Federal Court Cour fédérale

Date: 20191209

Docket: IMM-1508-18

Citation: 2019 FC 1569

Ottawa, Ontario, December 9, 2019

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

JOHN JOSEPH GOODMAN

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

PUBLIC JUDGMENT AND REASONS

(Confidential Judgment and Reasons Issued December 9, 2019)

[1] The Applicant in these consolidated applications, John Joseph Goodman, challenges four decisions that concern his immigration status in Canada. For ease of reference, I will refer to the two Respondents, The Minister of Public Safety and Emergency Preparedness and The Minister of Citizenship and Immigration, as the "Minister".

[2] In Court file IMM-686-16, Mr. Goodman seeks to set aside the decision of a Senior Immigration Officer rendered on January 29, 2016, refusing his application for permanent residence under the spouse-in-Canada class (the Spousal Decision).

[3] In Court file IMM-1508-18, Mr. Goodman seeks to set aside a decision of the Minister dated February 28, 2018, refusing an application for Ministerial Relief from inadmissibility brought under what was then s 34(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] (replaced by s 42.1) (the Ministerial Decision).

[4] In Court file IMM-1633-15, Mr. Goodman challenges a decision by the Immigration Division (ID), Immigration and Refugee Board, dated March 10, 2015, finding him to be inadmissible to Canada on the basis of criminality and for being a member of a terrorist organization (the ID Decision).

[5] In Court file IMM-4246-16, Mr. Goodman seeks relief from a decision of a Senior Immigration Officer dated August 12, 2016, finding that he would not be subject to a risk of persecution, danger of torture, risk to life, or risk of cruel and unusual treatment or punishment, if returned to his country of origin (the PRRA Decision).

I. Background

[6] Mr. Goodman concedes that he is inadmissible to Canada under s 34(1)(f) of the IRPA

Irish National Liberation Army (INLA). Not surprisingly, the ID found that Mr. Goodman's

membership in the INLA "cannot be disputed" based on his admitted membership between 1974 and 1981 (see para 41 of the ID's decision). The ID also found Mr. Goodman to be inadmissible for criminality based on convictions for firearms offences in Northern Ireland in 1976 for which he served 3 years in prison. That finding has not been challenged.

[7] Mr. Goodman concedes his inadmissibility based on his INLA membership but he asserts that, in various ways, he has been unfairly or unreasonably deprived of his rights to seek relief from removal from Canada in the context of the decisions implicated in these applications.

[8] Some of Mr. Goodman's arguments overlap. For instance, he argues that in the context of the Spousal and the Ministerial Decisions, he was unlawfully deprived of recourse to full-blown humanitarian and compassionate (H&C) relief as required by s 2(e) of the *Canadian Bill of Rights*, SC 1960, c 44 [*Bill of Rights*]. According to Mr. Goodman, that provision guarantees consideration of the full range of H&C factors notwithstanding limitations in the IRPA that purport to exclude such a discretion. Inasmuch as those decision-makers failed to observe this "obligation", Mr. Goodman asks the Court to declare the restrictions contained within s 25(1) of the IRPA to be inoperable.

[9] Mr. Goodman also impugns both the ID and Ministerial Decisions on the basis of an ostensible misapprehension of evidence concerning and, in particular, whether he was complicit in the most egregious aspects of the INLA's terrorist activity. According to this argument, the ID's evidentiary errors informed and infected the Ministerial Decision to the extent that both decisions are unreasonable.

[10] Mr. Goodman raises a breach of procedural fairness issue in the context of both the admissibility and Ministerial relief proceedings based on an allegation that the Minister failed to pursue available statutory options for Mr. Goodman's removal in a timely way, and thereby unfairly deprived him of more robust options to seek relief that were once but are no longer available to him.

[11] Finally, Mr. Goodman challenges the fairness and reasonableness of the PRRA Decision. His fairness argument is based on the failure of the decision-maker to respond to his request for a deferral pending the outcome of the application for Ministerial relief, and by ignoring his request for the opportunity to make an updated submission.

II. Analysis – The Effect of s 2(e) of the *Bill of Rights*

[12] Mr. Goodman argues that the 2013 amendments to s 25 of the IRPA that excluded consideration of H&C factors for certain classes of foreign nationals violate s 2(e) of the *Bill of Rights*. Those amendments eliminated previously available recourse to H&C relief for persons found to be inadmissible on security grounds listed in s 34, for the violation of human or international rights in the form of war crimes, crimes against humanity and certain forms of corruption listed in s 35, and for involvement in organized criminality or engagement in transnational crimes listed in s 37 (e.g. money laundering, human trafficking). For the sake of argument, the standard of review I will apply to this issue is correctness.

[13] Mr. Goodman's point is that, as a foreign national facing involuntary removal from Canada, his right to a fair hearing in accordance with the principles of fundamental justice

guaranteed by s 2(e) of the *Bill of Rights* in the context of applications for Ministerial relief and for spousal sponsorship must include a discretion to broadly consider equitable factors. It is not enough, he says, that limited relief is available under s 42.1 where the Minister is satisfied that a person's continued presence in Canada is not contrary to the national interest. That form of discretionary relief is said to be insufficient because it fails to include, among other things, any consideration of the needs of affected children or the importance of family unity. Mr. Goodman concedes that H&C considerations do not trump the national security and public safety interests that are also recognized by the IRPA, but he does maintain that their consideration is essential to the guarantee of a fair hearing.

