Federal Court  Cour fédérale

Date: 20180426

Docket: IMM-3020-17

Citation: 2018 FC 455

Ottawa, Ontario, April 26, 2018

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

SARBJEET SINGH

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is a judicial review application of a decision of the Immigration and Refugee Board of Canada, Immigration Appeal Division [IAD], dated June 13, 2017, whereby the IAD dismissed the Applicant's appeal of a deportation order issued by the Board's Immigration Division [ID] on the ground that the appeal is barred by section 64 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act], as amended by the *Faster Removal of Foreign*

Criminals Act, SC 2013, c 16 [FRFCA] which came into force on June 19, 2013. Section 64 now provides that no appeal of such orders lies with the IAD when the appellant has been found inadmissible on grounds of serious criminality. The term "serious criminality" is defined in section 64 as being in respect of a crime that was punished in Canada by a term of imprisonment of at least 6 months. Prior to the coming into force of the FRFCA, the minimum term of imprisonment ousting the jurisdiction of the IAD was 2 years.

[2] The Applicant is a citizen of India. He was granted permanent residence status on March 15, 2009, after having been sponsored by his spouse. On May 11, 2011, he was convicted in Ontario of two counts of "luring a child under sixteen years of age" contrary to section 172.1 of the *Criminal Code*, RSC, 1985, c C-46. He was sentenced to 15 months imprisonment and 3 years' probation.

[3] On February 29, 2016, an inadmissibility report based on this conviction was issued against the Applicant under section 44 of the Act. The Applicant was then given an opportunity to provide submissions as to why that report should not be referred to the ID for an admissibility hearing, which he did on April 27, 2016. On September 27, 2016, the section 44 report was referred to the ID and an admissibility hearing was held on December 21, 2016. The ID found the Applicant to be inadmissible for serious criminality pursuant to paragraph 36(1)(a) of the Act on the basis that there were reasonable grounds to believe that the Applicant had been convicted of an offence under an Act of Parliament that is punishable by a maximum term of imprisonment of at least 10 years or for which a term of imprisonment of more than 6 months has been imposed. As a result, the Applicant was ordered deported.

[4] The ID informed the Applicant that he had the right to seek judicial review of its decision but not to appeal it to the IAD pursuant to section 64 of the Act because he had been sentenced to a term of imprisonment of more than 6 months.

[5] On January 4, 2017, the Applicant filed both a Notice of Application for Leave and for Judicial Review and an appeal to the IAD. The Notice of Application was directed at both the decision of Canada Border Service Agency [CBSA] to refer the section 44 report to the ID and the ID's finding of inadmissibility on grounds of serious criminality. That proceeding was mostly directed at CBSA's decision to refer the matter to the ID, which, according to the Notice of Application, "did not consider all the factors requested in the Applicant's section A44 submissions," including the humanitarian and compassionate [H&C] considerations put forward by the Applicant. With respect to the ID decision, the Applicant contended that it was flawed because it was based on CBSA's decision. That Notice of Application was withdrawn on February 1, 2017.

[6] On March 8, 2017, the IAD requested the Applicant to provide submissions on whether it had jurisdiction to hear his appeal. On April 6, 2017, the Applicant filed the requested submissions, claiming that paragraph 64(2)'s appeal bar did not apply to cases in which persons whose inadmissibility arose from criminal convictions occurring prior to June 19, 2013. A few days later, the Applicant asked the IAD to defer making a decision on jurisdiction until the Supreme Court of Canada [SCC] rendered its decision in *Tran v Canada (Public Safety and Emergency Preparedness)*, SCC Court File No. 36784 (since released: *Tran v Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50 [*Tran*]).

[7] Then, on April 26, 2017, the Applicant filed a further application with the IAD, this time seeking orders for disclosure of information from the CBSA and the London Police Service [LPS] related to his arrest, charges and conviction. In particular, the Applicant was looking for information that CBSA would not disclose save through a formal request under the *Access to Information Act*, RSC, 1985, c A-1. The requested information referred to when CBSA had initially learned of the Applicant's arrest, the charges laid against him and his conviction. In support of his disclosure application, the Applicant affirmed having been told by the LPS when he was arrested that CBSA would be informed of the charges against him.

[8] The Applicant claimed that this information was necessary for him to determine whether CBSA had acted in a manner that constitutes an abuse of process by deliberately or incompetently delaying its enforcement actions against him after the FRFCA came into force so as to negate the right of appeal that would otherwise have been available to him under the former version of paragraph 64(2) of the Act.

[9] On June 13, 2017, the IAD concluded that it did not have jurisdiction to hear the Applicant's appeal on the ground that paragraph 64(2) of the Act prevents a permanent resident from appealing an ID decision to the IAD if the permanent resident has been found inadmissible on grounds of serious criminality when the crime was punished by a term of imprisonment of at least 6 months.

[10] The IAD stated that although the Act was amended on June 19, 2013, reducing the minimum term of imprisonment for the crime associated with a finding of serious criminality

from 2 years to 6 months, the FRFCA included transitional provisions which provided that persons subject to a section 44 report, who had a right of appeal under the Act, as it stood prior to June 19, 2013, and whose referral to the ID was signed prior to that date, maintained that right of appeal. As the Applicant's referral to the ID had been signed on September 27, 2016, the IAD concluded that he was not covered by the transitional provisions and that he had, therefore, no right of appeal as a result of section 64 of the Act.

