Federal Court of Appeal | Cour d'appel fédérale

**Date: 20230629**

**Docket: A-207-21**

**Citation: 2023 FCA 151**

**CORAM:** **PELLETIER J.A.**
**DE MONTIGNY J.A.**
**GLEASON J.A.**

**BETWEEN:**

**UYI JACKSON OBAZUGHANMWEN**

**Appellant**

**and**

**THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

**Respondent**

Heard at Vancouver, British Columbia, on March 30, 2023.

Judgment delivered at Ottawa, Ontario, on June 29, 2023.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: PELLETIER J.A.
GLEASON J.A.

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## REASONS FOR JUDGMENT

**DE MONTIGNY J.A.**

[1] The appellant is a permanent resident; he has three Canadian-born children, as well as a wife, who is a Canadian citizen.

[2] In October 2019, he was referred for an admissibility hearing before the Immigration Division (ID) of the Immigration and Refugee Board pursuant to sections 36(1)(*a*) (serious

criminality) and 37(1)(*a*) (organized criminality) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA). He challenged both referrals before the Federal Court, arguing that they should be set aside and returned for reconsideration by a different Ministerial Delegate (MD) so that more robust consideration could be given to humanitarian and compassionate (H&C) and best interests of the child (BIOC) considerations in deciding whether to refer one or both reports to the ID.

[3] The appellant's main contention, both before the Federal Court and this Court, is that a finding of inadmissibility for organized criminality carries much more severe consequences than a finding of inadmissibility on other grounds since the adoption of the *Faster Removal of Foreign Criminals Act,* S.C. 2013, c. 16 in 2013. Following the enactment of that Act, a finding of inadmissibility pursuant to section 37 precludes the appellant from filing an H&C application where he could raise H&C factors and the best interests of his three children. Such a draconian measure, he submits, infringes his constitutional rights (pursuant to sections 7 and 12 of the *Canadian Charter of Rights and Freedoms* (the Charter)). In his view, the pre-2013 jurisprudence, according to which Canada Border Services Agency (CBSA) officers and MDs have a very limited discretion and are not required to address H&C considerations, cannot be applied blindly after 2013; on the contrary, courts must take into consideration that he will never have an opportunity to raise these considerations if they are not examined at the referral stage.

[4] The Federal Court rejected that argument, concluded that the pre-2013 jurisprudence limiting the discretion of the officials at the referral stage applies with equal force after 2013, and refused to entertain the appellant's constitutional arguments: see *Obazughanmwen v. Canada*

*(Public Safety and Emergency Preparedness)*, 2021 FC 683. Justice Brown nevertheless agreed to certify a question of general importance as to whether a Minister's Delegate has the discretion to consider complex issues such as humanitarian and compassionate factors and the best interests of the child when deciding whether to refer a permanent resident to the Immigration Division pursuant to section 37 of the IRPA.

[5] For the reasons that follow, I would dismiss the appeal both because the question was improperly certified, and because in any event the decision of the Minister's Delegate is reasonable and consistent with past jurisprudence.

## I. Background

[6] The appellant, Mr. Uyi Jackson Obazughanmwen, is a citizen of Nigeria born in 1975. He came to Canada in 2003 and filed a refugee claim that was refused in 2004. His wife, Blessing Ojo, also filed a refugee claim in 2003 that was accepted. In October 2004, the couple were married, and the appellant's wife sponsored him; the appellant became a permanent resident on July 4, 2007. The couple has three children, born in 2003, 2007 and 2010. They are all Canadian citizens.

[7] In April 2009, the appellant was convicted of sexual assault pursuant to section 271 of the *Criminal Code*, R.S.C. 1985, c. C-46 for an incident which took place in June 2006, and he was sentenced to two years less a day. During his incarceration from 2010 to 2012, the appellant completed various programming aimed at rehabilitation. He completed his probation order in May 2014.

[8] In March 2017, the appellant was convicted of fraud under $5,000 and sentenced to a fine of $2,000 and a 12-month probation order for his involvement in an Advance Fee Lottery Scheme that duped seniors into believing they had won lottery money and asked them to pay processing fees. The victims would pay the alleged processing fees but would never receive their fictitious winnings. The CBSA's evidence indicates that the appellant's involvement in the Advance Fee Lottery Scheme began in 2012 and continued until as recently as August 2018.