[14] At paragraph 24 of Mr. Goodman's Further Memorandum of Fact and Law, the need for broad equitable discretion is expressed in the following way:

> 24. The discretion to consider equitable or H&C factors has been a pillar of Canadian immigration decision-making for decades. The H&C discretion is rooted in Canadian values respecting the importance of family unity and the protection of the vulnerable, and recognizes that the rigid application of the rules governing admission to this country will sometimes not account for compelling human circumstances that excite in a reasonable person the desire to relieve the misfortunes of another.
>
> [Footnotes omitted.]

[15] The form of relief Mr. Goodman seeks is a declaration that the 2013 amendments to s 25 of the IRPA be declared inoperable because the removal of H&C discretion conflicts with the fairness obligation imposed by s 2(e) of the *Bill of Rights*. In its simplest expression, Mr. Goodman argues that it was not open to Parliament to extinguish this form of relief even for persons guilty of the most egregious forms of misconduct, brutality and criminality.

[16] I take Mr. Goodman's point that H&C relief has had a long-standing place in Canada's immigration legislation. That history is succinctly described in an affidavit sworn by Professor Sharry Aiken. Professor Aiken teaches in the areas of immigration law and international refugee law at Queen's University Faculty of Law, and is a recognized expert in those fields. I accept her affidavit as an accurate statement of the legislative history relevant to the availability of H&C relief. The question that remains, however, is whether that history, and the judicial authorities that have considered it, have rendered the availability of H&C relief unassailable by Parliament in light of s 2(e) of the *Bill of Rights*. In order to answer that question, it is necessary to reflect on the scope of protection afforded by s 2(e) and, in particular, whether its application is limited to due process considerations or, alternatively, whether it also compels a decision-maker to apply H&C considerations without limitation to persons who would otherwise be excluded by the exceptions now contained within s 25. The obvious place to begin is by examining the language of s 2(e) which provides:

2 Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to	2 Toute loi du Canada, à moins qu'une loi du Parlement du Canada ne déclare expressément qu'elle s'appliquera nonobstant la Déclaration canadienne des droits, doit s'interpréter et s'appliquer de manière à ne pas supprimer, restreindre ou enfreindre l'un quelconque des droits ou des libertés reconnus et déclarés aux présentes, ni à en autoriser la suppression, la diminution ou la transgression, et en particulier, nulle loi du Canada ne doit s'interpréter ni s'appliquer comme
…	[…]

(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;	e) privant une personne du droit à une audition impartiale de sa cause, selon les principes de justice fondamentale, pour la définition de ses droits et obligations;

[17] Having considered the authorities cited by the parties, I have concluded that s 2(e) of the *Bill of Rights* does not guarantee to a foreign national a substantive right to the application of H&C factors. It follows that it was open to Parliament to limit the application of H&C factors in the manner now contemplated by s 25.

[18] Unlike s 7 of the *Charter*, which links the principles of fundamental justice to the rights to life, liberty and security of the person, s 2(e) of the *Bill of Rights* ties the application of the principles of fundamental justice only to the right to a fair hearing. On its face, that qualification limits the application of s 2(e) to matters of fair process, such as the right to notice and the right to respond. This interpretation conforms to the decision in *Duke v the Queen*, [1972] SCR 917 at page 923:

> It is against this background that the appellant's submission must be considered. Under s. 2(*e*) of the *Bill of Rights* no law of Canada shall be construed or applied so as to deprive him of "a fair hearing in accordance with the principles of fundamental justice." Without attempting to formulate any final definition of those words, I would take them to mean, generally, that the tribunal which adjudicates upon his rights must act fairly, in good faith, without bias and in a judicial temper, and must give to him the opportunity adequately to state his case.

[19] The above statement is consistent with the observation in *Bell Canada v Canadian Telephone Employees Association*, 2003 SCC 36, [2003] 1 SCR 884 at page 899, that the content of s 2(e) is established by reference to common law principles of natural justice.

[20] An even clearer statement recognizing the narrow scope of s 2(e) in comparison to s 7 of the Charter can be found in *Re British Columbia Motor Vehicle Act*, [1985] 2 SCR 486 at page 511:

> In section 2(*e*) of the *Canadian Bill of Rights*, the words "principles of fundamental justice" were placed explicitly in the context of, and qualify a "right to a fair hearing". Section 7 of the *Charter* does not create the same context. In section 7, the words "principles of fundamental justice" are placed in the context of, and qualify much more fundamental rights, the "right to life, liberty and security of the person". The distinction is important.

[21] The right of Parliament to authorize the deportation of a permanent resident for serious criminality was considered in *Canada (Minister of Employment and Immigration) v Chiarelli*, [1992] 1 SCR 711 (see page 734). In that decision, Justice Sopinka observed that the personal circumstances of individuals who breached the applicable criminality provision "may vary widely". Nevertheless, he held that the deliberate violation of a statutory condition of Canadian residency "is sufficient to justify a deportation order" and "[i]t is not necessary, in order to comply with fundamental justice, to look beyond this fact to other aggravating or mitigating circumstances". Although H&C relief was otherwise available to Mr. Chiarelli under the IRPA, that fact alone does not detract from the Court's broad statement about the right of Parliament to establish the statutory conditions under which non-citizens will be permitted to enter and remain in Canada. The criminality residency condition was found to be "a legitimate, non-arbitrary

choice by Parliament of a situation in which it is not in the public interest to allow a non-citizen to remain in the country" [p 734].

[22] In *Medovarski v Canada (Minister of Citizenship and Immigration); Esteban v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 SCR 539, the Court reiterated its position in *Chiarelli* that s 7 of the *Charter* does not mandate the provision of a compassionate appeal from a deportation decision arising from the commission of a serious crime, though H&C relief was noted to be otherwise available under s 25.