[11] The IAD also declined the Applicant's request to suspend its determination pending the SCC's decision in *Tran*. It held that it was bound by the Act to deal with the Applicant's appeal as informally and quickly as the circumstances and the considerations of fairness and natural justice permit. The IAD found no infringement of natural justice or procedural fairness in deciding its jurisdiction without waiting for the SCC decision in *Tran* as there were safeguards that would permit the Applicant to re-open and pursue his appeal in the event the SCC hands down a decision that supports his arguments.

[12] Before this Court, the Applicant made a similar request by seeking an order extending the time within which to perfect his application for leave under rule 10 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, until 30 days after the SCC renders its decision in *Tran*. That motion was dismissed by the Court (Justice Manson) on August 31, 2017 (*Singh v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 795 [*Singh*]). Justice Manson held that the interest of justice did not support the delay sought by the Applicant as the timing of the issuance of *Tran* was at best speculative and there was no certainty that the outcome of that decision would be determinative of the Applicant's rights in the present

case. He also agreed with the Respondent that "the applicable transition provision with respect to subsection 64(2) was followed by the IAD and is currently determinative of the state of the law that binds this Court" (*Singh* at paras 21-22).

[13] As to the merits of his judicial review application, the Applicant essentially claims that by not discussing anything related to his disclosure application or making any reference to it, the IAD refused to exercise its jurisdiction and committed, as a result, a reviewable error. In particular, he contends that the IAD's refusal to deal with that application, which raises the issue of whether there was an abuse of process involved in his case, deprived him of the ability to appreciate the nature of the proceedings against him and fully meet the case against him by arguing that an abuse of process, if established, should act as an exception to the section 64 appeal bar. This, he says, amounts to a breach of the duty of procedural fairness that was owed to him by the IAD.

[14] In his written submissions before the Court, the Applicant argued that the retroactive application of paragraph 64(2) of the Act would, in the circumstances of his case, result in a breach of his rights under the *Canadian Charter of Rights and Freedoms* [*Charter*]. In particular, he contended that allowing the incompetent, negligent or deliberate actions of CBSA to prejudice his rights, as they existed prior to the coming into force of the FRFCA, would be a breach of his rights under section 7 of the *Charter*. He further contended that it is well within the IAD's powers to consider questions of law, including *Charter*-based arguments, especially where, as is the case here, what is in issue is not whether legislation is *Charter* compliant but whether government action is.

[15] However, at the hearing of the present judicial review application, the Applicant conceded that any *Charter* argument in this case was dependant on the information to be disclosed by CBSA and the LPS and that it was, therefore, premature.

II. Preliminary Issues

[16] The Respondent submits that the present proceedings should be dismissed because the Applicant failed to file an affidavit in support of his application, contrary to rule 10(2)(d) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 [*Immigration Rules*]. I disagree.

[17] Rule 10(2)(d) of the *Immigration Rules* requires that the applicant serve on the Respondent an application record containing, among other documents, "one or more supporting affidavits verifying the facts relied on by the applicant in support of the application." The Applicant's Record contains no affidavit from him.

[18] It is true that this Court has previously held that irregularities in an affidavit, such as an affidavit from former counsel or an applicant's child, or the failure to file an affidavit can lead the Court to summarily dismiss an application for leave (*Fatima v Canada (Citizenship and Immigration)*, 2017 FC 1086 at para 5; *Dhillon v Canada (Citizenship and Immigration)*, 2009 FC 614 at paras 5-6 and 9; *Metodieva v Canada (Employment and Immigration)*, [1991] FCJ No 629, 132 NR 38 (FCA), 1991 CarswellNat 843 at para 7). However, this is not always the case. This Court, on a number of occasions, has addressed a case on its merits when leave had been granted despite the lack of affidavit (*Bakenge v Canada (Citizenship and Immigration)*, 2017 FC

517 at paras 3-4), or has declined to dismiss the judicial review application for failure to submit an affidavit when the Certified Tribunal Record [CTR] can be relied upon to assess the facts alleged by the applicant (*Ali v Canada (Citizenship and Immigration)*, 2011 FC 1247 at para 58).

[19] Here, leave has been granted despite the absence of an affidavit from the Applicant and I am satisfied that the CTR can be relied upon to assess the underlying factual foundation in what is for all intents and purposes a matter raising a question of law.

[20] The Respondent also submits that the appropriate minister to be named as a party to an application for leave and judicial review in cases where the tribunal is the IAD, is the Minister of Citizenship and Immigration and that the Style of Cause should be amended accordingly. The Applicant has not responded to this submission. However, I am not persuaded that naming the Minister of Public Safety and Emergency Preparedness as a party to the present proceedings was incorrect. That Minister and its officials are the ones involved in the process leading to the issuance of a section 44 report and to a referral to the ID being made (*Tran*, at para 6). It was certainly the case here where, according to the CTR, it is that Minister and its officials who referred the section 44 report to the ID, intervened before the ID in order to seek a conclusion of inadmissibility and an order of deportation against the Applicant and sent written submissions on the preliminary issue raised by the IAD on March 8, 2017 regarding whether the Applicant's appeal was barred by paragraph 64(2) of the Act.

