Federal Court  Cour fédérale

Date: 20210629

Docket: IMM-6785-19

Citation: 2021 FC 683

Ottawa, Ontario, June 29, 2021

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

UYI JACKSON OBAZUGHANMWEN

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of the decision of the Minister's Delegate (a delegate of the Minister of Public Safety and Emergency Preparedness) to refer the Applicant, a permanent resident of Canada, for an admissibility hearing before the Immigration Division [ID] pursuant to paragraph 36(1)(a), paragraph 37(1)(a) and section 44 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

II. Facts

[2] The Applicant is a citizen of Nigeria. He came to Canada in 2003 and filed a refugee claim, which was refused in 2004. His wife (before they were married) also filed a refugee claim in 2003, which was accepted. They were married in October 2004, his wife sponsored him and he became a permanent resident in 2007. The couple now have three minor children, all Canadian citizens.

[3] In April 2009, the Applicant was convicted of sexual assault and sentenced to two years less a day. While he was incarcerated, his family moved into a small basement apartment because his wife could not afford their previous rent alone. The family also used food banks due to their financial difficulties. The Applicant also submits his wife and son suffer from chronic migraines.

[4] While incarcerated, the Applicant completed various rehabilitation programs. He completed his probation order in 2014 and the Sex Offender Maintenance Program. He submits, since then he has been active in his church and in the Nigeria-Canada Association of British Columbia.

[5] In 2015, the Applicant was convicted of fraud under $5,000 due to his involvement in an Advance Fee Lottery Scheme, in which seniors were duped into believing they had won lottery money. They were sent fraudulent cheques and asked to pay processing fees.

[6] The victim in this case paid the alleged processing fees, but the cheques did not clear. The fraud resulted in substantial losses.

[7] Two Reports were written pursuant to subsection 44(1) of *IRPA* by a Canada Border Services Agency [CBSA] Officer [CBSA Officer] [individually a Report, and collectively, the Reports].

[8] The first Report was under subsection 44(1) of *IRPA* and dated October 26, 2018. In the normal course, and as occurred here, this Report would be considered by a Minister's Delegate [MD]. This Report concerned serious criminality arising from the Applicant's conviction for sexual assault in 2009. It carried the potential for a referral by a MD to the ID for inadmissibility under paragraph 36(1)(a) of *IRPA*.

[9] If the Applicant is found inadmissible pursuant to paragraph 36(1)(a) of *IRPA*, he has the right of consideration on humanitarian and compassionate [H&C] grounds under subsection 25(1) of *IRPA*.

[10] The second Report dated May 9, 2019, concerned organized criminality. It was also written for consideration by a MD. This Report arose from the Applicant's conviction for fraud under $5,000 in relation to his fraudulent conduct in the Advance Fee Lottery Scheme. It carried the potential for a referral by a MD to the ID for inadmissibility under paragraph 37(1)(a) of *IRPA*.

[11] Individuals found inadmissible under paragraph 37(1)(a) are precluded from consideration for relief on H&C factors by subsection 25(1):

> 25 (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.
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> [Emphasis added]

[12] The Applicant received both Reports sent by the CBSA Officer by way of what the Respondent calls Procedural Fairness Letters (although they are short and in a standard form). Each Procedural Fairness Letter informed the Applicant a Report under subsection 44(1) of *IRPA* had been prepared, and that he may be found inadmissible pursuant to paragraph 36(1)(a) and/or paragraph 37(1)(a).

[13] The Procedural Fairness Letters gave the Applicant the opportunity to make written submissions "providing reasons why a removal order should not be sought. The submissions may include details relevant to your case, including, but not limited to the length of your stay in Canada, the location of family support and responsibilities, the conditions in your home country, your degree of establishment, your criminal history, any history of non-compliance and your current attitude, and any other relevant factors".

[14] Through counsel, the Applicant made two detailed submissions, dated August 16, 2019 and October 1, 2019, principally concerning the Report for serious criminality resulting from his conviction for sexual assault. The Applicant asked that neither matter be referred to the ID. The Applicant made H&C submissions, including submissions on the best interests of his three children [BIOC] under section 25(1).

[15] After receiving the Applicant's submissions, the CBSA Officer wrote a further report dated October 2, 2019, titled "Subsection 44(1) and 55 Highlights – Inland Cases (Short)" [Highlights Report]. The Highlights Report dealt with both earlier Reports and summarized the two submissions from the Applicant. In the Highlights Report, the CBSA Officer recommended the MD seek a deportation order in respect of the paragraph 37(1)(a) Report concerning organized criminality. In the alternative, the CBSA Officer recommended the MD seek a deportation order in respect of the paragraph 36(1)(a) Report concerning serious criminality. The Highlights Report referred to the H&C and BIOC, and other submissions of the Applicant.

[16] The two Reports, the Highlights Report and the Applicant's submissions were then sent to the MD for consideration.

III. Decision under review

[17] On October 16, 2019, the MD issued two referrals [Referrals] under subsection 44(2) of *IRPA*; each requested the ID to conduct an admissibility hearing. The admissibility hearing would determine if the Applicant is a person described under paragraph 36(1)(a) and/or paragraph 37(1)(a). The Highlights Report with its H&C and BIOC information formed part of

the record before the MD, as did the submissions provided by Applicant's counsel. The record also includes short notes dated October 16, 2019, prepared by the MD which briefly comment on both H&C and BIOC.