[9] In September 2018, the appellant came to the CBSA's attention because of a referral from the Federal Serious and Organized Crime Unit of the Royal Canadian Mounted Police for involvement in the Advance Fee Lottery Scheme.

[10] Two reports were prepared by a CBSA officer pursuant to subsection 44(1) of the IRPA regarding the potential referral of the appellant to the ID for inadmissibility. The first one, dated October 26, 2018, was for serious criminality under paragraph 36(1)(*a*) of the IRPA and related to the sexual assault conviction. The second one, dated May 9, 2019, was for organized criminality under paragraph 37(1)(*a*) of the IRPA and was based on the facts and allegations contained in the police reports pertaining to the conviction for fraud under $5,000.

[11] The appellant was provided the opportunity to respond to both reports, and he filed two sets of submissions in August and October of 2019.

[12] On October 2, 2019, the CBSA officer prepared a highlights report, summarizing the allegations and submissions regarding both the serious criminality and organized crime grounds

of inadmissibility. Based on the fact that the appellant's involvement in fraud was his most recent criminality, the officer recommended that a deportation order be sought for organized criminality pursuant to paragraph 37(1)(*a*) of the IRPA. If the evidence of organized crime was not sufficient for a finding of inadmissibility, the delegate recommended, in the alternative, that the appellant be found inadmissible for serious criminality pursuant to paragraph 36(1)(*a*).

[13] On October 16, 2019, the Minister's Delegate completed two subsection 44(2) referrals of the appellant to the ID for an admissibility hearing. The reports referred the appellant for both organized criminality and serious criminality. On the same date, the MD wrote to the appellant to advise him that he was being referred to the ID for an admissibility hearing and setting out the basis of the referral. The appellant sought judicial review of these two referrals issued by the MD.

## II. The decision of the Federal Court

[14] Before the Federal Court, the appellant argued that the two referrals should be set aside and remanded for reconsideration with a more robust consideration of H&C and BIOC factors in deciding if the reports should be referred to the ID for an admissibility hearing. The appellant emphasized that there is no other forum or procedural step at which these considerations can be studied when a finding of inadmissibility is made under section 37. Indeed, no appeal lies to the Immigration Appeal Division (IAD), and since the passage of the *Faster Removal of Foreign Criminals Act*, a finding of inadmissibility pursuant to section 37 precludes the filing of an application for permanent residence on humanitarian and compassionate grounds. The appellant further contended that the H&C bar infringes his rights under sections 7 and 12 of the Charter.

[15] The Federal Court rejected those arguments, and found that requiring MDs to examine complex issues of fact and law including H&C and BIOC considerations would be inconsistent with the screening function of MDs. The rationale underlying previous jurisprudence, according to Justice Brown, is that the ID, and not the CBSA or a MD, has the authority to determine admissibility and therefore to address complex factual and legal arguments, including Charter issues. CBSA officials and MDs simply perform administrative screening functions (Decision at para. 24).

[16] Reviewing the case law (*Mannings v. Canada (Public Safety and Emergency Preparedness)*, 2020 FC 823; *Lin v. Canada (Public Safety and Emergency Preparedness)*, 2019 FC 862 (*Lin FC*), 2021 FCA 81 (*Lin FCA*); *Surgeon v. Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1314 (*Surgeon*); *Sharma v. Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 319 (*Sharma*)), the Federal Court found that:

- The recommendations of a MD do not constitute a final decision and do not result in a change of status. MDs simply perform a screening process;
- CBSA officers and MDs are not authorized or required to make findings of fact or law, rather they provide non-binding opinions on admissibility based on a summary review of the record. 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;
- The ID makes a determination as to admissibility, not the MD.

[17] On the basis of these findings, the Federal Court concluded that MDs are not required to consider H&C factors at the referral stage, and that, if they do, they have a very limited

discretion. Moreover, when a MD rejects these factors in their report, they need only provide a brief explanation.

