on judicial review (*Khosa*, at para 61). While there is no error in this aspect of the MD's decision, this judicial review is allowed as a result of the failure of the MD to consider the *Charter* values.

F. *Was the MD required to consider the Charter?*

(1) Positions of the Parties

[66] Mr. Abdi argues that in making her decision, the MD was required to balance the statutory objectives of the IRPA with applicable *Charter* values.

[67] The statutory objectives that Mr. Abdi argues are relevant are contained in s. 3 of IRPA and include: family reunification; integration of permanent residents; protection of public safety; and support for the social and economic well-being of refugees. He emphasizes that public safety is not the only relevant statutory objective.

[68] Mr. Abdi argues that his circumstances engage sections 15(1), 12, 7, 2(d) of the *Charter.* He argues that the balancing which was required by the MD should have resulted in the issuance of a warning letter.

[69] The Respondent on the other hand argues that the referral decision is a routine administrative decision with a narrow issue for consideration by the MD. The Respondent argues that there was no obligation on the MD to go outside s. 44 of IRPA and that it was reasonable for

the MD to prioritize security. The Respondent disagrees that the *Charter* or international law considerations are applicable.

[70] The intervenor CCLA made submissions that despite the uncertainty in the scope of the MD's discretion, she was required to consider the *Charter*. It also argues that the fact that the MD considered H&C factors is not a substitute for *Charter* considerations. In particular it emphasizes that in Mr. Abdi's case the failure of the MD to consider his status as a ward of the state and the downstream impact of the loss of his permanent resident status is enough to engage s.15 of the *Charter.*

[71] In its submissions, the JFCY argues that the historical and contextual framework of Mr. Abdi's experience as a youth in care, his multiple intersecting grounds of vulnerabilities, and the fact that he has been disadvantaged by the actions of the state, needed to be considered by the MD in the *Charter* context.

(2) Statutory Discretion and Role of the MD

[72] The first issue for consideration is what discretion the MD had, if any, in making her decision. Specifically, in exercising this discretion, was the MD required to consider Mr. Abdi's *Charter* submissions?

[73] The law is clear that administrative decision-makers, like the MD, must act consistently with the *Charter* when exercising their statutory discretion (*Slaight Communications Inc. v Davidson*, [1989] 1 SCR 1038 at 1077-1078 per Lamer J; *Chamberlain v Surrey School District*

No. 36, 2002 SCC 86 at para 71*; Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23 at paras 62-75).

[74] The *Charter* is a fundamental constraint on the action of an administrative decision-maker (*Baker v Canada*, [1999] 2 SCR 817 at para 55 [*Baker*]. Specifically, administrative decision-makers must "always consider fundamental values" when exercising their discretion and are "empowered, and indeed required, to consider *Charter* values within their scope of discretion" (*Doré*, at para 35). Therefore, decision-makers must render decisions in accordance with the *Charter* by considering *Charter* values themselves.

[75] In addition, the IRPA, the statute under which the MD was acting, incorporates the general concept that the MD must consider and render decisions in accordance with the *Charter* where it states at s.3(3)(d) as follows:

3 (3) This Act is to be construed and applied in a manner that	**3 (3)** L'interprétation et la mise en oeuvre de la présente loi doivent avoir pour effet:
[…]	[…]
(d) ensures that decisions taken under this Act are consistent with the Canadian *Charter of Rights and Freedoms*, including its principles of equality and freedom from discrimination and of the equality of English and French as the official languages of Canada;	**d)** d'assurer que les décisions prises en vertu de la présente loi sont conformes à la *Charte canadienne des droits et libertés*, notamment en ce qui touche les principes, d'une part, d'égalité et de protection contre la discrimination et, d'autre part, d'égalité du français et de l'anglais à titre de langues officielles du Canada;

[76] In the context of referral decisions, the Supreme Court recently accepted that the MD has *some* discretion *not* to refer a well-founded report to the ID in serious criminality cases such as Mr. Abdi's (*Tran v Canada (Public Safety and Emergency Preparedness),* 2017 SCC 50 at para 6 [*Tran*]). It is the exercise of discretion that "triggers" the necessity to consider *Charter* implications (*Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at para 62; *Deri v Canada (Citizenship and Immigration),* 2015 FC 1042 at para 46).

[77] Further the permissive language used in section 44(2) of the IRPA- the word "may" - confirms that the MD had options available to her in reaching her decision:

44(2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.	**44(2)** S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi.

