Federal Court  Cour fédérale

Date: 20230310

Docket: IMM-5522-21

Citation: 2023 FC 329

[ENGLISH TRANSLATION]

Ottawa, Ontario, March 10, 2023

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

AKIM MVANA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

L'ASSOCIATION QUÉBÉCOISE DES AVOCATS ET AVOCATES EN DROIT DE L'IMMIGRATION

Intervener

JUDGMENT AND REASONS

[1] This application for judicial review, authorized pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act or IRPA], contains only one question. The

applicant, Mr. Akim Mvana, argues that paragraph 36(3)(a) of the IRPA is unconstitutional because it is inconsistent with subsection 15(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c 11 [Charter].

[2] The Immigration Appeal Division [IAD] had to rule as to the constitutionality of paragraph 36(3)(a) and concluded that it was not inconsistent with subsection 15(1). That is the decision of which judicial review is sought.

[3] A notice of constitutional question, required pursuant to section 57 of the *Federal Courts Act*, RSC 1985, c F-7 [FCA], was duly given to all Attorneys General in the country on June 27, 2022. None of them appeared in this case.

[4] By order dated July 29, 2022, my colleague McHaffie J granted an application by the Association québécoise des avocats et avocates en droit de l'immigration [AQAADI] for leave to intervene to provide observations, clarifications and perspectives that could be useful during the discussion of legal issues before the Court. The AQAADI participated in the hearing; the style of cause of the judgment is amended accordingly.

I. Facts

[5] The appellant's journey through the immigration system must be presented, albeit in summary fashion given that the issue is one of law, with the facts having a minor impact.

[6] Mr. Mvana was born in the Democratic Republic of the Congo on April 18, 1982. He arrived in Canada in 2007 and obtained refugee status on November 10, 2008. However, he was convicted of assault (s 266(a) of the *Criminal Code*, RSC 1985, c C-46), after pleading guilty to an indictable offence. It seems that he may have done so to avoid having to defend himself against a second charge (IAD decision dated January 25, 2017, para 10). For the offence to which he pleaded guilty, the applicant received a suspended sentence and probation conditions, in addition to 100 hours of community service. A removal order made against him was stayed (section 68 of the IRPA) with conditions, for a period of three years (IAD decision dated January 25, 2017, para 18).

[7] The applicant was charged once again, this time for criminal offences allegedly committed on May 10, 2019:

- Driving while impaired (paragraph 320.14(1)(a) and section 320.19 of the *Criminal Code)*
- Driving with a blood alcohol concentration exceeding 80 mg of alcohol in 100 mL of blood (paragraph 320.14(1)(b) and section 320.19 of the *Criminal Code*)
- Obstruction of a peace officer (ss 129(a) and (e) of the *Criminal Code*)

He was convicted of the offence described at paragraph 320.14(1)(b), that is, driving with a blood alcohol concentration exceeding 80 mg of alcohol in 100 mL of blood, within two hours after ceasing to operate a conveyance. This is an offence that may be prosecuted either summarily or by way of indictment.

[8] In the applicant’s case, the procedure chosen was summary conviction and, pursuant to section 320.19 of the *Criminal Code*, the maximum punishment when prosecuted summarily is significantly lower. Below is the text of subsection 320.19(1):

320.19 (1) Every person who commits an offence under subsection 320.14(1) or 320.15(1) is guilty of	320.19 (1) Quiconque commet une infraction prévue aux paragraphes 320.14(1) ou 320.15(1) est coupable :
(a) an indictable offence and liable to imprisonment for a term of not more than 10 years and to a minimum punishment of,	a) soit d'un acte criminel passible d'un emprisonnement maximal de dix ans, la peine minimale étant :
(i) for a first offence, a fine of $1,000,	(i) pour la première infraction, une amende de mille dollars,
(ii) for a second offence, imprisonment for a term of 30 days, and	(ii) pour la deuxième infraction, un emprisonnement de trente jours,
(iii) for each subsequent offence, imprisonment for a term of 120 days; or	(iii) pour chaque infraction subséquente, un emprisonnement de cent vingt jours;
(b) an offence punishable on summary conviction and liable to a fine of not more than $5,000 or to imprisonment for a term of not more than two years less a day, or to both, and to a minimum punishment of,	b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire passible d'une amende maximale de 5 000 $ et d'un emprisonnement maximal de deux ans moins un jour ou de l'une de ces peines, la peine minimale étant :
(i) for a first offence, a fine of $1,000,	(i) pour la première infraction, une amende de mille dollars,
(ii) for a second offence, imprisonment for a term of 30 days, and	(ii) pour la deuxième infraction, un emprisonnement de trente jours,
(iii) for each subsequent offence, imprisonment for a term of 120 days.	(iii) pour chaque infraction subséquente, un emprisonnement de cent vingt jours.