[23] The strongest authority supporting Mr. Goodman's argument that the principles of fundamental justice under s 2(e) can include substantive legal obligations is the decision of Justice Jocelyne Gagné in *Hassouna v Canada (Citizenship and Immigration),* 2017 FC 473, [2017] 4 FCR 555. That case concerned the revocation of citizenship. Justice Gagné noted that the potential loss of this crucial status and the absence of a right of appeal gave rise to a high degree of procedural fairness. The statutory revocation process was deemed to be unfair under s 2(e) because it lacked a right to an oral hearing before an independent decision-maker and was deficient in the provision of disclosure. I am in full accord with those aspects of the decision.

[24] Justice Gagné next considered whether there was an obligation on the Minister to consider H&C factors before revoking citizenship. Relying on the decisions in *Canada (Prime Minister) v Khadr*, 2010 SCC 3, [2010] 2 SCR 44, and *Canada (Attorney General) v Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 SCR 401, she found that there was such an obligation. The decisions in *Khadr*, and *Federation of Law Societies* were, however, based on

principles of fundamental justice arising under the *Charter* and not under s 2(e) of the *Bill of Rights*. I am not aware of any other decision where s 2(e) of the *Bill of Rights* has been applied to import substantive legal rights to an administrative decision. Furthermore, unlike this case, the citizenship revocation scheme examined by Justice Gagné appears not to have expressly excluded H&C factors from consideration by the Minister. It is one thing to compel an administrative decision-maker to take account of H&C factors where the legislation does not expressly remove that right. It is quite another thing to ignore the express will of Parliament to remove H&C discretion in certain cases of serious criminality.

[25] With all due respect to my colleague, to the extent that the ratio in *Hassouna*, above, differs from my own analysis about the scope of s 2(e), I decline to follow it.

[26] Several authorities have been cited in support of Mr. Goodman's argument that s 2(e) of the *Bill of Rights* demands discretion to consider H&C factors in cases like his. This argument is, however, supported by the debatable inference that, because courts have sometimes recognized the availability and importance of H&C relief in their interpretation of other provisions in the IRPA, that form of relief has taken on a quasi-constitutional character that is beyond Parliamentary reach.

[27] For example, in *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 SCR 559, the Court interpreted the scope of ministerial discretion under s 34(2) having regard to the broader availability of H&C relief under s 25. The Court stated that s 34 should not be transformed into an alternative humanitarian review by affording a broad

discretion to the Minister [para 84]. I accept that this interpretation drew some support from the availability of a broader H&C discretion under s 25. The *Agraira* decision does not, however, stand for the proposition that Parliament could not later narrow or eliminate the availability of H&C relief for some individuals based on their established misconduct.

[28] In *Hameed v Canada (Public Safety and Emergency Preparedness),* 2015 FC 1353, [2015] FCJ No 1488 (QL), Justice Anne Mactavish was invited to revisit the holding in *Agraira* in light of the 2013 amendments to s 25 of the IRPA. Justice Mactavish quite correctly declined that submission and observed that *Agraira* was binding both on the Minister and the Court. She was, accordingly, unwilling to expand the scope of Ministerial discretion under s 34(2) to include broad H&C considerations. The same general sentiment is found in the decision of *Sharma v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 319, [2017] 3 FCR 492, where a legislative amendment to lower the inadmissibility threshold for serious criminality and to curtail a right of appeal was said to be "of no import in determining the participatory rights of the persons concerned" [para 38]. These were said to be policy choices falling exclusively within Parliament's authority.

[29] I accept Mr. Goodman's point that some decisions reflecting on the correct application of H&C factors speak to the importance of that discretion in the overall scheme of the legislation: see *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817; *de Guzman v Canada (Minister of Citizenship and Immigration),* 2005 FCA 436, [2006] 3 FCR 655; and *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909. That is

not to say, however, that a long-standing discretion cannot be modified or removed by *Charter* compliant legislative amendment.

[30] Even if I am wrong about the limited scope of s 2(e), it is well established that a principle of fundamental justice will only be recognized where the authorities establish a strong and widespread societal consensus that the principle is essential to achieving adjudicative fairness: see *R v Malmo-Levine*; *R v Caine*, 2003 SCC 74 at para 113, [2003] 3 SCR 571.

[31] The authorities relied upon by Mr. Goodman fail to show that H&C discretion is essential to achieving fairness in the kinds of cases that are excluded by s 25. Indeed, there is another legitimate view that, short of removing foreign nationals to places where their personal safety is at risk, the perpetrators of the most serious forms of criminality involving terrorism, crimes against humanity, war crimes and organized crime ought not to enjoy the benefit of a broad equitable discretion to remain in Canada, particularly where some Ministerial discretionary relief and a risk analysis remain available.

[32] My views on this issue have been reinforced by the recent Federal Court of Appeal decision in *Kreishan v Canada (Citizenship and Immigration),* 2019 FCA 223, 310 ACWS (3d) 382. There the Court was dealing with differential access to a right of appeal before the Refugee Appeal Division (RAD). The argument was that this restriction for some claimants increased their risk of refoulement and violated s 7 of the *Charter*. The Court held that the fact that certain classes of claimants have access to procedural advantages unavailable to others was of no legal consequence, provided that other statutory mechanisms were available to these other classes of

claimants to afford protection from the risks presented by refoulement. The *Charter* did not, therefore, compel a range of review or appeal mechanisms from every potentially disadvantageous decision. This point is driven home in the following passage from the decision:

> [121] Analogy may be drawn to other asylum claimants who, for reasons of criminality or participation in crimes against humanity, are inadmissible under Article 1F of the Convention. In commenting on the role of section 7 in relation to this category of claimants, Evans J. (as he then was) observed in Jekula v. Canada (Minister of Citizenship and Immigration), [1999] 1 FC 266, 154 F.T.R. 268 (Jekula), "while it is true that a finding of ineligibility deprives [a] claimant of access to an important right, namely the right to have a claim determined by the Refugee Division, this right is not included in 'the right to life, liberty and security of the person'" … "[A] determination that a refugee claimant is not eligible to have access to the Refugee Division is merely one step in the administrative process that may lead eventually to removal from Canada" (at paras. 31-32).
>
> [122] So too is the denial of an appeal to the RAD. It is but one measure in a process that may lead to removal. The section 7 interests of all claimants, regardless of the underlying administrative basis of their rejection – excluded under Article 1F, rejected by the RAD or rejected by the RPD, ineligible to appeal as having no credible basis – are protected at the removal stage, whether by a PRRA, a request to defer removal or the right to seek a stay of removal in the Federal Court. This section does not mandate appeals or judicial review at every stage of the process (Canada (Secretary of State) v. Luitjens (1991), 46 F.T.R. 267, 155 Imm. L.R. (2d) 40 (F.C.T.D.).

[33] It seems to me that this same logic applies to Mr. Goodman's argument. In simple terms, he does not enjoy a right to a full-fledged H&C assessment. It is only at the point of *de facto* removal that his *Charter* interests may be engaged, and not before.

[34] Mr. Goodman's reliance on the decisions in *Air Canada c Canada (Commissaire de la concurrence)*, (2003) 222 DLR (4th) 385, [2003] RJQ 322 (QCCA), and *Canadian National*

Railway v Western Canadian Coal Corporation, 2007 FC 371, 309 FTR 286, is similarly misplaced. Those decisions stand only for the proposition that when economic interests have been affected, a party is entitled under s 2(e) of the *Bill of Rights* to a fair hearing involving minimum procedural safeguards. That provision does not protect the economic interests at play, but only provides that a fair method of possible recourse is available. This point was earlier made in *Singh v Canada (Minister of Employment and Immigration)*, [1985] 1 SCR 177 at page 228, [1985] SCJ No 11:

> 95. In view of the last sentence in the Attorney General's acknowledgment quoted above, I am not absolutely clear whether or not it was conceded by the Attorney General that the "rights" referred to in s. 2(*e*) of the *Canadian Bill of Rights* are not the same rights or rights of the same nature as those which are enumerated in s. 1, including "the right of the individual to life, liberty, security of the person... and the right not to be deprived thereof except by due process of law".
>
> 96. Be that as it may, it seems clear to me that the ambit of s. 2(*e*) is broader than the list of rights enumerated in s. 1 which are designated as "human rights and fundamental freedoms" whereas in s. 2(*e*), what is protected by the right to a fair hearing is the determination of one's "rights and obligations", whatever they are and whenever the determination process is one which comes under the legislative authority of the Parliament of Canada. It is true that the first part of s. 2 refers to "the rights or freedoms herein recognized and declared", but s. 2(*e*) does protect a right which is fundamental, namely "the right to a fair hearing in accordance with the principles of fundamental justice" for the determination of one's rights and obligations, fundamental or not. It is my view that, as was submitted by Mr. Coveney, it is possible to apply s. 2(*e*) without making reference to s. 1 and that the right guaranteed by s. 2(*e*) is in no way qualified by the "due process" concept mentioned in s. 1(*a*).
>
> 97. Accordingly, the process of determining and redetermining appellants' refugee claims involves the determination of rights and obligations for which the appellants have, under s. 2(*e*) of the *Canadian Bill of Rights*, the right to a fair hearing in accordance with the principles of fundamental justice. It follows also that this case is distinguishable from cases where a mere privilege was refused or revoked, such as *Prata v. Minister of Manpower and*

> *Immigration*, [1976] 1 S.C.R. 376, and *Mitchell v. The Queen*, [1976] 2 S.C.R. 570.

III. Were the ID and Ministerial Decisions Unreasonable?

[35] Notwithstanding Mr. Goodman's concession of inadmissibility based on his membership in the INLA, he seeks to challenge some of the ID's findings concerning his personal culpability. He is concerned about those findings because they were adopted by the Minister in the later decision denying him relief under s 34(2) of the IRPA. Because the two decisions are linked, Mr. Goodman seeks to attack both on the basis that they contain common and material evidentiary errors and are, therefore, unreasonable.

[36] I do not accept that the ID's decision can be challenged in this way. The ID's authority was limited to the determination of Mr. Goodman's admissibility. Because that issue was not in dispute, it is of no legal consequence that the ID went on to make some additional observations about Mr. Goodman's level of complicity in the INLA's crimes. It is arguably open to Mr. Goodman, however, to seek relief based on the reasonableness of the Minister's treatment of the ID's findings.

[37] Mr. Goodman argues that the Minister erred by adopting the ID's "unreasonable" findings in exercising the statutory discretion to excuse his inadmissibility. This, of course, presupposes that it was not open to the Minister to accept the ID's evidentiary findings at face value. It is unnecessary, however, to resolve this issue. This is so because I have concluded that the ID's findings as challenged by Mr. Goodman are reasonable, based on the evidence. It follows from this that the Minister's adoption of those findings was also reasonable.

[38] Mr. Goodman asserts that the ID ignored and misapprehended material evidence and, in so doing, made unreasonable factual findings about his complicity in the worst aspects of violence carried out by the INLA during the period of his membership.