[21] Therefore, I see no reason to amend the Style of Cause.

III. Issue and Standard of Review

[22] In my view, the sole issue to be determined in this case is whether the IAD, prior to dismissing the Applicant's appeal for want of jurisdiction, had a duty to consider the Applicant's disclosure application so as to put the Applicant in a position to assess whether his right of appeal to the IAD was lost as a result of an abuse of process on the part of CBSA and, as the case may be, make the argument before the IAD. Put another way, was the IAD's jurisdiction spent the moment it held that the Applicant's appeal was barred by paragraph 64(2) of the Act and was not saved by the FRFCA's transitional provisions?

[23] Normally, the issue of whether an administrative decision-maker erred in considering its own jurisdiction is reviewable under the reasonableness standard of review (*Flore v Canada (Citizenship and Immigration)*, 2016 FC 1098 at para 20). As for issues of procedural fairness, it is well settled that the applicable standard of review is correctness (*Canada (Citizenship and Immigration) v Khosa*, [2009] 1 SCR 339, 2009 SCC 12 at para 43).

[24] Here, I agree with the Respondent that the question of the applicable standard of review is of little importance as I am satisfied that the IAD decision was both reasonable and correct.

IV. Analysis

A. *The legislative framework*

[25] According to paragraph 63(3) of the Act, a permanent resident may appeal to the IAD against a decision at an admissibility hearing to make a removal order. However, section 64 of the Act limits that right by providing that no such appeal may be made in instances where the permanent resident has been found to be inadmissible, among other things, on grounds of serious criminality. The term "serious criminality" is defined in paragraph 64(2) as being in respect of a crime that was punished in Canada by a term of imprisonment of at least 6 months.

[26] Currently, paragraphs 64(1) and (2) of the Act read as follows:

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	(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

months or that is described in paragraph 36(1)(b) or (c).	faits visés aux alinéas 36(1)b) et c).

[27] Paragraph 64(2) was amended by section 24 of the FRFCA. Prior to the amendment, which came into force on June 19, 2013, serious criminality was defined as being with respect to a crime that was punished in Canada by a term of imprisonment of at least 2 years. According to the FRFCA's transitional provisions, individuals whose referrals to the ID for an admissibility hearing pursuant to paragraph 44(2) of the Act were signed prior to June 19, 2013, would continue to benefit from a right of appeal to the IAD as that right stood prior to that date. In other words, these individuals would continue to be governed by the more generous definition of "serious criminality" of paragraph 64(2) as it read prior to the coming into force of the FRFCA.

[28] The relevant transitional provisions read as follows:

Appeal	**Appel**
32. Subsection 64(2) of the Act, as it read immediately before the day on which section 24 comes into force, continues to apply in respect of a person who had a right of appeal under subsection 63(1) of the Act before the day on which section 24 comes into force.	32. Le paragraphe 64(2) de la Loi, dans sa version antérieure à l'entrée en vigueur de l'article 24, continue de s'appliquer à l'égard de quiconque avait un droit d'appel au titre du paragraphe 63(1) de cette loi avant l'entrée en vigueur de l'article 24.

Appeal	**Appel**
33. Subsection 64(2) of the Act, as it read immediately before the day on which section 24 comes into force, continues to apply in respect of a person who is the subject of a report that is referred to the Immigration Division under subsection 44(2) of the Act before the day on which section 24 comes into force.	33. Le paragraphe 64(2) de la Loi, dans sa version antérieure à l'entrée en vigueur de l'article 24, continue de s'appliquer à l'égard de toute personne visée par une affaire déférée à la Section de l'immigration au titre du paragraphe 44(2) de cette loi avant l'entrée en vigueur de l'article 24.

[29] The FRFCA did not amend paragraph 36(1)(a) of the Act which sets out the inadmissibility grounds for serious criminality committed in Canada. Therefore, at the time the FRFCA came into force, a permanent resident was inadmissible on such grounds "for 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". The FRFCA did not change that. Therefore, the Applicant would have been found inadmissible had the section 44 report been referred to the ID prior to June 19, 2013. This is not contested.

[30] The process leading to a section 44 report being issued and referred to the ID and an appeal eventually made to the IAD, was described as follows in *Tran*:

> [6] If a Canada Border Services Agency ("CBSA") officer is of the opinion that a permanent resident is inadmissible, that officer may prepare a report setting out the relevant facts and transmit that report to the Minister of Public Safety and Emergency Preparedness ("Minister") (IRPA, s. 44(1)). If the Minister is of the opinion that the report is well founded, the Minister may refer the report to the Immigration Division of the Immigration and Refugee Board ("Immigration Division") for an admissibility hearing (s. 44(2)). However, even if he is of the opinion that the report is

> well founded, the Minister retains some discretion not to refer it to the Immigration Division.
>
> [7] If the Minister does refer the report to the Immigration Division, an admissibility hearing is held for the permanent resident, and the Immigration Division must either recognize that person's right to enter Canada (IRPA, s. 45 (a)), authorize him or her to enter Canada for further examination (s. 45 (c)), or make a removal order against that person (s. 45 (d)). If a removal order is made, that person's permanent resident status is lost (IRPA, s. 46(1) (c)). Although a right to appeal to the Immigration Appeal Division exists against a decision to make a removal order against a permanent resident (IRPA, s. 63(3)), there is no right to appeal by a permanent resident who has been found inadmissible on grounds of serious criminality if the finding of inadmissibility was "with respect to a crime that was punished in Canada by a term of imprisonment of at least six months" (IRPA, s. 64(2)).