[18] As for the potential violation of sections 7 and 12 of the Charter, the Court agreed that a section 37 finding of inadmissibility has serious consequences since the appellant would have no access to H&C relief. His only available statutory relief would be a restricted Pre-Removal Risk Assessment (PRRA) pursuant to subsections 112(3) and 113(*d*) of the IRPA or a ministerial relief application under section 42.1, neither of which would allow a consideration of H&C circumstances or BIOC factors. This, however, was a policy decision by Parliament. As for the fact that a section 37 finding of inadmissibility would bar an appeal to the IAD by operation of section 64 of the IRPA, the Court observed that the appellant would have no appeal to the IAD under a section 36 referral in any event, since subsections 64(1) and (2) of the IRPA take away that right from those sentenced to more than six months, as was the case for the appellant.

[19] The Federal Court also gave additional reasons why it should decline to intervene at this stage. First, it noted that the ID is able to address the appellant's arguments that a paragraph 37(1)(*a*) inadmissibility finding is contrary to the Charter to the extent that it precludes H&C and BIOC relief. In support of that proposition, the Court cited jurisprudence that the ID is authorized to grant Charter relief (*Torres Victoria v. Canada (Public Safety and Emergency Preparedness)*, 2011 FC 1392 (*Torres*)). Such a decision by the ID would itself be subject to judicial review.

[20] If the appellant is ordered removed under paragraph 37(1)(*a*), he will also have other avenues of potential mitigation, such as a restricted PRRA, a request to defer which might result in a short-term stay of removal, an Exceptional Temporary Resident Permit under section 24, and ministerial relief under section 42.1 of the IRPA.

[21] Finally, the Federal Court also noted that the Charter arguments were not advanced before either the CBSA or the MD and are raised for the first time on judicial review, and that no notice of constitutional question was served as required by section 57 of the *Federal Courts Act*, R.S.C., 1985, c. F-7. As a result, the record may be inadequate for their determination.

[22] For all of the above reasons, the Federal Court dismissed the application for judicial review. Because it found that its decision has serious consequences for others who may wish to make H&C or BIOC submissions either to the ID or otherwise notwithstanding inadmissibility per section 37, the Federal Court certified the following question:

> 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?

## III. Issues

[23] The appellant and the respondent have identified different legal issues. The appellant identifies two sub-issues to answer the certified question, and his submissions focus on the Charter arguments for including a "robust consideration" of the best interests of the child at the

referral stage (Appellant's factum, at para. 24). The respondent, on the other hand, argues that the certified question was not properly certified as it was already settled in the case law that the MD's decision is reasonable, and that the current interpretation of section 44 of the IRPA, when properly interpreted, is constitutional.

[24] In my view, this appeal properly raises the following questions:

A. Was the question properly certified?

B. If so, was the MD's decision reasonable?

## IV. Analysis

### A. *Was the question properly certified?*

[25] There is no doubt that the consequences of a finding of inadmissibility pursuant to paragraph 37(1)(*a*) are more severe than those resulting from a finding of inadmissibility pursuant to paragraph 36(1)(*a*). First, a person found inadmissible for organized criminality is barred from filing an appeal to the IAD, whereas inadmissibility for serious criminality will only bar such an appeal if the person has been punished by a term of imprisonment of at least six months (ss. 64(1) and (2) of the IRPA).

[26] More importantly for our purposes, an individual found inadmissible pursuant to paragraph 37(1)(*a*) is forever barred from filing a H&C application pursuant to subsection 25(1) of the IRPA since the adoption of the *Faster Removal of Foreign Criminals Act*, and therefore has no opportunity to raise BIOC issues. As for a PRRA, it will be of limited utility. Pursuant to

subsection 112(3), refugee protection may not be conferred on an applicant who has been determined to be inadmissible for organized criminality, whereas such a bar applies to applicants determined to be inadmissible for serious criminality only if they have been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years. Moreover, subsection 113(*d*) stipulates that the seriousness of the treatment that an applicant face in his or her country of origin will be balanced against the nature and severity of the acts committed by the applicant and the danger that the applicant constitutes to the security of Canada in the case of an applicant who has been declared inadmissible on grounds of security, violating human or international rights or organized criminality. In contrast, the balancing will only take into account the danger an applicant constitutes to the security of Canada if declared inadmissible on grounds of serious criminality.