[78] In exercising discretion, the MD is the legal and factual merits-decider. The MD must address relevant issues and compile a record to allow the Court to properly conduct its judicial review function (*Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v Laseur,* 2003 SCC 54 at para 30 [*Martin*]. The Court cannot conduct

judicial review of *Charter* issues in a factual vacuum (*Mackay v Manitoba*, [1989] 2 SCR 357 at 364 [*Mackay*]).

[79] Based on the above, I am satisfied that the MD was required to consider the *Charter* implications to Mr. Abdi. The MD was also required to render a decision on these *Charter* considerations, which this Court, on judicial review, could then review.

(3) *Charter* Framework

[80] In *Doré*, the Court outlined the framework by which judicial review courts are to determine whether the "*Charter* values" underlying a grant of discretion have been appropriately considered. In *Doré*, at paras 55-58, the Court noted that decision-makers are bound to balance *Charter* values arising before them with the statutory objectives which are at play. The main question is how the *Charter* value at issue will best be protected in view of the statutory objectives (*Doré*, at para 56). If the *Charter* value is not appropriately balanced with statutory objectives, the decision is unreasonable (*Doré*, at para 58).

[81] The *Doré* framework was recently reaffirmed in *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32, at para 57 [*TWU*] where the Supreme Court states that "…*Charter* rights are no less robustly protected under an administrative law framework" as developed by *Doré*. The Court went on to state in paragraphs 58 and 59:

> [58] Under the precedent established by this Court in *Doré* and *Loyola*, the preliminary question is whether the administrative decision engages the *Charter* by limiting *Charter* protections — both rights and values (*Loyola*, at para. 39). If so, the question becomes "whether, in assessing the impact of the relevant *Charter*

> protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play" (*Doré*, at para. 57; *Loyola*, at para. 39). The extent of the impact on the *Charter* protection must be proportionate in light of the statutory objectives.
>
> [59] *Doré* and *Loyola* are binding precedents of this Court. Our reasons explain why and how the *Doré/Loyola* framework applies here. Since *Charter* protections are implicated, the reviewing court must be satisfied that the decision reflects a proportionate balance between the *Charter* protections at play and the relevant statutory mandate. This is the analysis we adopt.

[82] This is the test which governs Mr. Abdi's circumstances and in applying this analysis to the MD's decision it is clear that there are a number of deficiencies in her decision. Most blatantly, the MD's decision discloses no indication that the MD even considered *Charter* values. This is directly contrary to framework outlined in *Doré* and *TWU*, and the provisions of IRPA, all of which requires the MD to consider *Charter* values.

[83] As a result, this Court on judicial review cannot do what *Doré* and *TWU* mandate, which is to review the balancing of the statutory objectives and the *Charter* rights and values by the MD. Here the MD did not make a determination on whether the *Charter* rights and values put forward by Mr. Abdi were "engaged". In fact, the *Charter* is not mentioned anywhere in the MD's cover letter outlining the issues she considered or in the body of her decision. This is so despite Mr. Abdi's extensive submissions on the *Charter*. This Court cannot therefore properly conduct its review role to consider if the MD's balancing was proportionate since it is impossible to determine if the *Charter* issues were even weighed in the balance (*Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 [*Loyola*] at para 68).

[84] The Court, on judicial review, does not conduct a *de novo* review of this balancing exercise, but rather reviews on a reasonableness standard whether the balancing was reasonable *(Doré*, at paras 45, 51*).* However the Court cannot meaningfully do so in the absence of any evidence of consideration of the *Charter* values at play. *Charter* values cannot be considered, as noted above, in a factual vacuum (*Mackay*, at 364).

[85] I acknowledge that it is possible for a decision maker to implicitly consider *Charter* values. In the companion case to *TWU*, *Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33 at para 29 [*TWU Ontario*], the Court concluded that despite the fact that there were no reasons offered by the decision-maker, the Court could conduct judicial review based on the reasons which "could be offered" and the record. This is consistent with the Supreme Court's previous findings in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 14 [*Newfoundland Nurses*] that courts should conduct a holistic review of administrative decisions with regard to the record.

[86] That is not an option in this case because there is no evidence that the MD implicitly considered relevant *Charter* values pleaded by Mr. Abdi. There is no consideration by the MD of Mr. Abdi's facts which could engage *Charter* rights. Again, while I acknowledge that there is no obligation for a decision-maker to consider every issue, there must be some evidence that the MD considered the *Charter* issues, or facts giving rise to an engagement of *Charter* values, in light of the supremacy of the Constitution.