[31] The IAD is one of four divisions of the Immigration and Refugee Board of Canada [the Board]. According to section 162 of the Act, the IAD, as do the other three divisions of the Board, has the sole and exclusive jurisdiction to hear and determine all questions of law and fact in respect of any matter brought before it under the Act. This includes questions of jurisdiction. Section 162 also makes it incumbent on the IAD, as it does for all the three other divisions, to "deal with all proceedings before it as informally and quickly as the circumstances and the considerations of fairness and natural justice permit."

[32] Pursuant to section 165 of the Act, the IAD and its members, unlike the other three divisions and their members, do not have the powers and authority of a commissioner appointed under Part I of the *Inquiries Act*, RSC, 1985, c I-11 or the power to "do any other thing they consider necessary to provide a full and proper hearing." However, section 174 of the Act confers on the IAD,

[…] all the powers, rights and privileges vested in a superior court of record necessary to the exercise of its jurisdiction, including the searing and examination of witnesses, the production and inspection of documents and the enforcement of its orders	[…] les attributions d'une juridiction supérieure sur toute question relevant de sa compétence et notamment pour la comparution et l'interrogatoire des témoins, la prestation de serment, la production et l'examen des pièces, ainsi que l'exécution de ses décisions

[33] Finally, one of the features of an appeal before the IAD is the IAD's special relief jurisdiction, which the ID does not possess as it has no other choice but to issue a deportation order once it is satisfied that there are reasonable grounds to believe that the person concerned is inadmissible for serious criminality (*Bisla v Canada (Citizenship and Immigration)*, 2016 FC 1059 at para 16). Indeed, according to paragraph 67(1)(c) of the Act, other than in the case of an appeal by the Minister, the IAD may allow an appeal if it is satisfied, taking into account the best interests of a child directly affected by the decision, that sufficient H&C considerations warrant special relief in light of all the circumstances of the case. This, I would assume, is one of the reasons why an appeal to the IAD is so appealing to the Applicant given the H&C considerations he submitted in vain to the ID.

B. *The IAD did not err in holding that the Applicant's appeal is barred by paragraph 64(2) of the Act and that it therefore has no jurisdiction to entertain it*

[34] The Applicant argues that the IAD, by making no reference to his disclosure application or discussing anything related to it, refused to exercise its jurisdiction and breached the duty of procedural fairness owed to him as he requires the information requested to assess whether there

has been an abuse of process on the part of CBSA which, if established, would, in his view, act as an exception to the section 64 appeal bar.

[35] The Respondent submits that determining jurisdiction is a preliminary stage of the appeal process and that once the IAD concludes it does not have jurisdiction over an appeal, it no longer has any authority to consider other questions in relation to that appeal. In the alternative, the Respondent contends that the abuse of process argument the Applicant hopes to make before the IAD is bound to fail either because it has no traction in the case law or because the Applicant is barred by the doctrine of implied waiver to advance it at this stage as he failed to raise it at the earliest opportunity, that is when the section 44 report was issued or when said report it was referred to the ID, or on judicial review of either decision.

[36] I believe the Respondent's view correctly reflects the current state of the law on both counts.

[37] There is no debate in the present case that the Applicant is inadmissible to Canada pursuant to paragraph 36(1)(a) of the Act because he is not a Canadian citizen and he committed an offence under an Act of Parliament for which he served a term of imprisonment of more than 6 months. There is also no debate that paragraph 64(2) of the Act creates a bar to the Applicant's appeal to the IAD and that said bar is not superseded by the FRFCA's transitional provisions, notably section 33.

[38] Although this case was decided prior to the changes to paragraph 64(2) of the Act, *Kroon v Canada (Minister of Citizenship and Immigration)*, 2004 FC 697 [*Kroon*], established some important principles regarding that provision. In that case, the Court held that the IAD lacked the power to determine the constitutionality of section 64. This was so, according to Justice Rouleau, because once the factual determination was made that the applicant was inadmissible for serious criminality, the IAD lost "any mandate to hear an appeal," including any power to decide legal questions, constitutional or otherwise, arising under that provision. Justice Rouleau added that "Parliament could not have been more clear in its intention to limit the IAD's jurisdiction with respect to individuals who fall within paragraph 36(1)(a) of the Act" (*Kroon* at para 32). He reiterated that in interpreting section 64, it was important to keep in mind the stated objectives of the legislation:

> [40] In interpreting the provisions of the *IRPA*, including the rights of appeal under the Act, it is important to keep in mind the stated objectives of the legislation to "protect the health and safety of Canadian and to maintain the security of Canadian society" and to "promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks" (paragraphs 3(1)(h) and (i). Section 64 of *IRPA*, which clearly eliminates any appeal to the IAD by individuals excluded on the grounds of serious criminality, attempts to further these security objectives.