[27] Prior to the adoption of the *Faster Removal of Foreign Criminals Act*, there was a substantial body of jurisprudence to the effect that both the CBSA officers and the MDs perform essentially an administrative screening function and that they have a very limited discretion to refuse to refer a case for an admissibility hearing, especially in cases of serious criminality and organized criminality. Indeed, counsel for the appellant came to that very conclusion upon her review of the jurisprudence, and she accepted that the consideration of H&C factors and of the best interests of the children was limited and not mandatory (Appellant's factum at para. 42). Yet she argues that there has been "significant divergence in the case law relating to the scope of the discretion afforded pursuant to s 44 to consider H&C factors" (Appellant's factum at para. 31), and that the case law predating the 2013 legislative change must therefore be approached with caution. The appellant submits that the Federal Court and this Court have erred in continuing to

rely on pre-2013 jurisprudence that was premised on a completely different legislative scheme that had a built-in safety valve and allowed individuals to raise H&C factors after they had been referred to an admissibility hearing. For that reason, the appellant claims that the question was properly certified because it has never been squarely addressed in the case law. The respondent disagrees and argues that the jurisprudence has settled the certified question such that it has already been answered.

[28] It is well established in the jurisprudence of this Court that a question cannot be certified unless it is serious, dispositive of the appeal and transcends the interests of the parties. It must also have been raised and dealt with by the court below, and it must arise from the case rather than from the judge's reasons. Finally, and as a corollary of the requirement that it be of general importance pursuant to section 74 of the IRPA, it cannot have been previously settled by the decided case law: see *Liyanagamage v. Canada (Minister of Citizenship and Immigration)*, [1994] F.C.J. No. 1637 (QL) at para. 4; *Mudrak v. Canada (Citizenship and Immigration)*, 2016 FCA 178 at para. 36; *Lewis v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at paras. 36, 39 (*Lewis*).

[29] I agree with the respondent that the certified question has been addressed in a number of cases both prior to and after 2013 and has been put to rest. In cases such as *Correia v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 782, *Hernandez v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 429, *Canada (Minister of Public Safety and Emergency Preparedness) v. Cha*, 2006 FCA 126 (*Cha*), *Awed v. Canada (Citizenship and Immigration)*, 2006 FC 469 and *Faci v. Canada (Pubic Safety and Emergency Preparedness)*, 2011 FC 693, all

referred to by the appellant, the "overall consensus seems to coalesce" (to use the words of counsel for the respondent) around the principles that CBSA officers and MDs had very limited discretion, and that there was no general obligation to consider H&C factors nor to explain why they were not considered sufficient to offset other factors supporting a decision to refer a case for an admissibility hearing.

[30] When reviewed carefully, this case law demonstrates that CBSA officers and MDs have limited discretion because of the restricted nature of the inquiry they are tasked to perform, and that they are performing a purely administrative and screening function. I accept, as suggested by the appellant, that this jurisprudence sometimes refers to the fact that there are other opportunities to raise H&C considerations at later stages of the process; but when this was suggested in the jurisprudence, it was mostly as a contextual factor to assess the appropriate level of procedural fairness required.

[31] The decision of this Court in *Cha* is illustrative of the rationale in support of a limited discretion conferred on officers and MDs by subsection 44(1) and (2):

> [35] I conclude that the wording of sections 36 and 44 of the Act and of the applicable sections of the Regulations does not allow immigration officers and Minister's delegates, in making findings of inadmissibility under subsections 44(1) and (2) of the Act in respect of persons convicted of serious or simple offences in Canada, any room to manoeuvre apart from that expressly carved out in the Act and the Regulations. Immigration officers and Minister's delegates are simply on a fact-finding mission, no more, no less. Particular circumstances of the person, the offence, the conviction and the sentence are beyond their reach. It is their respective responsibility, when they find a person to be inadmissible on grounds of serious or simple criminality, to prepare a report and to act on it.
>
> […]
>
> [37] It cannot be, in my view, that Parliament would have in sections 36 and 44 of the Act spent so much effort defining objective circumstances in which persons who