[9] Mr. Mvana was sentenced to a fine of $1,600 and his driver's licence was confiscated for one year.

[10] On December 11, 2020, the Minister invoked subsection 68(4) of the IRPA to cancel, by operation of law, the stay of removal that the appellant had enjoyed. That subsection reads as follows:

68 (4) If the Immigration Appeal Division has stayed a removal order against a permanent resident or a foreign national who was found inadmissible on grounds of serious criminality or criminality, and they are convicted of another offence referred to in subsection 36(1), the stay is cancelled by operation of law and the appeal is terminated.	68 (4) Le sursis de la mesure de renvoi pour interdiction de territoire pour grande criminalité ou criminalité est révoqué de plein droit si le résident permanent ou l'étranger est reconnu coupable d'une autre infraction mentionnée au paragraphe 36(1), l'appel étant dès lors classé.

II. Issue

[11] Section 36 of the IRPA is at issue. This is the provision of the Act that renders a foreign national convicted of certain offences under an Act of Parliament inadmissible to Canada. More specifically, the dispute relates to paragraph 36(3)(a). I have reproduced section 36 in its entirety as an annex to this judgment. For our immediate purposes, I have reproduced paragraphs 36(1)(a), 36(2)(a) and 36(3)(a) below:

36 (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	36 (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :
(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for	a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un

which a term of imprisonment of more than six months has been imposed;	emprisonnement de plus de six mois est infligé;
…	…
(2) A foreign national is inadmissible on grounds of criminality for	(2) Emportent, sauf pour le résident permanent, interdiction de territoire pour criminalité les faits suivants :
(a) having been convicted in Canada of an offence under an Act of Parliament punishable by way of indictment, or of two offences under any Act of Parliament not arising out of a single occurrence;	a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions à toute loi fédérale qui ne découlent pas des mêmes faits;
…	…
(3) The following provisions govern subsections (1) and (2):	(3) Les dispositions suivantes régissent l'application des paragraphes (1) et (2) :
(a) an offence that may be prosecuted either summarily or by way of indictment is deemed to be an indictable offence, even if it has been prosecuted summarily;	a) l'infraction punissable par mise en accusation ou par procédure sommaire est assimilée à l'infraction punissable par mise en accusation, indépendamment du mode de poursuite effectivement retenu;
…	…

[12] The mechanism in question is rather simple. Anyone convicted of an offence punishable by imprisonment for a term of not more than 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of six months is imposed, is inadmissible under the terms of paragraph 36(1)(a). Parliament qualified this situation in a marginal note as "serious criminality"; the meaning of this expression becomes clear when we compare the marginal note

of subsection (1) to that of subsection (2). In fact, subsection (2) refers simply to “criminality”, rather than to “serious criminality”, because it is sufficient for the person to be convicted of an offence punishable by way of indictment, independently of the punishment an accused is liable to, or of two offences under any Act of Parliament not arising out of a single occurrence. Inadmissibility on grounds of serious criminality applies to any person who is not a citizen of Canada including a permanent resident. Furthermore, permanent residents are not covered by a so-called “criminality” offence; only a so-called “serious criminality” offence could make them inadmissible. Both paragraphs have the same effect: inadmissibility for anyone convicted of an offence punishable by way of indictment. In the case of a permanent resident, the offence must be punishable by 10 years of imprisonment. For other foreign nationals, imprisonment is not a criterion as it is enough for the offence to be indictable.

[13] I note that paragraphs 36(1)(a) and 36(2)(a) do not provide for a mode of prosecution. Paragraph 36(1)(a) results in inadmissibility if the offence is punishable by imprisonment of at least 10 years. The mode of prosecution, by way of indictment or summary conviction, is not specified. Similarly, paragraph 36(2)(a) renders inadmissible anyone who is not a permanent resident but has been convicted of an offence punishable by way of indictment. Parliament gave no indication that the mode of prosecution matters. As can be seen, a foreign national who is not a permanent resident can be declared inadmissible for a wider range of offences than a permanent resident.