[39] Mr. Goodman argues that the ID made two fundamental errors in the assessment of the evidence bearing on the structure of the INLA. These errors led it to wrongly conclude that, throughout the time of Mr. Goodman's membership, it was a unitary organization, albeit one that was, at times, riven by feuding and disagreements about the use of violence.

[40] In particular, Mr. Goodman challenges the reasonableness of two statements from the ID's decision. The first is found in paragraph 59 where the ID found "that there was no real

ideological rift between the factions" (ie. the traditionalists and the Steenson group).

Mr. Goodman also challenges the content of paragraph 61 which states:

> [61] [redacted]
> There is no evidence that supports this conclusion. Mr. Holland, Mr. Goodman's own expert witness, on the activities of Steenson, "Steenson, no. There's no evidence that Steenson was ever involved in what we would call ordinary crime, or in a sectarian attack. He was – he was ruthless and cold-blooded in his attacks, bet [*sic*] he tended to direct them very specifically against police and army targets. Even his enemies admit that, in the police."
>
> [Footnote omitted.]

[41] Mr. Goodman complains that these findings are based on a highly selective reading of the evidence, and particularly of the testimony provided by historian Jack Holland. The ID's attribution to Mr. Holland of the opinion that there was no real ideological rift between competing INLA factions is said to have been taken out of context from a much longer answer that actually confirmed the existence of different ideological views within the INLA about the use of violence.

[42] The same criticism is made of the ID's interpretation of Mr. Holland's evidence to the effect that there was no evidence that the Steenson faction had more callous views about infliction of civilian casualties. Again, it is argued that the testimony relied upon by the ID was taken out of context and ignored Mr. Holland's other evidence that more directly addressed this issue. Mr. Goodman's argument is neatly summarized at paragraph 110 of his Further Memorandum of Fact and Law in the following way:

> 110. The evidence before the ID demonstrated that the GHQ Dublin faction had a clear policy with respect to the use of violence that differed greatly from that of Mr. Steenson and his followers. It was therefore unreasonable to attribute atrocities committed by the latter faction to the group that the Applicant belonged to. These findings are significant and undermine the ID's analysis. They are also untenable because, as will be described below, they directly impact the Ministerial Relief decision.

[43] Mr. Goodman asserts that, on a correct reading of Mr. Holland's evidence, he should not have been found responsible for the actions of the Steenson group in which he neither participated nor condoned.

[44] Mr. Goodman's allegations about the ID's supposed selective treatment of evidence – particularly the testimony from historian Mr. Holland – amounts to a disagreement about how best to interpret that evidence. The question for the Court is whether the interpretation adopted by the ID had a reasonable evidentiary foundation. In my view it did. Whether or not there were ideological differences between the so-called Belfast and Dublin factions about the indiscriminate use of violence does not seem to me to be particularly germane in the face of evidence that both factions employed tactics that resulted in the deaths of civilians.

[45] It seems to me that Mr. Goodman's complaint about the ID's supposed selective assessment of evidence is, itself, based on the isolation of passages taken out of context from the entire decision. Clearly the ID was cognizant of Mr. Goodman's point that, during the period of his membership, the INLA mostly targeted members of the military and the police. However, the ID also accepted evidence that civilians, prison guards, politicians and diplomats were

sometimes the targets or incidental victims of INLA bombings and gunfire: see paras 47, 50 and 63 and pp 1994, 1996, 1997 and 1969 of the CTR in IMM-1633-15, Vol 3 of 4.

[46] The arguments that the ID erred by concluding that, at least during Mr. Goodman's tenure, the INLA was a single organization with no real ideological differences is untenable. Mr. Holland's evidence confirmed that despite some internal disagreements about the use of violence, the INLA was a unitary organization. This is the most viable conclusion to be taken from Mr. Holland's testimony below:

> COUNSEL Now, you talked about the split in the IRA. In your book you've talked about it. There's splits within the INLA too?
>
> WITNESS Yes.
>
> COUNSEL When did those splits start developing?
>
> WITNESS Right from the beginning there was a split. I think if you look at the map of Ireland, it'll explain why there were so many splits in republican organizations. The border which separates the north of Ireland from the republic of Ireland is partly the explanation for why it splits on development, tend to develop.
>
> What occurs is this. That republic organizations that are active in the north of Ireland, tend to have their commanders, their upper leadership based in the south of Ireland. After awhile, those in the north of Ireland begin to feel that the people in the south of Ireland aren't supplying them with enough guns or explosives or don't understand the situation in the north of Ireland. So that builds up resentment, hostility, suspicion, and these often erupt in feuds, particularly within the INLA, as it happened four or five times in the last 25 years.
>
> I mean there are ideological reasons also. But the main reason, I think, is the fact that the people who are carrying out the violence are in the north of Ireland and those who run the organization tend to be based in Dublin and so there's a gap that grows up over the years. This is often disguised in

ideological terms, but I think it boils down to the simple fact that those in the south are far from the scene of the violence in the north.

COUNSEL You said the split in the INLA really had started developing from the very beginning.

WITNESS Yes.

COUNSEL When did it sort of become obvious that there were serious problems?

WITNESS Well, I would say about December, 1981, when one of the leaders of the INLA based in Dublin was shot by members of the INLA who were sent down from Belfast. This was an attempt at assassination which failed.

The reason was that the leadership in Belfast at that time under the control of a man called Steenson (ph), Jerid Steenson, was angry and annoyed, because they thought that the Dublin based people were not supplying them with weapons and not supporting their struggle in the north with the kind of enthusiasm that they thought they deserved. They had also had disputes with people in Belfast who were linked to the Dublin leadership, namely Sean Flynn, Jackie Goodman, Bernard Dorian.