> commit certain well defined offences in Canada are to be removed, to then grant the immigration officer or the Minister's delegate the option to keep these persons in Canada for reasons other than those contemplated by the Act and the Regulations. It is not the function of the immigration officer, when deciding whether or not to prepare a report on inadmissibility based on paragraph 36(2)(*a*) grounds, or the function of the Minister's delegate when he acts on a report, to deal with matters described in sections 25 (H&C considerations) and 112 (Pre-Removal Assessment Risk) of the Act (see *Correia* at paragraphs 20 and 21; *Leong* at paragraph 21; *Kim* at paragraph 65; *Lasin v. Canada (Minister of Citizenship and Immigration)*, [2005] FC 1356 at paragraph 18).

[32] These principles, emanating from the pre-2013 jurisprudence, have not been displaced by the 2013 legislative scheme. In 2016, for example, this Court reiterated the limited discretion of CBSA officers and MDs in *Sharma*, and stated that "officers and the Minister or his delegate must always be mindful of Parliament's intention to make security a top priority (see paragraphs 3(1)(h) and (i) of IRPA)" (*Sharma* at para. 23). The Court went on to add that the rationale offered in *Cha* at paragraph 37 with respect to foreign nationals applies with equal force to permanent residents.

[33] Then, in 2018, Chief Justice Crampton of the Federal Court similarly found that it was not unreasonable for a CBSA officer and for a Minister Delegate to refer a permanent resident to an admissibility hearing for serious criminality without considering the H&C factors to which the applicant referred in his submissions. After a careful review of the relevant jurisprudence, Chief Justice Crampton noted that there was a conflict as to whether CBSA officers and MDs have any discretion when acting pursuant to subsections 44(1) and (2), and expressed the view that in any event, any discretion to consider H&C factors under these subsections with respect to criminality or serious criminality is "very limited, if it exists at all", and that there is no general obligation to do so (*McAlpin v. Canada (Public Safety and Emergency Preparedness)*, 2018 FC

422 at para. 70). Those principles were later reiterated by the Federal Court in *Melendez v. Canada (Public Safety and Emergency Preparedness)*, 2018 FC 1131 (at paras. 31-34) and in *Surgeon* (at paras. 4, 10).

[34] Also of relevance in this debate is the decision of this Court in *Canada (Citizenship and Immigration) v. Bermudez*, 2016 FCA 131, where the following guidance was provided with respect to the application of section 25 of the IRPA:

> [38] Section 25 of the IRPA includes specific delegations of the Minister's authority to a limited class of individuals to exercise H&C discretion under clearly and expressly defined circumstances. It follows that non-citizens, whether they be foreign nationals or permanent residents, do not have the right to have H&C considerations imported and read into every provision of the IRPA, the application of which could jeopardize their status (*Canada (Minister of Citizenship and Immigration) v. Varga*, 2006 FCA 394, [2006] F.C.J. No. 1828 (QL), at para. 13; *Medovarski v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 S.C.R. 539; *Esteban v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 S.C.R. 539, at para 47). In other words, section 25 of the IRPA "was not intended to be an alternative immigration scheme" (*Kanthasamy*, at paras. 23 and 85).
>
> (My emphasis)

[35] The appellant attempts to distinguish the pre-2013 jurisprudence on the basis that H&C considerations could be raised at later stages of the removal process prior to the adoption of the *Faster Removal of Foreign Criminals Act*, which the appellant described as a "safety valve" that was removed with the introduction of this legislative scheme. In other words, the appellant's submission is that the pre-2013 jurisprudence was premised on the notion that it would have been inappropriate to grant an individual two opportunities to raise H&C factors. Since the cases decided by this Court and the Federal Court after 2013 failed to grapple with this issue, it cannot

be said that the question certified below has already been addressed and decided, and the appellant therefore submits that it is incumbent upon this Court to deal with it squarely.