[87] Here, Mr. Abdi provided detailed submissions on his particular and unique facts, including the fact that he was a long-term ward of the state. With respect to his lack of Canadian citizenship, he highlighted the fact that the DCS intervened to remove his name from his aunt's citizenship application. These factors may be relevant considerations with respect to a s.15 *Charter* value of non-discrimination in the MD's referral decision. But they were not considered. There is no indication in the record or in the MD's decision that she turned her mind to any of these considerations.

[88] This situation is unlike *TWU Ontario*, where the Court noted that it could look to "reasons which could be offered" in absence of any explicit reasons. In that case, the Court concluded that it was clear on the evidence that the decision-makers "…were alive to the question of the balance to be struck between freedom of religion and their statutory duties" (*TWU Ontario*, at para 28). In contrast here, there is no evidence that the decision-maker was "alive" to the issues.

[89] Rather, this case is more similar to *Lemus v Canada (Citizenship and Immigration)*, 2014 FCA 114 at para 24 [*Lemus*], where the Federal Court of Appeal noted that the decision under review did not analyze relevant facts. The Court noted the following:

> While the Officer noted the existence of subsection 25(1.3), she did not look at the facts relevant to the matters raised in the application for refugee protection that might have also been relevant to whether requiring the Lemus family to return to El Salvador would cause unusual and undeserved, or disproportionate hardship.

[90] In *Lemus* the Court determined that it would not be appropriate to delve into the record and reconstruct the decision. That conclusion was supported by the Supreme Court's decision in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 [*Alberta Teachers*] where at para 55, the Court noted that:

> [i]n some cases, it may be that a reviewing court cannot adequately show deference to the administrative decision maker without first providing the decision maker the opportunity to give its own reasons for the decision. In such a case, even though there is an implied decision, the court may see fit to remit the issue to the tribunal to allow the tribunal to provide reasons.

[91] In other words, despite *Newfoundland Nurses,* there is no open invitation for courts to reconstruct reasons where they are silent on important, relevant facts; or, where there are "no dots on the page" to connect: *Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431. This is the error identified in *Lemus*, and according to *Alberta Teachers*, is a basis to remit to the MD, and not a basis for this Court to reconstruct the reasons.

[92] In fact, the Supreme Court most recently confirmed in *Delta Air Lines Inc. v Lukács*, 2018 SCC 2 at para 24 that courts cannot supplant the reasons actually provided by a decision-maker. Here, the MD provided exhaustive and detailed reasons on other elements of the claim, but left out the significant issue of the *Charter*. While it may appear to be a situation where the Court could simply fill in its own *Charter* analysis, the effect of doing so would supplant the MD's reasons, which were exhaustive on every other matter but the *Charter*. If *Doré* is correct, and administrative decision-makers are able to determine *Charter* considerations, the Court should allow the MD to do so without intervention.

[93] In absence of any explicit or implicit reasons, and although *Doré* counsels deference, this Court cannot defer to nothing. *Doré* and *TWU* make it clear that administrative decision-makers must conform to the *Charter* by engaging with it. It is the MD's responsibility, on first instance, to consider the *Charter* and render a decision in accordance with it. In this case, there is no engagement with the *Charter*.

[94] *Dunsmuir* indicates that a reasonableness review must be concerned with the "process of articulating the reasons" (*Dunsmuir*, at para 47). Here, the reasons are silent on important *Charter* considerations, and the decision-maker has immunized her decision from review (*Vavilov v Canada (Citizenship and Immigration)*, 2017 FCA 132 at para 39). Accordingly the decision is not justifiable, transparent, and intelligible according to *Dunsmuir*.

G. *Is the MD decision inconsistent with international law and the Charter?*

[95] Mr. Abdi relies upon s. 3(3)(f) of the IRPA to argue that the MD had to make her decision consistent with international law norms. This provision provides:

3(3) This Act is to be construed and applied in a manner that	**3(3)** L'interprétation et la mise en oeuvre de la présente loi doivent avoir pour effet :
[…]	[…]
(f) complies with international human rights instruments to which Canada is signatory.	**f)** de se conformer aux instruments internationaux portant sur les droits de l'homme dont le Canada est signataire.

[96] The same considerations outlined above regarding the lack of consideration by the MD to the *Charter* apply to this issue as well. The MD decision is silent on Mr. Abdi's submissions.

Accordingly the referral decision does not meet the *Dunsmuir* test with respect to international law considerations.

H. *Is there a constitutional question?*

[97] Mr. Abdi filed a Notice of Constitutional Question on May 28, 2018, challenging ss. 25, 36(1), 44(1), 44(2), 45, 46, 48, 49 and 64 of the IRPA under ss. 2(d), 7, 12, and 15(1) of the *Charter*.