…

WITNESS As far as I'm aware, that was the first. There had been disputes, but they were verbal disputes. They were disagreements. They were arguing continually about what the course of the organization should be, what tactics they should employ, et cetera, et cetera. But that was the first time when these disputes actually led to violence within the organization. In other words, the first time that there was an attempt by one faction within the INLA to physically remove another faction through violence.

COUNSEL So Mr. Goodman was on the side that supported the headquarters in Dublin.

WITNESS Flynn.

COUNSEL The Flynn faction. So I'll call them the Steenson faction and the Flynn faction.

WITNESS Okay.

COUNSEL In terms of Steenson, the Steenson faction, would you characterize the split as having an ideological base as well?

WITNESS At that time, I must confess, I did not see much of an ideological basis for the split. I think that was an example of a split created by the gulf between the leadership and Dublin and some of the activists in Belfast, particularly the younger activists. Steenson was only 23 at the time. Most of those around him, people like Sparky Barkly, Harry Kirpatrick, Sean Mackin, Ta Parr (ph), or John O'Reilly, were in his age group. They had been teenagers when the troubles started in the north of Ireland in 1969, or they'd be even younger, in fact.

Whereas the Flynn faction had been in the IRA at the time of the split in 1969, 1970 or had joined around that time. They had come from a background of the civil rights movement. So they tended to think more politically than the Steenson faction. The Steenson faction had grown up in an atmosphere of total violence and had really at that point no goal, other than to inflict as much violence as they thought they could in order to achieve their aims.

This was resisted by the Flynn faction as being inadequate. They weren't opposed to the use of violence, they were simply opposed to the use of violence by itself and they regarded that a political solution had to be arrived at some stage. So they were eager on building a political organization alongside a para-military organization.

COUNSEL Was the headquarters in Dublin able to control the Steenson faction?

WITNESS No. No one was able to control Jerid Steenson.

COUNSEL Why not?

WITNESS Put it this way, he was ambitious, he was extremely calculating, he was very wilful. He had the knack of gathering around him men, young men, who would do whatever he wanted them to do. As it turned out, he was a very poor judge of character, because there's a sort of people that followed him who were often petty criminals who would really – – you know, politics was not part of their agenda.

They were certainly prepared to go out and commit acts of violence and Steenson allowed them to do

> so and he didn't really care what they did afterwards, if they went and robbed a bank or a post office and pocketed the money. I don't think Steenson really cared, as long as they were there when he wanted them to be there to carry out acts of violence.

[47] I accept the Minister's point that the ID did not find that no ideological differences existed within the INLA. The statement Mr. Goodman challenges is qualified and refers to the absence of a "real ideological rift". This is a fair characterization of Mr. Holland's evidence. More to the point is the fact that Mr. Goodman was a [redacted] member of the INLA well before Mr. Steenson arrived on the leadership scene, and he left the INLA shortly after Mr. Steenson took control in Belfast. As the ID noted at paragraph 63 of its decision, Mr. Goodman [redacted] before Mr. Steenson's appearance and thus complicit in many of the violent acts listed at paragraph 47.

[48] In effect, what the ID found was that the Steenson group was undisciplined, ruthless and more tolerant of non-military casualties. The ID also found, however, that the earlier, more moderate INLA leadership [redacted] had also been responsible for deadly attacks on civilian targets. Mr. Goodman's complaint that two or three of the attacks noted by the ID were simple mistakes or unattributable amounts to quibbling. The fact remains that, as the ID found, even the more moderate leaders of the INLA were committed to the use of deadly violence and, on occasion, either deliberately or incidentally killed or injured civilians. There was, accordingly, ample reason to reject Mr. Goodman's assertion that, until Mr. Steenson's ascension, the INLA operated under a strict code concerning the targets of its attacks.

[49] The ID also took some guidance from the decision of Justice Cecily Strickland in *Nassereddine v Canada (Citizenship and Immigration)*, 2014 FC 85, [2015] 2 FCR 63, dealing with persons who provide only humanitarian or non-violent assistance in support of a terrorist cause. Justice Strickland held that to avoid a complicity finding on this basis requires clear and objective evidence of the existence of a separate and distinct structure and operation dedicated to non-violence. I agree with this view. It is simply not open to an member of a terrorist organization - like Mr. Goodman - to avoid the consequences of that membership By staying involved, Mr. Goodman was complicit.

[50] The ID's conclusion that, during the period of Mr. Goodman's involvement, the INLA was a single organization also had substantial evidentiary support. Mr. Holland testified that some republican and loyalist para-military groups did separate and form new organizations, but he did not suggest that that was the fate of the INLA – at least before Mr. Goodman's departure.

[51] Although there were factional disputes within the INLA or, as Mr. Holland described it, "tensions", it was not unreasonable for the ID to conclude that the INLA remained a single violent organization.

[52] I would add to the above that the Ministerial Decision did not place heavy or undue reliance on the ID's findings about ideological or operational differences within the INLA.

Rather, what the Minister was most concerned about was [redacted] [redacted] – that being a point-of-view antithetical to Canadian values.