[36] In my view, this submission must fail. The legislative changes introduced in 2013 by the *Faster Removal of Foreign Criminals Act* are of no moment in delineating the role played by CBSA officers and MDs pursuant to section 44 of the IRPA. As already mentioned, the thrust of the jurisprudence relating to the limited discretion afforded to these officials in deciding whether to report a foreign national or a permanent resident for an admissibility hearing has everything to do with the administrative (as opposed to adjudicative) nature of their functions, and very little with the fact that the IRPA may provide other opportunities for an individual to raise H&C issues.

[37] The case law, going back to *Cha*, is replete with statements emphasizing that the referral process at section 44 of the IRPA is only meant to look into readily and objectively ascertainable facts concerning admissibility, and not to adjudicate controversial and complex issues of law and evidence. As courts often repeated, it is a screening exercise and not an adjudicative process of the kind performed by the Immigration Division and the Immigration Appeal Division of the Immigration and Refugee Board. This point was most recently reiterated by Justice Barnes in *Lin FC* at para. 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.
>
> (emphasis in original)

[38] This Court confirmed that decision (*Lin FCA*), and emphasized in brief reasons that "[t[he process [under section 44] is akin to a screening exercise in that there is no finding of inadmissibility, nor alteration of status" (at para. 4). As a result, both Courts stated that it is for the ID to make an admissibility determination, followed in some cases (which do not include serious criminality or organized criminality) by a *de novo* appeal to the IAD where a full H&C review may be entertained.

[39] The fact that the IRPA was amended in 2013 to bar a consideration of H&C and BIOC factors at the adjudicative stage in some instances (including when the referral has been made pursuant to section 37) does not transform the nature of the role to be performed by CBSA officers and MDs under section 44 of the IRPA. What happens after a report for an admissibility hearing has been made does not alter the scope of discretion afforded to the officers and MDs tasked with a purely administrative function. As this Court stated in *Cha* (at para. 35) "Immigration officers and Minister's delegates are simply on a fact-finding mission, no more, no less. Particular circumstances of the person, the offence, the conviction and the sentence are beyond their reach". There is no basis in the wording of the *Faster Removal of Foreign Criminals Act* itself, nor in the debates surrounding its adoption, to come to a different conclusion.

[40] As a result, the question that is before us should not have been certified. It has already been answered on numerous occasions, and therefore it is not a question of general importance. The Court should resist the temptation to revisit a well-settled issue and to change the long standing interpretation of a provision simply because a tangential amendment brings about different consequences. In the end, I can do no better than to quote, once more, from the decision of this Court in *Cha* in support of my conclusion:

> [38] The intent of Parliament is clear. The Minister's delegate is only empowered under subsection 44(2) of the Act to make removal orders in prescribed cases which are clear and non-controversial and where the facts simply dictate the remedy. According to the Manual (ENF 6, paragraph 3), it is precisely because there was nothing else to consider but objective facts that the power was given to the Minister's delegate to make the removal order without any need to pursue the matter further before the Immigration Division. In the circumstances, the use of the word "may" does not attract discretion. …

[41] What is true of referrals pursuant to section 36 is obviously also applicable to referrals pursuant to section 37. The role of CBSA officials and MDs was well settled before 2013, and remain unchanged afterwards in the absence of any clear indication to the contrary. Accordingly, the certified question should not have been certified.

B. *Was the MD's decision reasonable?*

[42] Even if I were to find that the question was properly certified, the appeal should still be dismissed. For the sake of clarifying the issue raised in that question and to put it to rest, I wish to offer the following remarks.

[43] When reviewing an administrative decision from the Federal Court, this Court must "step into the shoes" of the Federal Court and determine if it identified the appropriate standard of

review for each issue, and whether it applied that standard properly: *Agraira v. Canada*, 2013 SCC 36 at paras. 45-49; *Revell v. Canada (Citizenship and Immigration)*, 2019 FCA 262 at para. 33 (*Revell*); *Sharma* at para. 15. In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, the Supreme Court clarified that the presumptive standard of review is reasonableness save when there is a contrary legislative intention or a "rule of law" reason. I agree with the appellant that this presumption is rebutted when the issue to be decided on judicial review raises constitutional questions. As previously mentioned, the Federal Court refused to deal with the constitutional issues put forward by the appellant, and for reasons that I will develop shortly, I am of the view that the Court did not err in coming to that conclusion.