[18] These two Referrals are the subject of this application for judicial review.

[19] The relevant sections of *IRPA* are:

Serious criminality	**Grande criminalité**
36 (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	**36 (1)** Emportent interdiction de territoire pour grande criminalité les faits suivants:
(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;	**a)** être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;
…	…
Organized criminality	**Activités de criminalité organisée**
37 (1) A permanent resident or a foreign national is inadmissible on grounds of organized criminality for	**37 (1)** Emportent interdiction de territoire pour criminalité organisée les faits suivants:
(a) being a member of an organization that is believed on reasonable grounds to be or to have	**a)** être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle se livre ou

been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment, or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence, or engaging in activity that is part of such a pattern; or	s'est livrée à des activités faisant partie d'un plan d'activités criminelles organisées par plusieurs personnes agissant de concert en vue de la perpétration d'une infraction à une loi fédérale punissable par mise en accusation ou de la perpétration, hors du Canada, d'une infraction qui, commise au Canada, constituerait une telle infraction, ou se livrer à des activités faisant partie d'un tel plan;
…	…
Report on Inadmissibility	**Constat de l'interdiction de territoire**
Preparation of report	**Rapport d'interdiction de territoire**
44 (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.	**44 (1)** S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.
Referral or removal order	**Suivi**
(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	**(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

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.	circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi.
[Emphasis added]	[Je souligne]

IV. Issues

[20] The issue is whether the two Referrals should be set aside and remanded for reconsideration by a different MD directed to give robust consideration to H&C and BIOC factors in deciding whether to refer one or both Reports (under section 36 and/or 37) to the ID for an admissibility determination.

V. Analysis

[21] When this case was argued, the Respondent submitted as a preliminary issue that it was premature because the Applicant is only at the beginning of an administrative process to determine if he is inadmissible. The Respondent relied on the very recent decision of the Federal Court of Appeal in *Lin v Canada (Public Safety and Emergency Preparedness)*, 2021 FCA 81 [*Lin FCA*] [Stratas JA]. Judicial review is not available, the Respondent argued, because the Applicant has not exhausted other remedies available to him including the admissibility hearing before the ID itself, and a possible subsection H&C application – the latter only if the Applicant is found inadmissible for serious criminality under paragraph 36(1)(a) of *IRPA*.

[22] It is common ground *IRPA* does not permit H&C relief on a referral or inadmissibility finding under paragraph 37(1)(a) of *IRPA*.

[23] However, after the hearing the Respondent wrote and withdrew the prematurity argument. There were other grounds raised, which I will deal with in these Reasons. While judicial review will be refused, I will nonetheless certify a question of general importance. In this connection, and because it was both argued before me and is part of the legal context of this case, I will refer to the prematurity argument but refrain from deciding it.

A. *MD not to deal with complex factual or legal issues*

[24] While *Lin FCA* is very recent law, underlying it is considerable relevant jurisprudence which seriously constrains the jurisdiction of a MD to make findings of fact or law, and which specifically prevents MDs from determining complex issues of fact and or law. The underlying rationale for this jurisprudence appears to be that it is the ID, not CBSA or a MD, that is empowered to determine admissibility. As such, it is the ID to which complex factual and legal arguments should be addressed including *Charter* issues, not officials at CBSA including a MD, who simply perform administrative screening functions.

[25] In this connection, the case law establishes the following legal points: The recommendations of a MD do not constitute a final decision: Justice Kane in *Mannings v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 823 [*Mannings*] at para 74 confirms that a referral by a MD at the section 44 state is not a final decision. *Lin FCA* itself states that MDs simply perform screening processes. Neither a CBSA Officer nor a MD is

authorized or required to make findings of fact or law: see the Federal Court's decision by Justice Barnes in *Lin v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 862 [*Lin FC*] at para 16. The ID is to make the determination as to admissibility, not the MD (*Lin FC* at para 21). Submissions on factual and legal issues are authorized to be made to the ID (*Lin FCA* at para 4).

[26] Importantly, a MD is not authorized or required to make findings of fact or law (*Lin FC* at para 16). Instead, a MD conducts a summary review of the record before them on the strength of which they express non-binding opinions about potential inadmissibility (*Lin FC* at para 16). This is no more than a screening exercise that triggers an adjudication. It is at the adjudicative stage, that is, at the ID where controversial issues of law and evidence may be assessed and resolved (*Lin FC* at para 16). The referral process, including CBSA and the MD, is intended only to assess readily and objectively ascertainable facts concerning admissibility (*Lin FC* at para 16).

[27] The section 44 process does not call for a long and detailed assessment of issues that can be properly assessed and fully resolved in later proceedings (*Lin FC* at para 16). To emphasize, with such a limited and restricted mandate under section 44 of *IRPA*, there is no obligation to ferret out complex legal issues or to accept at face value every assertion of personal hardship that a person advances (*Surgeon v Minister of Public Safety and Emergency Preparedness*, 2019 FC 1314 [*Surgeon*] [Barnes J] at para 10).