[14] Paragraph 36(3)(a) dispels any ambiguity by specifying that offences often labelled “hybrid” or “mixed”, because they can be prosecuted by way of indictment or by summary

conviction, are considered offences punishable by way of indictment. It does not matter that said hybrid offence was prosecuted by way of indictment. It is enough that the offence be punishable by way of indictment, Parliament having obviously decided that the mode of prosecution does not matter.

[15] The respondent and the intervener argue that the effect of this mechanism under section 36 constitutes a violation of section 15(1) of the Charter, which reads as follows:

15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	15 (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

III. Immigration Appeal Division

[16] The IAD had to decide whether Mr. Mvana had been convicted of an offence constituting "serious criminality" for the condition precedent to the application of subsection 68(4) to be met. If so, did the stay he had enjoyed have to be cancelled by operation of law, in accordance with

subsection 68(4) of the Act? The applicant therefore relied on the unconstitutionality of paragraph 36(3)(a) of the Act.

[17] Mr. Mvana having been convicted summarily, he argued before the IAD that a distinction had to be made because of the mode of prosecution. According to the argument, through the effect of paragraph 36(3)(a) of the IRPA, a hybrid offence is equated with offences prosecuted by way of indictment, which ensures that a foreign national is inadmissible even for an offence prosecuted summarily. This equation of summary conviction with an indictable offence deprives a foreign national of the benefit of the concrete effects of the Crown attorney's choice to proceed summarily. This option available to Crown prosecutors is presented as [TRANSLATION] "a fundamental mechanism enshrined in our system of justice" (Notice of Constitutional Question, June 27, 2022, para 20). Given that the mode of prosecution would change the underlying nature of the offence, according to Mr. Mvana, a foreign national is disadvantaged compared to a Canadian citizen.

[18] The IAD concluded that paragraph 36(3)(a) was not discriminatory within the meaning of section 15 of the Charter. An argument similar to that presented before this Court by Mr. Mvana was presented before the IAD.

[19] According to the IAD, what is at issue here is the legislative scheme for removals. The argument developed by the applicant is that a foreign national convicted of an offence by summary conviction is labelled and treated as more dangerous than a Canadian citizen convicted of the same offence, by summary conviction, and in the same circumstances. Even though he or

she was convicted by summary conviction, the foreign national is labelled with “serious criminality”.

[20] For its part, the IAD considered that citizens and foreign nationals with the same criminal profile are not comparable, given that Canadian citizens are not subject to removal from Canada. Subsection 6(1) of the Charter establishes a different treatment between citizens and foreign nationals. The paragraph reads as follows:

6 (1) Every citizen of Canada has the right to enter, remain in and leave Canada.	6 (1) Tout citoyen canadien a le droit de demeurer au Canada, d’y entrer ou d’en sortir

[21] As a result, paragraph 36(3)(a) of the Act can never apply to a Canadian citizen: discrimination based on citizenship cannot amount to discrimination prohibited by the Charter. Referring to *Canada (Minister of Employment and Immigration) v Chiarelli*, [1992] 1 SCR 711 [*Chiarelli*] and *Medovarski v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 SCR 539, 2005 SCC 51 [*Medovarski*], the IAD wrote:

> [27] For me, it is clear that paragraph 36(3)(a) of the IRPA is an integral part of a set of provisions which constitute a deportation scheme in the sense cited and cannot be dissociated from it. Although the Supreme Court of Canada has confirmed that this deportation scheme, including the security certificate proceedings, does not violate sections 7, 12 and 15 of the Charter, I consider that substantial arguments must be submitted to me in order to reach a contrary conclusion. I have not received such arguments from Mr. Mvana’s counsel.
>
> …
>
> [29] This means that the Charter itself authorizes a distinction based on citizenship when it comes to a person’s right to enter and remain in Canada.

[22] In the alternative, the IAD also considered whether the alleged distinction satisfies the first prong of the two-prong test for discrimination under section 15. The IAD quoted the judgment in *Quebec (Attorney General) v A*, 2013 SCC 5, [2013] 1 SCR 61, which in the IAD's view analyzed the evolution of the law, where Lebel J wrote:

> [162] In *Kapp*, the Court reworked the three-stage analytical framework from *Law* in light of the purpose of s. 15, namely to promote substantive equality, reshaping it into a two-part test for showing discrimination under s. 15(1). Where a violation of s. 15(1) is alleged, a court must ask the following questions: "(1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?" (*Kapp*, at para. 17). If the answer to each of these questions is yes, it can be concluded that the impugned legislative provision violates the equality guarantee in s. 15(1). The Court stated that this two-part test was, "in substance, the same" as the test from *Law* and that *Law* had confirmed the approach to substantive equality set out in *Andrews*: *Kapp*, at paras. 17 and 24.