[44] The appellant's main contention is that the pre-2013 jurisprudence should be distinguished in the context of a referral made pursuant to paragraph 37(1)(*a*), because the built-in safety valve that allows for consideration of H&C factors at later stages of the process was removed with the adoption of the *Faster Removal of Foreign Criminals Act* in 2013. As a result, claims the appellant, an individual could be removed from Canada without ever having a real opportunity to put forward and benefit from an assessment of H&C considerations, including the best interests of his or her child. This new legislative scheme, the appellant argues, does not comply with sections 7 and 12 of the Charter and contravenes our international obligations under the *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3.

[45] I have already explained why I do not think it is the proper role of CBSA officers or of MDs to consider these issues, and I need not return to that issue.

[46] I also find that the appellant is not entirely deprived of other recourses before being removed if he is found inadmissible. As noted by the Federal Court, a removal order cannot be enforced until after the person concerned has had an opportunity to apply to remain in Canada through a PRRA under sections 112 and 113 of the IRPA. As part of that assessment, an officer will consider risk in the country of return, including whether the applicant's removal to their country of nationality would subject them to a risk of torture, risk to their life, or risk of cruel and unusual treatment or punishment.

[47] Pursuant to section 48 of the IRPA, an enforceable removal order must be effected "as soon as possible". Nevertheless, the person concerned may request that removal be deferred and the CBSA retains a limited discretion to defer removal. Depending on the circumstances, the CBSA may consider illness or other impediments to removal, the short-term best interests of children, or the existence of pending immigration applications that were made on a timely basis: *Baron v. Canada (Minister of Public Safety and Emergency Preparedness),* 2009 FCA 81 at paras. 49-51; *Lewis* at paras. 55, 58. Finally, the appellant could seek an Exceptional Temporary Resident Permit under section 24, and ministerial relief under section 42.1 of the IRPA. And of course, all of these decisions would be subject to judicial review in the Federal Court.

[48] If the appellant is of the view, as he seems to be, that preventing him from raising issues of H&C and BIOC before the ID or in a separate H&C application is in breach of his sections 7 and 12 Charter rights, the proper way to challenge the impugned provisions of the *Faster Removal of Foreign Criminals Act* is not to raise those issues for the first time before the Federal

Court. Rather, they should be put first to the ID at the time of an admissibility hearing for two related reasons.

[49] First, the Immigration Division is well equipped to handle complex issues. It provides for a full evidence-based hearing with representation by counsel in a quasi-judicial setting. It is well established that constitutional issues, and particularly Charter issues, should only be decided on the basis of a full evidentiary record, and with the benefit of an informed decision by the administrative tribunal endowed with the jurisdiction to make findings of fact and law. Administrative tribunals are in the best position to hear and decide the constitutionality of the statutory provisions they are tasked to apply. As Justice La Forest stated on behalf of the majority in *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board),* [1991] 2 S.C.R. 5 (at para. 16):

> 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.

[50] This reasoning is all the more compelling in the context of an application for judicial review, where the role of a reviewing court is to assess the reasonableness (and in some cases, the correctness) of the Immigration Division's decision. Courts benefit immensely from the expertise of administrative decision-makers, and from a full evidentiary and factual record that

will inform their decisions. Decisions of a constitutional nature, because of their nature and precedential value, should not be taken in a vacuum.

[51] Closely related to this first rationale supporting an initial decision by the ID is the notion that judicial review is a last resort remedy, which should only be brought once all available and adequate administrative remedies have been exhausted. This principle has been most forcefully and eloquently set out by this Court in *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61(*C.B. Powell*) and, in the immigration context, in *Sidhu v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 260, cited with approval by this Court in *Somodi v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 288. It has most recently been reiterated in *Lin FCA at* para. 5. This principle also finds its expression in subsection 72(2) of the IRPA, which states that an application for judicial review may not be made to the Federal Court "until any right of appeal that may be provided by this Act is exhausted".