[39] Also at issue in *Kroon* was whether the applicant's *Charter* rights were engaged by the fact that the respondent had failed, without valid reason, to convene an inquiry into the applicant's status in Canada under the former *Immigration Act* prior to the coming into force of the Act on June 28, 2002. The evidence in that case was that the immigration authorities were aware of the applicant's circumstances before the end of 2001. The applicant claimed that had the respondent ruled on his inadmissibility prior to the coming into force of the Act, he would

have been able to file an appeal of any deportation order immediately and thus, would not have lost his right of appeal as a result of the then new section 64.

[40] Although Justice Rouleau recognized that delay in the immigration context could, in appropriate circumstances, constitute a violation of section 7 of the *Charter*, he found the applicant's argument to be untenable as there was "no obligation on immigration officials to act within the time periods hoped for by an applicant, absent any legislative direction." He held that this argument was "analogous to suggesting that [the applicant] himself should have admitted his guilt for the sexual assault conviction years earlier, in which case the immigration process would have run its course sooner, or that the applicant could have notified immigration officials as soon as he was convicted and requested an earlier hearing" (*Kroon* at para 39).

[41] In *Ferri v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1580 [*Ferri*], which dealt with the jurisdiction of the IAD in the context of paragraph 68(4) of the Act, Justice Mactavish found Justice Rouleau's reasoning in *Kroon* "equally applicable in this case." Paragraph 68(4) provides that when the IAD has stayed a removal order against a permanent resident or a foreign national who has been found inadmissible on grounds of serious criminality or criminality and that they are convicted of another offence referred to in paragraph 36(1) of the Act, the stay is cancelled by operation of the law and the appeal before the IAD is terminated. At issue in *Ferri* was whether the effect of that provision was to deprive the IAD of jurisdiction to decide questions of law, including questions of constitutional validity. Prior to his hearing before the IAD, Mr. Ferri had served a Notice of Constitutional Question, alleging that paragraph 68(4) violated his rights under sections 7 and 15 of the *Charter*.

[42] Justice Mactavish held that paragraph 68(4) had that effect. She stated that once the IAD was satisfied that (i) the individual concerned was a foreign national or a permanent resident; (ii) they had previously been found to be inadmissible on grounds of serious criminality or criminality; (iii) it had previously stayed a removal order made in relation to that individual; and (iv) the individual had been convicted of another offence referred to in paragraph 36(1) of the Act, the IAD's jurisdiction over the case was spent in the sense that "the IAD [lost] jurisdiction over the individual, with the stay being cancelled and the appeal being terminated" (*Ferri* at paras 40-41). She further held that this interpretation of paragraph 68(4) was "consistent with the fact that, in enacting the *Immigration and Refugee Protection Act* in 2002, Parliament re-balanced the interests of public safety and individual rights by broadening the categories of persons who may be removed without an appeal to the IAD" (*Ferri* at para 43).

[43] Finally, Justice Mactavish rejected the notion that *Kroon* had to be distinguished from the case at bar because section 64 operates to prevent the IAD from assuming jurisdiction over an individual whereas paragraph 68(4) contemplates situations where the IAD has already assumed jurisdiction over a person:

> [44] As was noted previously, Justice Rouleau came to a similar conclusion in the *Kroon* case previously cited. While *Kroon* also dealt with section 64 of *IRPA*, rather than subsection 68(4), I am of the view that his reasoning is equally applicable in this case. The fact that section 64 operates to prevent the IAD from assuming jurisdiction over an individual, whereas subsection 68(1) of the *Act* contemplates situations where the IAD has already assumed jurisdiction over a person does not, in my view, justify ignoring the express language of the provision, and finding constitutional jurisdiction where it would not otherwise exist.

[44] Two years ago, in *Sharma v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 319 [*Sharma*], the Federal Court of Appeal, in discussing Parliament's choice to amend paragraph 64(2) so as to "draw the cut-off line at six months instead of two years," underscored the fact that "[i]t is not for the Court to vary the clear intention of Parliament and to remedy the alleged unfairness of its choice by stretching the requirements of procedural fairness beyond its accepted meaning and content" (*Sharma* at para 38). *Sharma* was about the duty of fairness owed to the applicant in the context of the decisions to issue the section 44 report and to subsequently refer the report to the ID for an admissibility hearing. The applicant was claiming that he was entitled to be provided with a copy of the section 44 report before his case was referred to the ID.

[45] As in the present case, the applicant in *Sharma* was sentenced to a term of imprisonment of less than 2 years prior to the coming into force of the FRFCA but the section 44 report was only issued in March 2014, that is nearly a year after the coming into force of that piece of legislation. The referral to the ID ensued and the ID found the applicant inadmissible on grounds of serious criminality. The applicant argued that one factor to consider in determining the content of the duty of procedural fairness owed to him by the officers who issued the section 44 report and referred the report to the ID was that by delaying the issuance of the report, the immigration authorities had deprived him of an opportunity to avoid deportation as his right of appeal, which was available to him as a result of the 2-year cut-off line of former section 64 of the Act, had now been removed by the FRFCA.