[23] On this basis, the IAD accepted that citizenship is an analogous ground of discrimination. However, as the IAD stated, the IRPA can only apply to foreign nationals. Therefore, no advantage is conferred upon citizens. It follows that no group is disadvantaged in comparison to another when citizens and foreign nationals are compared within the scope of the IRPA. Therefore, the law does not create a distinction giving rise to the application of section 15.

IV. Parties' arguments

[24] By order dated July 29, 2022, this Court conferred intervener status upon the AQAADI. Its intervention was limited to 20 pages and to 20 minutes at the hearing. The Court allowed these limits to be exceeded. I will therefore examine each of the parties' arguments.

A. *Applicant*

[25] The applicant challenges the constitutionality of paragraph 36(3)(a) of the IRPA. This is the only issue raised. The Notice of Constitutional Question (section 7 of the FCA) alleges that the unconstitutionality flows from its inconsistency with subsection 15(1) of the Charter because the law creates a distinction based on an enumerated or analogous ground and this distinction results in a disadvantage by perpetuating prejudice or stereotyping.

[26] More precisely, the applicant complains that the IRPA equates hybrid offences with offences punishable by way of indictment despite the choice of the Crown to prosecute the alleged criminal offence by summary conviction. Through the effect of paragraph 36(3)(a), this results in a foreign national being inadmissible for criminality (or serious criminality) even for an offence prosecuted by summary conviction. The applicant states that this leads to differential discriminatory treatment. How? The foreign national is perceived and treated as a serious criminal while the prosecution's choice to proceed by summary conviction would have sent a different signal with respect to the danger the foreign national really represents. The choice made by the prosecutor to proceed by way of summary conviction is declared [TRANSLATION] "a fundamental mechanism enshrined in our justice system".

[27] Not only is the alleged benefit of the Crown attorney's choice to prosecute by summary conviction taken away by paragraph 36(3)(a) of the IRPA, but this also fuels bias according to which a foreign national is more dangerous than a Canadian citizen. According to the applicant, being labelled more dangerous than a Canadian citizen perpetuates bias against foreign nationals,

since the objective seriousness of what was perceived as an offence punishable by summary conviction is increased when this has nothing to do with the dangerousness of the individual.

[28] A foreign national will therefore be perceived as a "serious criminal" (or a "criminal") even when the Crown's choice of how to proceed is totally different, thereby attributing to the foreign national a danger he or she does not represent. This is how the applicant summarized his argument at paragraph 29 of his Notice of Constitutional Question:

> [TRANSLATION]
>
> 29. In sum, paragraph 36(3)(a) of the IRPA creates a distinction based on an analogous ground and, at the same time, creates a disadvantage by perpetuating bias against or applying stereotypes to persons who are not Canadian citizens. Therefore, it violates section 15 of the Charter and is unconstitutional.

[29] In his memorandum and at the judicial review hearing, the applicant developed his thesis of the case. Citizenship has constituted an analogous ground for the application of section 15 of the Charter since *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143; this was again affirmed in *Lavoie v Canada*, 2002 SCC 23; [2002] 1 SCR 769 [*Lavoie*].

[30] One of the pillars of the applicant's argument is the Supreme Court of Canada's decision in *R v Dudley*, 2009 SCC 58, [2009] 3 SCR 570 [*Dudley*]. This is a judgment on a question of procedure concerning hybrid offences. Assuming a so-called hybrid offence is prosecuted on an information laid more than six months after the offence was alleged to have been committed (the limitation period; it is now 12 months, section 786 of the *Criminal Code*), what is the legal consequence if the prosecutor had initially elected to proceed summarily?

[31] Basing his argument on disparate paragraphs, the appellant claimed that electing to proceed summarily would definitively change the underlying character of the offence, which would no longer be considered a criminal act (Memorandum of Fact and Law, para 31, relying on paras 49 and 50 of *Dudley*). This led the applicant to say that [TRANSLATION] "paragraph 36(3)a) of the IRPA, in equating hybrid offences with indictable ones, is contrary to this principle and deprives litigants who are not Canadian citizens of the benefit of the concrete effects of the Crown attorney's choice" (Memorandum of Fact and Law, para 34). The applicant did not specify what "principle" this was, or the benefit of the concrete effects flowing from the Crown's election to proceed summarily. He simply stated that a Canadian citizen would not have seen his or her conviction [TRANSLATION] "denatured" this way, thus demonstrating a differential and therefore discriminatory treatment.