[52] The appellant objects that the constitutionality of the H&C bar resulting from the adoption of the *Faster Removal of Foreign Criminals Act* in 2013 cannot be put to the ID, because it has no jurisdiction to consider H&C factors before issuing a removal order. While this is no doubt correct, it would not prevent the ID from considering a constitutional argument. As pointed out by the Federal Court, the Charter arguments raised by the appellant are precisely the type of complex factual and legal issues that the ID is authorized to consider. The Federal Court came to that conclusion on the basis of a decision that I reached in *Torres*, where I stated:

> [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 decision of the Supreme Court (see, *Cuddy Chicks Ltd. v Ontario (Labour Relations Board)*, [1991] 2 SCR 5; *Douglas/Kwantlen Faculty Assn v Douglas College*, [1990] 3 SCR 570 and *Tétreault-Gadoury v Canada (Employment and Immigration Commission)*, [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.

[53] This is still good law, and for that reason the appellant's objection that he would be unable to raise constitutional arguments before the ID is without merit. In any event, whatever the ID would decide at that stage (either on the merit of the arguments raised by the appellant or on the jurisdictional aspect) would be subject to judicial review before the Federal Court. This is not just pure technicality. It prevents fragmentation of the administrative process, avoids large costs and delays that may ultimately be unnecessary if the applicant succeeds at the administrative level, ensures that the ultimate decision will be made on the basis of a full record and with the benefit of findings made by experienced and knowledgeable decision makers, and is more in line with the concept of judicial respect for administrative decisions: see *C.B. Powell* at para. 32.

[54] I am mindful of the fact that the ID could refuse to address the Charter issues raised by the appellant on the ground that sections 7 and 12 are not engaged at the referral stage but only at the removal stage. As noted by the respondent, there is a large body of jurisprudence to the effect that it is premature to consider potential Charter violations at the admissibility stage because the

person, even if found inadmissible, may not be removed: see *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58 at para. 75, citing *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68 at para. 67; *Moretto v. Canada (Citizenship and Immigration)*, 2019 FCA 261 at para. 48; *Revell* at para. 38. If that were the case, the appellant could still bring an application for judicial review of such a decision before the Federal Court. And in the event that he was unsuccessful because his challenge is premature, the only logical conclusion would be that the validity of the H&C bar is better left at the stage where he will actually be ordered to be removed.

[55] For all of the above reasons, I am of the opinion that the MD's decision was reasonable within the context of the relevant provisions of the IRPA and of the applicable jurisprudence. The MD's discretion pursuant to section 44 of the IRPA is limited and he was not obliged to consider H&C and BIOC matters. That being said, it appears both from the MD's letter to the appellant of October 16, 2019, and from the highlight report of October 2, 2019, that he did consider the H&C factors and that he was alert, alive and sensitive to the best interests of the appellant's children. Counsel for the appellant has not forcefully challenged these findings, either orally or in writing, and has not convinced me that the decision of the MD in that respect was unreasonable.

[56] The constitutional validity of the provisions precluding the filing of an application for permanent residence on H&C grounds and barring an appeal before the IAD when an individual has been found inadmissible pursuant to section 37 was not raised before the MD, and could not

be raised for the first time before the Federal Court. These questions must be addressed at a later stage of the administrative process before being amenable to judicial review.

## V. Conclusion

[57] I would dismiss this appeal.

"Yves de Montigny"
J.A.

"I agree.
J.D. Denis Pelletier J.A."

"I agree.
Mary J.L. Gleason J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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| **DOCKET:** | A-207-21 |
| **STYLE OF CAUSE:** | UYI JACKSON OBAZUGHANMWEN v. THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS |
| **PLACE OF HEARING:** | VANCOUVER, BRITISH COLUMBIA |
| **DATE OF HEARING:** | MARCH 30, 2023 |
| **REASONS FOR JUDGMENT BY:** | DE MONTIGNY J.A. |
| **CONCURRED IN BY:** | PELLETIER J.A.<br>GLEASON J.A. |
| **DATED:** | JUNE 29, 2023 |

**APPEARANCES:**

| | |
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