[98] For the reasons outlined above, this judicial review is allowed on the grounds that the MD did not consider the various *Charter* issues raised by Mr. Abdi and therefore the decision of the MD is not "justified, transparent, and intelligible" as required by *Dunsmuir*.

[99] Since this is the dispositive matter on judicial review, there is no need to address the larger constitutional issues posed by Mr. Abdi.

[100] Further I note that the direction of the Supreme Court that if a case can be disposed of on another ground, such as an administrative law ground, courts should not proceed to the constitutional challenge (*Tremblay v Daigle*, [1989] 2 SCR 530 at 571; *R. v Morgentaler*, [1988] 1 SCR 30 at 51; *Skoke-Graham v The Queen*, [1985] 1 SCR 106 at 121-22; *State Farm Mutual Automobile Insurance Company v Privacy Commissioner of Canada*, 2010 FC 736 at para 119).

[101] The lack of consideration of *Charter* values is, according to *Doré*, an administrative law error. In *Doré*, the Court noted that its approach to judicial review of discretionary decisions

involving *Charter* issues invited a "richer conception of administrative law" (*Doré*, at para 35 (emphasis added)) and introduced a "more flexible administrative approach to balancing *Charter* values" (*Doré*, at para 37 (emphasis added)). *Doré* merges reasonableness review with review of constitutional discretion.

[102] Further, this Court is not in a position to answer the constitutional questions posed which were not presented to the MD. Although Mr. Abdi did challenge s.44(2) in his submissions to the MD, this was not raised in his Notice of Application, and Mr. Abdi did not raise the other provisions before the MD which he now challenges. This is problematic as Parliament has appointed the MD as the merits-decider and tasked it with compiling a fulsome record: *Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2014 FCA 245 at para 46 [*Forest Ethics*]; *Okwuobi v Lester B. Pearson School Board*, 2005 SCC 16 at paras 38-40 [*Okwuobi*]. *Charter* issues should not be decided in the abstract in absence of such a record (*Forest Ethics*, at para 55).

[103] Despite this, Mr. Abdi argues that since he seeks a declaration on this judicial review, the Court can assume jurisdiction on these questions. Mr. Abdi relies upon the *United States of America v Shulman*, 2001 SCC 21 [*Shulman*]. However *Shulman* was decided in the context of appellate review. In the context of judicial review, the Supreme Court has made it clear that the unavailability of a remedy before a decision-maker is no reason to bypass that decision-maker, and proceed straight to judicial review (*Okwuobi*, at para 44).

[104] I therefore decline to answer the constitutional challenge to various provisions of the IRPA because (1) the matter can be decided on administrative law grounds and (2) the constitutional questions are largely raised for the first time before this Court without the benefit of an evidentiary background.

I. *Are there questions for certification?*

[105] Mr. Abdi proposes nine questions for certification. The Respondent objects to the certification of any of the questions.

[106] The test for certification is outlined in *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 at para 46 [*Lunyamila*] as follows:

> The question must be a serious question that is dispositive of the appeal, transcends the interests of the parties and raises an issue of broad significance of general importance. This means that the question must have been dealt with by the Federal Court and must arise from the case itself rather than merely from the way in which the Federal Court disposed of the application. An issue that need not be decided cannot ground a properly certified question (*Lai v. Canada (Public Safety and Emergency Preparedness)*, 2015 FCA 21 (CanLII), 29 Imm. L.R. (4th) 211 at para. 10).

[107] Additionally, a certified question will only be sufficiently general and important where the law is unsettled on the question (*Mudrak v Canada (Citizenship and Immigration)*, 2016 FCA 178 at para 36; *Leite v Canada (Citizenship and Immigration)*, 2016 FC 1241 at para 28).