[46] The Federal Court of Appeal held that Parliament's decision to bring the section 64 appeal bar's minimum threshold from 2 years to 6 months was "of no import in determining the

participatory rights of the persons concerned." It held that Parliament had "turned its mind to the temporal application of its amendment and softened its impact by determining that persons whose referral to the ID was signed by the Minister or his delegate before June 19, 2013, regardless of the date the referral was sent to the ID, would not be caught by the new six month limit and would be eligible to an appeal if their term of imprisonment was less than two years (see FRFCA, s. 33)," adding, as indicated previously, that it was not for courts to vary the clear intention of Parliament and to remedy the alleged unfairness of its choices (*Sharma* at para 38).

[47] Recently, in *Martinez v Canada (Citizenship and Immigration)*, 2017 FC 982 [*Martinez*], the Court (Justice Elliott) dealt with a similar abuse of process argument as in the present case, albeit in the context of a judicial review application of an ID decision. In that case, the applicant was also found inadmissible under paragraph 36(1)(a) of the Act for a criminal conviction handed down in September 2010 for which the applicant was given a suspended sentence in addition to the 210 days he spent in custody between his arrest and his guilty plea. His sentence also included 2 years of probation. The section 44 report was issued in May 2015 and it was referred to the ID on September 9, 2015.

[48] Before the ID, Mr. Martinez sought an adjournment pending the completion of an access to information request that had been filed with CBSA with the objective of attempting to use the requested information to argue, as does the Applicant in the present case, that CBSA had committed an abuse of process by delaying the making and referral of the section 44 report concerning the 2010 conviction until after the coming into force of the FRFCA. The ID refused

to grant the adjournment on the basis that it did not have the ability to grant a stay of proceedings on the grounds asserted by the applicant.

[49] Justice Elliott first examined whether the ID had erred in refusing to grant the adjournment request. She found that it had not. Relying on this Court's decision in *Torre v Canada (Citizenship and Immigration)*, 2015 FC 591 [*Torre*], which she noted "has been followed and applied several times in this Court," Justice Elliott held that there was "ample support for the refusal to grant the adjournment" (*Martinez* at para 42). She further noted that *Torre* made it clear, based on an analysis of the Supreme Court of Canada decision in *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307, that the only delay the ID was entitled to consider to determine whether there was an abuse of process was the delay between the decision made by the Minister to prepare a report under section 44 and the ID's admissibility finding, and that any other period of time used to calculate an unreasonable delay allegedly resulting in an abuse of process was irrelevant (*Martinez* at para 40).

[50] Justice Elliott then considered whether the referral of the section 44 report was, in and of itself, an abuse of process. The applicant was complaining not that it took a long time to make the referral but rather that CBSA "'reached back to an old conviction' at a time when there was new law" (*Martinez* at para 46). In other words, he was complaining that the law was improperly applied retrospectively either for the express purpose of depriving him of his appeal rights by deliberately delaying the referral until after the coming into force of the FRFCA or through the delay and prioritization processes within CBSA which caused it not to refer the section 44 report until 2015 even though the referral could have been made earlier (*Martinez* at para 48).

[51] Justice Elliott held that both arguments were answered by *Sharma*. In particular, she stated that some of the Federal Court of Appeal's observations in that case were "important in the present case" and "apply equally to this matter" (*Martinez* at paras 49-50). She summarized them as follows:

> (1) Parliament turned its mind to the temporal application of the *FRFCA* amendment to six months and it is not for the courts to vary the clear intention of Parliament;
>
> (2) Prior to removal from Canada other procedures are available to stop deportation so the admissibility hearing is not determinative of deportation; and,
>
> (3) Parliament has left to the Ministry the determination of the procedure to follow. A level of deference is therefore owed to the procedure selected by the Ministry.
>
> (*Martinez* at para 49, citing *Sharma* at paras 38, 37 and 28)

[52] Based on these observations, she concluded that when reviewing the process undertaken by CBSA in any given case, the Court should not interfere with the policy choice made by Parliament when it enacted the FRFCA's transitional provisions:

> [50] The principles enunciated in *Sharma* apply equally to this matter. It is not the role of this Court or the ID to extend or modify the transitional provisions in section 33 of the *FRFCA* that were specifically chosen by Parliament. The legislature could have provided that the former provisions of subsection 64(2) applied if the sentencing occurred prior to passage of the *FRFCA* but, it chose not to. The legislature chose the date on which the referral decision is signed by the Minister or his delegate. The Court should not interfere with that policy choice by Parliament when reviewing the process undertaken by CBSA.