[28] Moreover, decisions to make a report and to refer it to the ID are administrative in nature, and do not translate to any change in status for an applicant (*Sharma v Canada (Public Safety and Emergency Preparedness*, 2016 FCA 319 [de Montigny JA] at para 37).

[29] Much of this jurisprudence is reported in *Surgeon* starting at para 5:

> [5] In *McAlpin v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 422, [2018] FCJ No 423 [*McAlpin*], Chief Justice Paul Crampton held that, for cases involving serious criminality, the Delegate is entitled to prioritize public safety and security even to the point of refraining from considering mitigating personal circumstances [see para 65]. More recently in *Lin v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 862, 308 ACWS (3d) 609, I described the Delegate's limited authority in the following way:
>
> > [16] Neither the Officer nor the Delegate is authorized or required to make findings of fact or law. They conduct a summary review of the record before them on the strength of which they express non-binding opinions about potential inadmissibility. This is no more than a screening exercise that triggers an adjudication. It is at the adjudicative stage where controversial issues of law and evidence can be assessed and resolved. As the Federal Court of Appeal held in *Canada (Minister of Public Safety and Emergency Preparedness) v Cha*, 2006 FCA 126 at paras 47 and 48, [2007] 1 FCR 409, the referral process is intended only to assess readily and objectively ascertainable facts concerning admissibility. It does not call for a long and detailed assessment of issues that can be properly assessed and fully resolved in later proceedings. To the extent that there is any discretion not to make a referral to the ID, it is up to the Officer and the Delegate to determine how that will be exercised and what evidence will be applied to the task. This point was made by Justice James Russell in *Faci*, above, at para 63:
> >
> > …

> [18] The decision of the Federal Court of Appeal in *Sharma v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 319, 274 ACWS (3d) 382 (FCA), is also instructive on the scope of the discretion available to the Officer and the Delegate in the exercise of their s 44 authority. Mr. Sharma was a permanent resident who faced an admissibility hearing on the ground of criminality. The Court recognized that the Officer and the Delegate had "some flexibility when deciding whether or not to write an admissibility report" but their discretion was said to be "very limited" with respect to both foreign nationals and permanent residents. Beyond observing that a permanent resident may be entitled to "a somewhat higher level of participatory rights" the decision does not identify a broader substantive discretion favouring that class of residents. Indeed, the Court applied the security rationale from its earlier decision in *Cha*, above, to Mr. Sharma saying that it applied with equal force to foreign nationals and permanent residents [see para 23]. The decision described the very limited purpose served by the s 44 process in the following way:
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> …
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> [37] …Yet, as previously noted, the decisions to make a report and to refer it to the ID are administrative in nature, and do not translate to any change in status for the appellant. Only the ID can make a removal order in this case, and the appellant has a number of other recourses available to him before actually being removed from the country (applications for judicial review of the report, of the referral and of the ID decisions, a pre-removal risk assessment, and an H&C application). …
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> [Emphasis added]

[30] In my respectful view, accepting this jurisprudence as I do, it would be inappropriate to grant judicial review in this case to require a differently constituted MD to delve into the complex issues of fact and law concerning H&C, or to assess the facts and law involved in

determining BIOC. It seems to me that would be a qualitatively different assessment from and would go well beyond the screening function contemplated by *Lin FCA.*

B. *Truncated H&C consideration by MD*

[31] As noted, the jurisprudence establishes that MDs are not to engage in complex issues of fact or law. The jurisprudence indicates this includes H&C and BIOC considerations. Indeed it seems MDs are not even required to consider H&C factors (*Kidd v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 1044 [Gascon J] at para 33; *Mannings* at para 76); however if they do, MDs have a very limited discretion.

[32] When dealing with H&C and BIOC, the Applicant submits *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*] is not applicable in the context of a referral pursuant to section 44. This criticism seems unwarranted: while a MD need not consider H&C or BIOC, if he or she does, "the assessment of those factors should be reasonable, having regard to the circumstances of the case. Where those factors are rejected, an explanation should be provided, even if only brief in nature" (*McAlpin v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 422 [Crampton CJ] at para 70).

C. *Prematurity*

[33] As noted before, on April 21, 2021, and after pleadings were complete in this case, the Federal Court of Appeal decided *Lin FCA.* At issue were two appeals concerning a MD's

decision to refer certain applicants to admissibility hearings before the ID. Justice Stratas held the applications were premature:

> [4] In the present cases, the delegates of the Minister, acting under section 44, expressed evidence-based beliefs that the circumstances are sufficient to warrant a more formal inquiry and an adjudicated decision on inadmissibility by the Immigration Division and, if necessary, the Immigration Appeal Division. The process is akin to a screening exercise in that there is no finding of inadmissibility, nor alteration of status. The appellants will have a full opportunity to adduce evidence and advance their factual and legal arguments and concerns regarding the relevant issues in the Immigration Division and the Immigration Appeal Division. This includes any procedural fairness or substantive issues regarding the section 44 screening process that undermine the Immigration Division's ability to proceed. It also includes whether there were any misrepresentations giving rise to the grant of permanent residence, the relevant knowledge of the appellants, and any humanitarian and compassionate considerations. Thus, in the present cases, proceedings before the Immigration Division and the Immigration Appeal Division are both available and adequate: *Strickland v. Canada (Attorney General)*, 2015 SCC 37, [2015] 2 S.C.R. 713 at para. 42.
>
> [5] The general rule is that judicial review should not be brought until all available and adequate administrative recourses are pursued: *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61, [2011] 2 F.C.R. 332; *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc*., 2013 FCA 250, [2014] 2 F.C.R. 557 at para. 84; *Dugré v. Canada (Attorney General)*, 2021 FCA 8; and in the immigration context, see *Sidhu v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 260, 19 Imm. L.R. (3d) 113, cited with approval in *Somodi v. Canada (Citizenship and Immigration)*, 2009 FCA 288, [2010] 4 F.C.R. 26 at para. 19. Buttressing this is the prohibition in para. 72(2)(a) of the *Immigration and Refugee Protection Act* that forbids judicial review until all administrative appeals are exhausted.
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> …

> [9] In the present cases, if the Minister or the Federal Court itself had raised the bar at the earliest opportunity in the Federal Court, considerable time, expense and judicial resources would have been saved.
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> [Emphasis added]

[34] As in the present case, I note the admissibility process had just started. CBSA and the Minister through the MD have to date only undertaken the requisite "screening process". In the present case, the screening process was complete once the MD sent the two Referrals, non-binding recommendations, to the ID. The MD made no H&C or BIOC decisions.

[35] Because the Respondent withdrew its prematurity submissions, I am not required to make a decision in this regard.

D. *Issues for the ID*

[36] The Applicant asks the Court to order the MD to robustly review H&C and BIOC issues, even given this constraining jurisprudence. This I decline to do.

[37] The Applicant submits the statutory bar to relief under subsection 25(1) for H&C and BIOC entails an infringement of rights under section 7 and 12 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11 [*Charter*].

[38] Whether or not he is correct, I agree with the Applicant that the difference between a referral under paragraph 36(1)(a) and a referral under paragraph 37(1)(a) is that under section 37

the Applicant is precluded from seeking H&C relief, and further that this may preclude BIOC factors.

[39] However, the Applicant submits the *Charter* will give him either the right to apply for H&C relief if ordered removed under 37 by the ID (Applicant's memorandum), and/or to raise BIOC and H&C factors before the ID itself (oral submissions), notwithstanding H&C relief by statute is not available where inadmissibility results under section 37.

[40] The Applicant in summary makes the following section 7 and 12 arguments.

[41] Section 7 provides the life, liberty and security of the person are protected, and any violation of these rights must be in accordance with the principles of fundamental justice. The Applicant notes a determination of whether section 7 is engaged entails a case-by-case assessment. He says the facts of this case, which involve the removal of a long-time permanent resident with a wife who suffers from a chronic illness and three Canadian children who are utterly dependent on the financial, emotional, and logistical support of their father, engage his liberty and security of the person interest.

[42] The Applicant say his inability to argue H&C or BIOC factors interferes with his liberty and security interests as the father to three Canadian children.

[43] Importantly he submits the H&C bar also affects his section 7 rights as a parent of the three children all of whom are Canadian citizens. The Applicant submits the deprivations violate

fundamental justice because they do not comply with the protections against over breadth and gross disproportionality.

[44] The Applicant also submits Section 12 of the *Charter,* cruel and unusual treatment or punishment, is triggered by the loss of H&C and BIOC relief if he is found inadmissible under 37. Under section 37, the issue is whether the limited discretion afforded to MDs to consider H&C factors, and in particular BIOC, where the individual in question has no possibility of raising such factors otherwise, creates cruel and unusual treatment in this case (and or other reasonably foreseeable cases).

[45] The Applicant says the Supreme Court of Canada gave a broad definition of the word "treatment" under section 7. In *Chiarelli v Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 711 [Sopinka J] at 735 the Supreme Court of Canada held deportation may come in the scope of "treatment" in section 12, see also: *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519.

[46] The Applicant submits the treatment resulting from the lack of meaningful consideration of H&C factors, and in particular the BIOC, is cruel and unusual. Treatment may be cruel and unusual as applied to the Applicant before the court or because it would have a grossly disproportionate impact on others. Either situation would render the current interpretation of the law unconstitutional. If it is "reasonably foreseeable" that the interpretation of the law will impose treatment that is grossly disproportionate to some peoples' situations, section 12 is violated.

[47] The Applicant submits by definition, the current interpretation of the law is not “highly individualized.” The MD is not under an obligation to engage in a robust and meaningful analysis of H&C factors, and in particular BIOC, but should be to accord with the *Charter*. Instead, the MD has very limited discretion and may not even be under an obligation to consider H&C factors and BIOC. The fact that a long-time permanent resident and parent of multiple Canadian children may be deported and separated from his children long-term without a *Kanthasamy*-style BIOC analysis ever being conducted has the consequence of imposing treatment on some individuals that is grossly disproportionate.