[108] Mr. Abdi poses the following questions:

1. Does the inclusion or possession of material that was not accessed in accordance with the *Youth Criminal Justice Act* render an administrative decision-maker's decision unreasonable even if those materials are redacted or not directly relied upon by the decision-maker?
2. In determining whether to refer an otherwise well-founded inadmissibility report on grounds of serious criminality to the Immigration Division for an admissibility hearing, does the Delegate's scope of discretion, in s.44(2) of the IRPA, permit or require an analysis of the full circumstances of a long-term permanent [resident] akin to the *Ribic* factors used by the Immigration Appeal Division?
3. In exercising their discretion under s.44(2) of the IRPA, is the Delegate obliged to consider whether their decision has potential to limit a *Charter* right or value in accordance with the analysis from *Doré/Loyola*? If so, in what circumstances is the obligation triggered?
4. When a party asserts that the Delegate's decision under s.44(2) has the potential to limit a *Charter* protection, must this issue be directly addressed in the reasons of the Delegate in order for the decision to be reasonable?
5. Are s.15 *Charter* protections engaged at the stage of determining whether a permanent resident is inadmissible to Canada where that person is a former Crown ward who did not become a Canadian citizen while in care?
6. Are s.7 *Charter* protections engaged at the stage of determining whether a permanent resident is inadmissible to Canada and if so, would section 7 be engaged where the deprivation of the right to liberty and security of the person of a permanent resident arises from their loss of status?

7. Has there been either a significant development in the law or circumstances/evidence that fundamentally shift the parameters of the debate such that *Chiarelli* may be reconsidered, specifically the holding that the deportation of a permanent resident who has been convicted of a serious criminal offence, despite their particular circumstances, is in accordance with the principles of fundamental justice?
8. Is an admissibility decision that causes or will likely cause the loss of permanent resident status a "treatment" that engages s.12 of the *Charter*?
9. Does s.2(d) of the *Charter* provide "*Charter* protections" that include the international human right to non-arbitrary interference with the family protected by Articles 17 and 23(1) of the International Covenant on Civil and Political Rights?

[109] Question 1 involves the *YCJA* and Mr. Abdi's argument that the MD relied on redacted records. This issue is not determinative of this matter nor does it transcend the interests of the parties here.

[110] Question 2 involves the scope of the MD's discretion under s.44(2). The Respondent argues that the issue on this judicial review is not the scope of any discretion, but rather if the discretion exists and if it was reasonably exercised. For the reasons outlined above and based upon *Tran* I have determined that the MD does have discretion. Therefore the response to this question would not be dispositive of the appeal, because it does not arise on the facts of the case. It should not be certified (*Varela v Canada (Citizenship and Immigration),* 2009 FCA 145 at para 29 [*Varela*]).

[111] Although Question 3 would be dispositive of an appeal, and it transcends the interests of the parties, the law on this question is settled. *Doré,* at para 24 holds that administrative decision-makers must always act consistent with *Charter* values. Further s.3(3)(d) of the IRPA imposes an obligation on all decision-makers under the IRPA to act consistently with the *Charter*. Accordingly, there is no need to certify a question to the Federal Court of Appeal when, as a matter of constitutional law, all decision-makers must consider whether their decisions are consistent with the *Charter*.

[112] Question 4 involves whether an MD is required to specifically address, in her reasons, an argument raised by a party that a particular decision has the potential to limit a *Charter* protection. Again the law on this issue is settled. A decision-maker does not need to address every argument raised by a party (*Newfoundland Nurses,* at para 16). In the context of cases engaging *Charter* values, the Supreme Court recently confirmed that there is no special obligation to provide reasons depending on the context of the decision-maker, and that courts could look to the reasons which "could be offered" in support of a decision (*TWU Ontario,* at paras 28-29).

[113] Further, in this case, the question is not whether the MD was required to provide reasons. Instead, it was whether there were any facts considered which indicated the *Charter* issue were analyzed. As such, the issue of whether there was an obligation to provide reasons is not dispositive of an appeal and does not squarely arise from the issues considered in the case.

[114] Accordingly, the law is settled and the question should not be certified.

[115] The remainder of the questions sought to be certified by Mr. Abdi pertain to his challenge to provisions of the IRPA, including whether *stare decisis* applies to bar his constitutional claims. These challenges, as noted above, need not be decided in this case. Accordingly, there is no need to certify these questions (*Lunyamila,* at para 46).

[116] In the circumstances I decline to certify any of the questions posed by the Applicant.

VII. Conclusion

[117] In order to meet the requirements of reasonableness the MD's decision must demonstrate justification, transparency and intelligibility (*Dunsmuir*, para 47). Considering the record before the MD and the significant submissions on the Charter issues raised by Mr. Abdi, the absence of any reference to the *Charter* in either the covering letter prepared by the MD or in her reasons does not allow this Court to properly review the decision.

[118] Therefore this judicial review is granted.

JUDGMENT in IMM-28-18

THIS COURT ORDERS that:

1. The application for judicial review is granted. The decision of the Minister's Delegate is set aside and the matter is remitted for redetermination by a different Delegate;

2. No question of general importance is certified; and

3. There will be no order as to costs.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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