[53] The Minister's decision is thorough and reflects an appropriate understanding of the scope of the statutory discretion, and a reasonable application of that discretion to the evidence. Clearly, the Minister was under no illusions about the INLA or Mr. Goodman's involvement in its violent activities. This is evident from the Minister's comprehensive reasons, which included the following:

> As previously observed, Mr. Goodman appears to be attempting to distance himself from the acts of terrorism committed by the IRA and INLA by maintaining that his role was one of administrative and logistical support and that he had no direct participation in any terrorist or violent acts. The CBSA notes that personal engagement in such activities is not a requirement to be found inadmissible under IRPA paragraph 34(1)(*f*), which is solely based on membership in an organization that has engaged, is engaging, or will engage in terrorism. Nonetheless, as previously documented, [redacted], former INLA member Patrick Francis Ward described the organization as a military hierarchy operating under strict discipline. This implies that a senior officer of the INLA would have had significant authority over and responsibility for the actions of subordinate staff or members. [redacted]

At the time of his 1982 arrest, he was, as noted by the ID, , and it was “obvious that Mr. Goodman was a person with authority in the INLA” (see attachment 19). It is the conclusion of the CBSA that it is highly improbable that Mr. Goodman was not intimately aware of the terrorist actions undertaken by the INLA, and it is not unreasonable to assume that he was also involved in the development and/or transmission of related orders to his subordinates, which for a period of time prior to his 1982 arrest comprised the whole of the INLA.

Mr. Goodman demonstrated a strong degree of loyalty and commitment to the Republican cause and to its commitment to using violence to achieve its objectives. He was rewarded by his quick rise through the ranks to hold positions of increasing authority and responsibility in both organizations. He was well-versed in the structure, methods and political goals of each. He persevered within the movements in spite of: repeated adverse interactions with the police resulting in a total of eight criminal charges; multiple short-term detentions followed by extended periods of imprisonment during which he claimed to have been interrogated and severely mistreated; injuries sustained during an offensive; an attempted assassination by his own organization in which he was shot; and separation from his family while in hiding following the latter. Even while incarcerated for several years, he became the quartermaster and was in charge of the INLA’s food supply and had authority over 40 to 50 INLA volunteers in the prison. Despite his ordeals, at no time did Mr. Goodman choose to dissociate from the movements; in fact, he accepted a promotion to the top of the INLA hierarchy after he was hospitalized following his shooting.

…

These elements have been assessed against the predominant national security and public safety considerations of his case. Specifically, for twelve years, Mr. Goodman was a member of the IRA and the INLA, both paramilitary organizations which engaged in terrorist activities resulting in numerous civilian casualties (see attachment 1). The CBSA has concluded that Mr. Goodman directed and was intimately knowledgeable about the activities undertaken by these organizations. He chose to move from the IRA to the INLA specifically because of the latter organization’s more aggressive

> stance on offensive violence. His belief in the use of violence to achieve political goals, even when peaceful alternatives existed, appears to have been ideological. He progressed steadily and quickly through the ranks, was involved in a variety of activities, held several different positions, reported to the highest levels of command, and had reached the second most senior position in the INLA at the time of his 1982 arrest. [redacted], he has not accepted responsibility for the actions of the organization or acknowledged the scope of the violence against civilians, notwithstanding the extensive and reliable evidence demonstrating that it was not uncommon and was at times deliberate. [redacted] Moreover, he continued his commitment to – and in the case of the IRA, management of – these organizations even during lengthy periods of incarceration and despite physical injury and threat of death. He did not voluntarily dissociate from the INLA and has not repudiated its past methods. While in his most recent submissions he put forth that [redacted] – a principle which is contrary to fundamental Canadian values.

[54] I am accordingly not persuaded that either the ID or the Minister erred in their respective assessments of the evidence or in the exercise of their available discretion. Indeed, the ID had no authority at all to decide other than it did, and the Minister came to a decision that fell well within the boundaries of the limited discretion available to her.

IV. Procedural Fairness and Delay

[55] Mr. Goodman argues that the Minister acted unfairly by failing to pursue the present inadmissibility allegations in the context of earlier refugee and admissibility proceedings,

thereby depriving him of more robust procedural and fact-finding rights. I will review these issues on the standard of correctness.

[56] Mr. Goodman contends that, since 1986, the Minister was aware of his involvement in the INLA; thereafter he was involved in several immigration proceedings where complicity issues could have been fully addressed and resolved. Instead, it was not until 1998 that the Minister initiated admissibility proceedings. In 2000, the Minister abandoned an allegation that Mr. Goodman had engaged in terrorism and instead elected to proceed on the sole basis of his admitted membership in the INLA. A useful summary of the procedural history involving Mr. Goodman can be found in paragraphs 4 to 6 of the ID's decision.

[57] For what it may be worth, I do not have explanations for all the delays in bringing Mr. Goodman's admissibility proceedings to a conclusion, beyond observing that some of them were at Mr. Goodman's request and some resulted from judicial challenges.

[58] I am not persuaded that Mr. Goodman has been treated unfairly by the Minister or that he has been prejudiced by delay. Mr. Goodman has, after all, never denied his inadmissibility to Canada. At best he could only pursue relief from deportation via proceedings he was obliged to initiate and has, in fact, pursued.

[59] Furthermore, procedural unfairness does not arise from the exercise of bare strategic choices by the Minister to pursue certain recourse under the IRPA and to decline to take or to abandon other statutory options. For instance, it was neither surprising nor unfair for the

Minister to seek an inadmissibility finding based on Mr. Goodman's [redacted] INLA membership and to abandon a more difficult-to-prove allegation of engaging in terrorism. The IRPA affords the Minister many procedural options with varying requirements of proof. In the absence of evidence of bad faith or material prejudice, the Minister's process choices are not matters of concern on judicial review and they are not a basis of relief in these cases. Although Justice Richard Mosley did observe in *Hassanzadeh v Canada (Minister of Citizenship and Immigration)*, 2005 FC 902, [2005] 4 FCR 430, that resort to the Ministerial relief option under the IRPA normally follows a finding of inadmissibility, he also held that the sequence of decision-making did not on its own raise a procedural fairness concern.