[48] In response to these *Charter* arguments, the Respondent denies infringement of either sections 7 of 12 rights.

[49] As a consequence of these potential breaches, the Applicant requests this Court to set aside the Decision of the MD and remand the decision below for redetermination in a manner that would presumably avoid the alleged *Charter*-based constitutional breaches.

[50] In this connection, Applicant’s counsel emphasized the seriousness of the situation facing the Applicant. She argued that a finding of inadmissibility under paragraph 37(1)(a) is one of the most serious findings possible against a permanent resident. Counsel submitted that while this may not be the final decision on the Applicant’s removal from Canada, there would be so little recourse available to him that an inadmissibility finding will virtually ensure he is deported.

[51] The Applicant says a section 37 finding of inadmissibility is serious in this particular case because the Applicant will have no right of appeal to the Immigration Appeal Division [IAD] given subsections 64(1) and 64(2) of *IRPA*:

No appeal for inadmissibility	**Restriction du droit d'appel**
64 (1) No appeal may be made to the Immigration Appeal Division by a foreign national or their sponsor or by a permanent resident if the foreign national or permanent resident has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality.	**64 (1)** L'appel ne peut être interjeté par le résident permanent ou l'étranger qui est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux, grande criminalité ou criminalité organisée, ni par dans le cas de l'étranger, son répondant.
Serious criminality	**Grande criminalité**
(2) For the purpose of subsection (1), serious criminality must be with respect to a crime that was punished in Canada by a term of imprisonment of at least six months or that is described in paragraph 36(1)(b) or (c).	**(2)** L'interdiction de territoire pour grande criminalité vise, d'une part, l'infraction punie au Canada par un emprisonnement d'au moins six mois et, d'autre part, les faits visés aux alinéas 36(1)b) et c).

[52] I am not persuaded on this point because in his case, the Applicant has no appeal to the IAD under a section 36 referral in any event. This is because subsections 64(1) and 64(2) take away that right from those sentenced to more than six months; the Applicant's sentence for the sexual assault conviction was two years less a day.

[53] The Applicant also submits that since the enactment of the *Faster Removal of Foreign Criminals Act*, SC 2013, c 16 in 2013, and given it has not been repealed, an inadmissibility finding under section 37 precludes the filing of an application for H&C relief, as already noted. As such, the only statutory relief available if he is found inadmissible under paragraph 37(1)(a) would be a restricted Pre-Removal Risk Assessment pursuant to subsections 112(3) and 113(d) of *IRPA* or a ministerial relief application under section 42.1, neither of which he submits may consider H&C circumstances or BIOC factors. This the Applicant says is inadequate.

[54] I appreciate the seriousness with which Parliament has dealt with those subject to inadmissibility removal under paragraph 37(1)(a) which might include in this case, removal for organized criminality. This however is a policy decision by Parliament, as the Respondent submitted.

[55] However, and with respect, there are several additional reasons why the Court declines to intervene at this stage.

[56] First, it is worth remembering this is judicial review, not a *de novo* assessment. For the same reason the issues of H&C and BIOC should be determined by the ID, in my view, the ID is also the appropriate forum in which the Applicant might seek his *Charter* remedy under sections 7 or 12. Even if hypothetically the Applicant is ordered removed under subsection 37, he will still have the right to apply for leave to judicial review of that order by this Court. In addition, the Respondent notes and I agree there are other avenues of potential mitigation such as a restricted Pre-removal Risk Assessment pursuant to subsections 112(3) and 113(d) of *IRPA*, a

Request to Defer which might result in a short term stay of removal, an Exceptional Temporary Resident Permit under section 24, plus ministerial relief under section 42.1 of *IRPA*.

[57] Further, and while both parties agree as do I that the Applicant will have access to H&C considerations only if ordered removed paragraph 36(1)(a), I am not persuaded H&C consideration will be unavailable if (hypothetically) the ID finds the Applicant inadmissible under paragraph 37(1)(a).

[58] I say this because, whether correct or not, at this point it is clear the Applicant may submit to the ID that a paragraph 37(1)(a) finding of inadmissibility will breach his section 7 and 12 *Charter* rights unless he may raise issues of H&C and BIOC before the ID itself or in a separate H&C application.

[59] If he is correct in these *Charter* based legal arguments, the ID indeed may be obliged to ensure its decision conforms with the *Charter*.

[60] In my respectful view, the issues raised by the Applicant are the very sort of complex factual and legal issues the ID is authorized to consider under the jurisprudence referred to above. In *Victoria v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 1392 [de Montigny J, as he then was] this Court found the ID has jurisdiction to determine *Charter* issues:

> [38] The Immigration Division undoubtedly possesses the jurisdiction both to determine the *Charter* issues raised by the Applicant and to grant relief if it determines that there has been an infringement to the Applicant's rights. Not only is it a court of competent jurisdiction pursuant to ss. 24(1) of the *Charter*, but ss. 162(1) of *IRPA* grants each Division of the Board sole and

exclusive jurisdiction to hear and determine questions of law and fact, including questions of jurisdiction. Moreover, Rule 47 of the *Rules* specifically addresses the procedure for challenging the constitutional validity, applicability or operability of any legislative provision under *IRPA*. The Immigration Division is clearly empowered to deal with the *Charter* arguments raised by the Applicant, in light of the seminal decisions of the Supreme Court (see, *Cuddy Chicks Ltd v Ontario (Labour Relations Board)*, 1991 CanLII 57 (SCC), [1991] 2 SCR 5; *Douglas/Kwantlen Faculty Assn v Douglas College*, 1990 CanLII 63 (SCC), [1990] 3 SCR 570 and *Tétreault-Gadoury v Canada (Employment and Immigration Commission)*, 1991 CanLII 12 (SCC), [1991] 2 SCR 22). According to these decisions, administrative tribunals endowed with the power to decide questions of law, have the authority to resolve constitutional questions that are inextricably linked to matters properly before them, unless such questions have been explicitly withdrawn from their jurisdiction.

[39] Recently confronted with the same issue, I held that it is preferable for this Court, as a matter of policy, to rule on *Charter* issues on the basis of a full evidentiary record and of an informed decision by the administrative tribunal tasked with the responsibility to make findings of fact and law (see, *Stables v Canada (Citizenship and Immigration)*, 2011 FC 1319). I reiterate what I then said in this respect:

> [27] The Supreme Court has held that tribunals with expertise and authority to decide questions of law are in the best position to hear and decide the constitutionality of their statutory provisions, and should play a primary role in determining *Charter* issues within their jurisdiction. Writing for the majority in *Cuddy Chicks Ltd. v Ontario (Labour Relations Board)*, 1991 CanLII 57 (SCC), [1991] 2 SCR 5 at para 16, Justice LaForest captured the usefulness and the value of a tribunal's factual findings when considering a constitutional question in the following terms:
>
> It must be emphasized that the process of *Charter* decision making is not confined to abstract ruminations on constitutional theory. In the case of *Charter* matters which arise in a particular regulatory context, the ability of the decision maker to analyze competing policy concerns is critical…The informed view of the Board, as manifested in a sensitivity to relevant facts and an

> ability to compile a cogent record, is also of invaluable assistance.
>
> (Quoted with approval by Mr. Justice Gonthier, for a unanimous Court, in *Nova Scotia (Workers' Compensation Board) v Martin*, 2003 SCC 54 at para 30, [2003] 2 SCR 504).

> [40] This approach is all the more appropriate in the context of an application for judicial review, where the Court's mandate is to assess the propriety of the Immigration Division's decision on the issues that it has decided. It would be contrary to the rationale underlying judicial review for a court to pronounce on an issue before the administrative decision-maker had the opportunity to consider it.

[61] I also note the Applicant did not advance sections 7 or 12 *Charter* arguments before either the CBSA or the MD below: these are new issues raised for the first time on judicial review. Even if the CBSA Officer and the MD had authority to investigate and report on these two *Charter* issues, which I find they do not, I am concerned the record may be inadequate for their determination. See *Canada (Citizenship and Immigration) v Canadian Council for Refugees*, 2021 FCA 72 [Stratas JA]:

> [79] At one point in the hearing, the Claimants seemed to suggest that the requirement of a sufficient evidentiary record before the Court is just a technicality. A foundational case from the Supreme Court rejects this. The sufficiency of evidence is "not…a mere technicality" but is "a flaw that is fatal" because it "is essential to a proper consideration of Charter issues". Deciding Charter cases in "a factual vacuum" would "trivialize" the Charter and cause "ill-considered opinions" in cases "of fundamental importance to Canadian society" that "profoundly affect the lives of Canadians and all residents of Canada". No one can "expect a court to deal with [a Charter issue where there is]…a factual void". And "the unsupported hypotheses of enthusiastic counsel" cannot fill that void. See *MacKay* at 361-362 and 366 S.C.R.
>
> [80] This especially matters where, as here, the allegation of unconstitutionality stems from the alleged effects of the impugned

provision. In *Danson* at 1101 S.C.R., the Supreme Court put it this way:

> In general, any Charter challenge based upon allegations of the unconstitutional effects of impugned legislation must be accompanied by admissible evidence of the alleged effects. In the absence of such evidence, the courts are left to proceed in a vacuum, which, in constitutional cases as in nature, has always been abhorred.

[81] Time and time again, the Supreme Court has underscored the importance of a court having a full evidentiary record before deciding Charter cases. See *A.G. (Que.) v. Quebec Protestant School Boards*, 1984 CanLII 32 (SCC), [1984] 2 S.C.R. 66, 10 D.L.R. (4th) 321 at 90-91 S.C.R.; *MacKay* at 361-362 S.C.R.; *R. v. Edwards Books and Art Ltd*., 1986 CanLII 12 (SCC), [1986] 2 S.C.R. 713, 35 D.L.R. (4th) 1 at 762, at 767-768 S.C.R.; *Danson* at 1101 S.C.R.; *Eaton v. Brant County Board of Education*, 1997 CanLII 366 (SCC), [1997] 1 S.C.R. 241, 142 D.L.R. (4th) 385 at paras. 2-3 and 55; *R. v. Goltz*, 1991 CanLII 51 (SCC), [1991] 3 S.C.R. 485, 131 N.R. 1, at 515-516 S.C.R.; and at least 16 other, more recent Supreme Court authorities on point.