[53] Justice Elliott also dismissed the notion that the Minister illegally applied the Act retrospectively when CBSA "reached back and referred an old conviction under the new law,"

holding that this argument was defeated by the FRFCA's transitional provisions which made it clear that "only referrals in existence at the time of the passage of the FRFCA enjoy the benefit of the appeal to the IAD" (*Martinez* at para 51). She reiterated that the ability of Parliament to rebut the presumption against retrospectivity by clearly signaling that it has turned its mind to that issue, has long been recognized and was reaffirmed in *Tran*, and held that the explicit language used in section 33 of the FRFCA was sufficient to rebut the presumption against the retrospective application of the law and to bar the right of appeal to the IAD when the referral to the ID for a conviction pronounced prior to the coming into force of the FRFCA on June 19, 2013, is made after that date:

> [53] Parliament has clearly indicated in section 33 of the *FRFCA* that only a section 44(2) referral made before the *FRFCA* came into force can receive the benefit of the former provisions of subsection 64(2) of *IRPA*. That is a definitive statement of the intention of Parliament, in the express language of the kind referred to by the Supreme Court in *Tran*, that the law does apply retrospectively where the referral had not been made by June 19, 2013.
>
> [54] The referral of the Applicant took place in 2015 and the *FRFCA* was passed in 2013. Section 33 of the *FRFCA* requires that the newer provisions of subsection 64(2) apply. Given the explicit language used in section 33, the presumption against retrospective application of the law was rebutted, the section 44(2) referral was in compliance with the legislation and there was no right to appeal to the IAD.

[54] Here is, in my view, what transpires from these cases for the purposes of the present matter, keeping in mind that the Applicant is no longer raising issues of a constitutional nature on the ground that he lacks, at least for the moment, the underlying evidentiary foundation to make such a claim:

a. Parliament's intention to limit the IAD's jurisdiction with respect to individuals who fall within the ambit of paragraph 36(1)(a) of the Act could not have been clearer as is the case of Parliament's intention to bring the new section 64 appeal bar's minimum threshold from 2 years to 6 months and to limit the impact of that change only to those whose referral to the ID was signed by the Minister or his delegate before the coming into force of the FRFCA, regardless of the date the referral was sent to the ID, so that these persons – and only these persons – continue to enjoy the benefit of an appeal to the IAD;

b. This interpretation is consistent with Parliament's intention, when adopting the Act in 2002, to make security a top priority and to re-balance the interests of public safety and individual rights by broadening the categories of persons who may be removed without an appeal to the IAD;

c. Parliament turned its mind to the temporal application of the amendments it brought to section 64 of the Act through the FRFCA. It could have provided that the former provisions of paragraph 64(2) setting the cut-off line at 2 years, would continue to apply if the sentencing occurred prior to the coming into force of the FRFCA but it chose not to. Instead, it chose the date on which the referral decision is signed by the Minister. It is not for the Court to vary the clear choices Parliament made in this respect and to remedy the alleged unfairness of those choices;

d. The language used in section 33 of the FRFCA is sufficiently clear to rebut the presumption against the retrospective application of the law and to bar, as a result, the right of appeal to the IAD when a decision to refer a matter to the ID was signed after the coming into force of the FRFCA, even if this is for a conviction preceding that date;

e. Despite the broad terms of section 162 of the Act, once the factual determination is made under section 64 that an applicant is inadmissible for serious criminality for a crime that was punished for a term of imprisonment of at least 6 months and that the decision to refer the section 44 report to the ID was signed after the coming into force of the FRFCA, the IAD loses "any mandate in the appeal" (*Kroon* at para 33), including the power to decide legal questions, constitutional or otherwise, arising under that provision. In other words, it "loses jurisdiction over the individual" (*Ferri* at para 41);

f. The same is true for the appeal bar set out in paragraph 68(4) of the Act even though, contrary to what is the case when section 64 is at play, the IAD already assumed jurisdiction over the individual;

g. Under the current legislative scheme, there is no obligation on immigration officials to act within the time periods hoped for by an applicant regarding the making or the referral to the ID of a section 44 report;

h. The only delay to consider which is relevant for determining whether there was an abuse of process in a context such as this one is the delay between the decision made by the Minister to prepare a report under section 44 and the ID's admissibility finding. Any other period of time should not be used to calculate an unreasonable delay allegedly resulting in an abuse of process.

[55] Therefore, my reading of the current state of the law is that when a notice of appeal is filed under paragraph 63(3) of he Act, the IAD's jurisdiction is limited to answering the following questions:

a. Is the individual concerned a foreign national or a permanent resident?

b. Has the individual previously been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized crime?

c. Is the serious criminality with respect to a crime that was punished in Canada by a term of imprisonment of at least 6 months or that is described in paragraph 36(1)(b) or (c)?

[56] If the answer to each of these questions is in the affirmative, then the IAD loses jurisdiction over the individual. In other words, when the facts of a case bring the IAD appellant within the wording of section 64, then the IAD is precluded from asserting jurisdiction over that individual from the outset, even though paragraph 162(1) of the Act gives the IAD, as it does to the ID, general power to consider all questions of law, including questions of jurisdiction.

[57] This not only means that the IAD cannot hear the merits of the case; it also means that it cannot hear any motions in relation to the appeal, including motions for the production of documents. That view, I believe, is supported by the wording of paragraph 174(2) which confers on the IAD all the powers, rights and privileges vested in a superior court of record necessary to the exercise of its jurisdiction, including the production and inspection of documents. In the French version of that provision, these powers are conferred in relation to "toute question relevant de sa compétence" (my emphasis). This language, when both the English and French versions of that provision are read together, as they should be, presupposes that to trigger the use of these powers, the IAD has jurisdiction over a matter in the first place. If it does not, then they cannot be used.