V. The PRRA Decision

[60] The record in IMM-4246-16 indicates that on February 4, 2016, Mr. Goodman's counsel wrote to the decision-maker (the Officer) in connection with Mr. Goodman's application for a PRRA. Counsel noted that the application had been filed on April 28, 2015, and updated a few weeks later. Mr. Goodman asked that the PRRA application be held in abeyance pending the determination of his outstanding application for Ministerial relief – a decision that was thought to be imminent. Counsel asked the Officer to respond to the request for a deferral and, if it was refused, to allow "an additional 30 days from the date of the CIC's response in order to provide updated submissions and materials". The Officer never responded to these requests and rendered a negative decision more than six (6) months later. Mr. Goodman contends that the Officer breached the duty of fairness by failing to respond and, in particular, by failing to allow him to update his initial submissions sent in more than a year earlier.

[61] The Minister argues in opposition that it was Mr. Goodman's obligation to perfect his PRRA application. It was open to Mr. Goodman to update his submissions at any time and, instead, he gambled on receiving a favourable response from the Officer.

[62] I accept that the Officer was not obliged to hold his decision in abeyance simply because Mr. Goodman requested it. The Officer was, however, told that Mr. Goodman wanted to make further submissions in support of relief if the Officer intended to proceed. In the context of the pending PRRA, this was a reasonable request. Depending on the length of possible delay in completing the PRRA process, the evidence bearing on risk could well change and Mr. Goodman had an interest in providing the most up-to-date evidence. The evidence before the Officer did indicate that the risk facing former INLA informers tended to be volatile and current information was, therefore, of critical importance.

[63] Fairness demanded that the Officer advise Mr. Goodman that he intended to proceed to a decision and then to afford an opportunity to make up-to-date submissions about risk. Silence was not an option open to the Officer because, in these circumstances, it suggested acquiescence to Mr. Goodman's request.

[64] If the Applicant in *Naeem v Canada (Citizenship and Immigration)*, 2016 FC 1073, ACWS (3d) 382, was denied fairness by not receiving a decision in response to a deferral request, then surely Mr. Goodman was entitled to the same consideration when his deferral request was tied to a stated intention to make further submissions in advance of a final decision.

[65] It was, accordingly, unfair for the Officer to proceed to a decision without warning Mr. Goodman and extending to him the requested opportunity to update his submissions. Mr. Goodman has provided examples of the evidence he would have submitted had he been given the opportunity. I agree that this evidence is material and could well have changed the outcome of the PRRA application. In the result, the PRRA decision is set aside. That application must be determined on the merits by a different decision-maker, and after Mr. Goodman has been given an opportunity to make further submissions. It is unnecessary and inappropriate to comment on the Officer's treatment of the evidence.

[66] I do not accept Mr. Goodman's alternative fairness argument that the Officer should have awaited the Ministerial Decision because, had it been favourable, the risk assessment would not have been limited to s 97 considerations. Hypothetically, this could have been a problem but, in fact, the Ministerial Decision was not favourable, and no unfairness resulted.

VI. Conclusion

[67] The applications in IMM-1508-18 (Ministerial Decision), IMM-686-16 (Spousal Decision) and IMM-1633-15 (ID Decision) are dismissed.

[68] The application in IMM-4246-16 (PRRA Decision) is allowed, with the matter to be redetermined on the merits by a different decision-maker, including the consideration of any updated submissions or evidence provided by Mr. Goodman.

VII. Certified Questions

[69] Mr. Goodman seeks to certify the following questions arising in IMM-1508-18 and IMM-686-16:

1. Does subsection 25(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, which bars access to a process for the review of humanitarian and compassionate factors for persons inadmissible under ss. 34, 35 and 37, violate section 2(e) of the *Canadian Bill of Rights*, S.C. 1960, c. 44?

2. Should the Supreme Court's decision in *Agraira v. Canada (MPSEP),* 2013 SCC 36, be revisited based on significant developments in the law, specifically the coming-into-force of the *Faster Removal of Foreign Criminals Act*, S.C. 2013, c. 16, which bars access to a process for the review of humanitarian and compassionate factors for persons inadmissible under ss. 34, 35 and 37 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27?

[70] The Minister opposes certification saying that the law concerning the first question is well settled and the second question is too vague.

[71] For the purpose of certification, I do not agree with the Minister that the law pertaining to the first question is wholly settled. I will, accordingly, certify that question.

[72] The second question is unnecessary and not determinative of the issues arising in this case and, thus, will not be certified.

JUDGMENT in IMM-1508-18

THIS COURT'S JUDGMENT is that:

1. The applications in IMM-1508-18 (Ministerial Decision), IMM-686-16 (Spousal Decision) and IMM-1633-15 (ID Decision) are dismissed;

2. The application in IMM-4246-16 (PRRA Decision) is allowed with the matter to be redetermined on the merits by a different decision-maker including the consideration of any updated submissions or evidence provided by the Applicant;

3. The following question is certified in IMM-1508-18 and IMM-686-16:

> Does subsection 25(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, which bars access to a process for the review of humanitarian and compassionate factors for persons inadmissible under ss. 34, 35 and 37, violate section 2(e) of the *Canadian Bill of Rights*, S.C. 1960, c. 44?

4. The Registry shall place a copy of this Judgment and Reasons in Court files:

IMM-1633-15	*Goodman v The Minister of Public Safety and Emergency Preparedness*
IMM-4246-16	*Goodman v The Minister of Immigration, Refugees and Citizenship*
IMM-686-16	*Goodman v The Minister of Citizenship and Immigration*

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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