[82] This is just a subset of an older, broader rule, expressed in non-Charter constitutional cases that constitutional issues should not be decided unless a full and adequate evidentiary record is before the Court: *Northern Telecom v. Communications Workers*, 1979 CanLII 3 (SCC), [1980] 1 S.C.R. 115, 98 D.L.R. (3d) 1 at 139 S.C.R.

[62] I also note no notice of constitutional question has been served or filed, as otherwise required by section 57 of *Federal Courts Act*, RSC 1985, c F-7. Section 57 is an important procedural step in the resolution of constitutional issues by this Court, and a step I am not inclined to waive without more. Subsection 57(1) says:

Constitutional questions	**Questions constitutionnelles**
57 (1) If the constitutional validity, applicability or operability of an Act of Parliament or of the	**57 (1)** Les lois fédérales ou provinciales ou leurs textes d’application, dont la validité, l’applicabilité ou l’effet, sur le

legislature of a province, or of regulations made under such an Act, is in question before the Federal Court of Appeal or the Federal Court or a federal board, commission or other tribunal, other than a service tribunal within the meaning of the National Defence Act, the Act or regulation shall not be judged to be invalid, inapplicable or inoperable unless notice has been served on the Attorney General of Canada and the attorney general of each province in accordance with subsection (2).	plan constitutionnel, est en cause devant la Cour d'appel fédérale ou la Cour fédérale ou un office fédéral, sauf s'il s'agit d'un tribunal militaire au sens de la Loi sur la défense nationale, ne peuvent être déclarés invalides, inapplicables ou sans effet, à moins que le procureur général du Canada et ceux des provinces n'aient été avisés conformément au paragraphe (2).

VI. Conclusion

[63] For the reasons above including this Court's inability under existing jurisprudence to order a new Minister's Delegate to give robust consideration to H&C and BIOC factors in deciding whether to refer one or both of the paragraph 36(1)(a) and paragraph 37(1)(a) Reports to the ID for a determination of admissibility, judicial review will be dismissed.

VII. Certified Question

[64] The Applicant proposed a certified question before and during the hearing relating to the section 7 *Charter* analysis. This question will not be certified because it is not addressed in these Reasons. After the hearing the Applicant proposed a certified question based on prematurity. However, prematurity is not decided and is therefore not relevant or dispositive issue; the proposed prematurity question may not be certified.

[65] In *Mahjoub (Re)*, 2017 FC 334 I summarized the law around certifying a question:

> [8] Section 82.3 of the *IRPA* provides that an appeal of a decision made under section 82, such as the 2016 Conditions of Release Order, may be brought only if a judge certifies that a serious question of general importance is involved. It also states that no appeal may be made from an interlocutory decision:
>
> > 82.3 An appeal from a decision made under any of sections 82 to 82.2 may be made to the Federal Court of Appeal only if the judge certifies that a serious question of general importance is involved and states the question. However, no appeal may be made from an interlocutory decision in the proceeding.
> >
> > [Emphasis added]
>
> [9] The Federal Court of Appeal in *Canada (Minister of Citizenship and Immigration) v Liyanagamage*, (1994), 176 NR 4 at paras 4-6, set out the principles governing the certification of a question under section 82.3. These principles may be summarized as follows:
>
> > (i) The question must be one that transcends the interests of the parties to the litigation and contemplates issues of broad significance or general application.
> >
> > (ii) The question must be dispositive of the appeal. The certification process is not to be used as a tool to obtain from the Court of Appeal declaratory judgments on fine questions which need not be decided in order to dispose of the case.
> >
> > (iii) The certification process is not to be equated with the reference process established by the *Federal Courts Act*.
>
> [10] In *Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168, the Federal Court of Appeal described the threshold for certification as follows:
>
> > [7] Paragraph 74(d) of the Act contains an important "gatekeeper" provision: an appeal to this Court may only be made if, in an application for judicial review brought under the Act, a Judge of

> the Federal Court certifies that a serious question of general importance is raised and states the question.
>
> […]
>
> [9] It is trite law that to be certified, a question must (i) be dispositive of the appeal and (ii) transcend the interests of the immediate parties to the litigation, as well as contemplate issues of broad significance or general importance. As a corollary, the question must also have been raised and dealt with by the court below and it must arise from the case, not from the Judge's reasons *(Canada (Minister of Citizenship and Immigration) v. Liyanagamage*, 176 N.R. 4, 51 A.C.W.S. (3d) 910 (F.C.A.) at paragraph 4; *Zazai v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89, [2004] F.C.J. No. 368 (C.A.) at paragraphs 11-12; *Varela v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145, [2010] 1 F.C.R. 129 at paragraphs 28, 29 and 32).
>
> [10] In *Varela*, this Court stated that it is a mistake to reason that because all issues on appeal may be considered once a question is certified, therefore any question that could be raised on appeal may be certified. The statutory requirement set out in paragraph 74(d) of the Act is a precondition to the right of appeal. If a question does not meet the test for certification, so that the necessary precondition is not met, the appeal must be dismissed.