[58] Here, it is not contested that the Applicant is a permanent resident who has been found inadmissible for serious criminality for a crime that was punished in Canada by a term of imprisonment of at least 6 months. I am therefore satisfied that the IAD did not err in declining jurisdiction over the Applicant's appeal and in not dealing with his application for the production of documents.

[59] It is clear that the IAD did not have jurisdiction to entertain the Applicant's appeal. As a result, the IAD was even precluded from determining questions of law in relation to the appeal, including the constitutionality of the very provision – section 64 – that limits the Applicant's right of appeal (*Kroon* at paras 32-33). In such context, the IAD was, *a fortiori*, precluded from embarking upon an inquiry as to whether there might have been an abuse of process on the part of CBSA that could lead to section 64 being varied so as to read into it, constitutionally or otherwise, an exception to the appeal bar provided therein.

[60] In sum, the IAD cannot be blamed for not exercising a power it did not possess in the first place, the Applicant's appeal being barred by section 64 of the Act. I see no error on the part of the IAD in this respect, regardless of the applicable standard of review.

[61] The Applicant's judicial review application will therefore be dismissed.

[62] The Applicant urges the Court to certify a question for appeal. He claims that the Federal Court of Appeal has never had a chance to examine whether the IAD has jurisdiction to determine the constitutional compliance, as opposed to validity, of a transitional provision that

determines the substantive right of an applicant to have a right of appeal. He proposes therefore that the Federal Court of Appeal be asked to determine whether paragraph 64(2) of the Act precludes the IAD from determining the constitutional applicability of section 33 of the FRFCA where an appellant is not challenging the constitutional validity of paragraph 64(2).

[63] It may be that there was no constitutional non-compliant action on the part of CBSA in this case, he says, but he insists that he has no way to determine that unless the IAD exercises its authority to order CBSA to disclose the requested information.

[64] In order to meet the test for certification, a proposed question must raise an issue that (i) transcends the interests of the immediate parties to the case; (ii) is of broad significance or of general importance; and (iii) is dispositive of the appeal (*Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168 at para 9).

[65] The Respondent opposes certification. It claims that the proposed question would not be dispositive of the appeal as it revolves around a constitutional issue which cannot form part of this Court's decision on judicial review as the Applicant has not filed the requisite Notice of Constitutional Question [NCQ]. This is fatal, it says, whether the issue raised is one of the constitutional validity of a legislative provision or its applicability, due to the government's non-*Charter* compliant conduct. However, this appeal, as framed, would be about the IAD's jurisdiction to consider the constitutional applicability of section 33 of the FRFCA, not about that provision's constitutional applicability. I do not see any constitutional dimension to the proposed question.

[66] The Respondent further contends that the law is settled in that area, there being no divergence in the case law, and that there is therefore no need for clarity of the law. The Respondent has a point but I do not believe that this, in and of itself, is sufficient to deny certification.

[67] My main concern with the Applicant's proposed question is that what underlies this whole case – the alleged abuse of process – could and should have been brought up much earlier in the process that ultimately led to the ID's inadmissibility finding. The Applicant asserts that he has no way of determining whether there has been an abuse of process unless the IAD exercises its authority to order CBSA to disclose the requested information. However, even assuming this is the case at this stage of the inadmissibility proceedings, the Applicant, as the Respondent points out, could have – but failed – to raise the alleged abuse of process issue at the earliest opportunity, that is when the section 44 report was issued, the Applicant having been invited to provide submissions as to why the report should not be issued, or, as in *Tran*, when said report was referred to the ID. He did not seek either to judicially review the section 44 report or the decision to refer it to the ID. It is true that the Applicant did raise the issue before the ID but he withdrew the application for leave and judicial review he had filed in relation to the ID decision.

[68] There is therefore a strong argument to be made that the Applicant, by failing to raise that issue at the earliest opportunity, an issue that he ultimately describes as a procedural fairness issue, waived his right to do so.

[69] When we consider this with the fact that the Applicant's abuse of process argument appears doomed to fail in light of the existing case law on this issue, which is to the effect that the only relevant delay to consider in determining whether there was an abuse of process in a context such as this one, is the delay between the decision made by the Minister to prepare a section 44 report and the ID's admissibility finding, I am persuaded that this case is not a proper case for certification. In my view, there are too many irritants to satisfy me that the issue raised in the proposed question transcends the interests of the immediate parties, is of broad significance or of general importance and will be dispositive of the appeal.

[70] I believe it is worth restating at this point that, as alluded to by the IAD in its decision, a section 44 report, its referral to the ID and even the ID's removal order are not necessarily determinative of whether an applicant will be removed from Canada, given the possibility of seeking relief via other provisions of the Act (*Sharma* at para 25).

[71] No question, therefore, will be certified.

JUDGMENT IN IMM-3020-17

THIS COURT'S JUDGMENT is that:

1. The judicial review application is dismissed;

2. No question is certified.

"René LeBlanc"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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