[11] In addition, as Pelletier JA confirmed in *Zazai v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89 at paras 11-12, certification may only take place where there is "a serious question of general importance which would be dispositive of an appeal." As a corollary, that Court added that the question must have been raised and dealt with in the decision below: "if it does not arise, or if the judge decides that it need not be dealt with, it is not an appropriate question for certification."

[12] The Supreme Court of Canada in *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 778 (SCC), [1998] 1 SCR 982 at paragraph 25, added that "[t]he certification of a 'question of general importance' is the trigger by which an appeal is justified. The object of the appeal is still the judgment itself, not merely the certified question."

[13] The late Justice Blanchard stated in *Re Mahjoub*, 2014 FC 200, where he dealt with the 126 questions the Applicant alleged arose out of his Reasonableness Decision:

> [8] In *Varela v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145 (CanLII), [2010] 1 F.C.R. 129 at paragraph 28, the Federal Court of Appeal stated that section 74 of the IRPA concerns the certification "of 'a' serious question of general importance, not of 'one or more' serious questions of general importance." The Court acknowledged that a specific case could raise more than one question of general importance; the Court held that "[…] this would be the exception rather than the rule." Similar wording is used in section 79 of the IRPA. It is clear that the Federal Court of Appeal did not contemplate the certification of 126 questions. Indeed, at paragraph 43 of its decision, the Court held that "[i]t is a mistake to reason that because all issues on appeal may be considered once a question is certified, therefore any question that could be raised on appeal may be certified."

[14] Justice Pelletier, writing for the Federal Court of Appeal in *Varela v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145 [*Varela*] stated:

> [29] Additionally, a serious question of general importance arises from the issues in the case and not from the judge's reasons. The judge, who has heard the case and has had the benefit of the best arguments of counsel on behalf of both parties, should be in a position to identify whether such a question arises on the facts of the case, without circulating draft reasons to counsel. Such a practice lends itself, as it did in this case, to a "laundry list" of questions, which may or may not meet the statutory test. In this case, none of them did.
>
> [Emphasis added]

[66] See also *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 [Laskin JA]:

> [46] This Court recently reiterated in *Lewis v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para. 36, the criteria for certification. 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 or 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, 29 Imm. L.R. (4th) 211 at para. 10). Nor will a question that is in the nature of a reference or whose answer turns on the unique facts of the case be properly certified (*Mudrak v. Canada (Citizenship and Immigration*), 2016 FCA 178, 485 N.R. 186 at paras. 15, 35).
>
> [47] Despite these requirements, this Court has considered that it is not constrained by the precise language of the certified question, and may reformulate the question to capture the real legal issue presented (*Tretsetsang v. Canada (Citizenship and Immigration)*, 2016 FCA 175, 398 D.L.R. (4th) 685 at para. 5 per Rennie J.A. (dissenting, but not on this point); *Ezokola v. Canada (Citizenship and Immigration)*, 2011 FCA 224, [2011] 3 F.C.R. 417 at paras. 40-44, reversed without comment on the point, *Ezokola v. Canada (Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 S.C.R. 678). Any reformulated question must, of course, also meet the criteria for a properly certified question.

[67] After consideration and applying these considerations, I have concluded there is a question of general importance to certify. The decision at bar has serious consequence for the Applicant and others who may wish to make H&C and or BIOC submissions either to the ID or otherwise, notwithstanding inadmissibility per section 37 may be or has been ordered. The rights asserted in this case are not just those of individual applicants, but may include rights of applicants and their Canadian children in relation to their parent(s).

[68] Therefore and pursuant to pursuant to subsection 74(d) of *IPRA*, I certify that the following is a serious question of general importance involved in this Application; it concerns the central finding in this case namely that MDs do not have jurisdiction to consider complex legal and factual issues in making referrals to the ID for admissibility hearings:

> May a Minister's Delegate under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] consider complex issues of fact and law including the best interests of children [BIOC] and/or humanitarian and compassionate [H&C] issues, in relation to a possible referral of a permanent resident under section 37 of *IRPA* to an admissibility hearing before the Immigration Division of the Immigration and Refugee Board of Canada, in relation to which IRPA bars consideration of H&C and may bar BIOC factors?

JUDGMENT in IMM-6785-19

THIS COURT'S JUDGMENT is that:

1. Judicial review is dismissed.
2. The following question of general importance is certified:

   May a Minister's Delegate under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] consider complex issues of fact and law including the best interests of children [BIOC] and/or humanitarian and compassionate [H&C] issues, in relation to a possible referral of a permanent resident under section 37 of *IRPA* to an admissibility hearing before the Immigration Division of the Immigration and Refugee Board of Canada, in relation to which *IRPA* bars consideration of H&C and may bar BIOC factors?
3. There is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6785-19
STYLE OF CAUSE:	UYI JACKSON OBAZUGHANMWEN v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	HELD BY WAY OF VIDEOCONFERENCE
DATE OF HEARING:	JUNE 3, 2021
JUDGMENT AND REASONS:	BROWN J.
DATED:	JUNE 29, 2021

APPEARANCES:

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