[32] The applicant went on to argue that he was not contesting the deportation scheme, but rather certain characteristics of the deportation process. Essentially, he alleged that there was only one: paragraph 36(3)(a) is based on, and perpetuates, biases and is therefore discriminatory. We were told that foreign nationals convicted of an offence prosecuted by way of summary conviction unfortunately become serious criminals (and criminals) who endanger the safety of Canadian citizens. Such is not the case.

[33] In fact, for the applicant, the objective of inadmissibility under subsection 36(1) of the IRPA is to protect Canadian society from persons who are dangerous and pose a threat to safety. No authority was presented to support this affirmation which nevertheless appears contrary to the "[t]he most fundamental principle of immigration law[, which] is that non-citizens do not have

an unqualified right to enter or remain in the country" (*Chiarelli*, p 733; restated in *Medovarski*, para 46) without the requirement to demonstrate a certain dangerousness.

[34] The applicant argued that the mode of prosecution elected by the Crown reflects the real level of dangerousness of the individual and the gravity of the act. He seemed to claim that this election, if it were real, should counteract Parliament's decision to declare that the mode of prosecution is irrelevant when a person has been accused of a hybrid offence. Perhaps looking to put the prosecutor's discretionary power on a pedestal, the applicant qualified it as an essential feature of the justice system (Memorandum of Fact and Law, para 61). In fact, the use of this notion comes from the minority opinion in *Dudley*, where Charron J is very careful not to see it as absolute ("discretion, including prosecutorial discretion, is an 'essential feature of the criminal justice system' which will not be lightly interfered with", para 65).

[35] In fact, the applicant even spoke of political interference in the election of the mode of prosecution through the adoption of paragraph 36(3)(a) of the IRPA. It would have been surprising had any authority supported such a proposition, and none was offered.

[36] Essentially, it seems to me that the thesis defended by the applicant is that only dangerous criminals can be ruled inadmissible; that for hybrid offences, the prosecutor's election to proceed summarily means that the accused is not dangerous; and that Parliament is not authorized to determine that a hybrid offence, regardless of the mode of prosecution elected, can be qualified as "serious criminality" (subsection 36(1) of the IRPA) or as "criminality" (subsection 36(2)). The repercussions of the choices made by Parliament are such that foreign nationals are perceived and

treated as serious criminals and therefore considered a danger that they do not represent. This perpetuates a bias against foreign nationals, a bias aggravated in this case by the fact that the appellant belongs to a visible minority.

B. *Intervener*

[37] It is well known that an intervener must take the case as it is and that "[t]he purpose of an intervention is to present the court with submissions which are useful and different from the perspective of a non-party who has a special interest or particular expertise in the subject matter of the appeal" (*R v Morgentaler*, [1993] 1SCR 462, cited in *R v Barton*, 2019 SCC 33, [2019] 2 SCR 579). Therefore, this is the context within which the AQAADI was granted leave to intervene.

[38] The intervener supported the applicant's claim that paragraph 36(3)(a) of the IRPA is of no force or effect as it contravenes section 15 of the Charter. However, its argument differs from that of the applicant.

[39] The intervention had two parts. First, the AQAADI tried to show that the IAD erred with respect to the substance of the constitutional right to equality. Then, it sought to submit arguments that it stated were based [TRANSLATION] "on the systematic and logical method of interpretation (consistency argument)" (Memorandum of Fact and Law, para 3). I intend to set out both arguments presented by the AQAADI and to dispose of them succinctly.

[40] The AQAADI accepts, as it must, the analytical framework concerning section 15 of the Charter, which has evolved over time and has been fixed for some time:

1) a distinction on its face or in its impact based on an enumerated or analogous ground;

2) the distinction imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating disadvantage

(see *Fraser v Canada (Attorney General)*, 2020 SCC 28, para 27; *R v CP*, 2021 SCC 19, paras 56 and 141).

[41] The AQAADI's argument concerns the definition it wants to give to the right to equality enshrined in section 15 of the Charter. What is raised is the substance of the legal guarantees that apply to persons charged with offences. The IAD allegedly erred with respect to the substance of the constitutional right to equality. We are given to understand that foreign nationals are deprived of fundamental guarantees.

[42] The intervener referred to the presumption of innocence in paragraph 1(d) of the Charter to argue that the applicant was not found guilty of an indictable offence because he was prosecuted by way of summary conviction. Therefore, he was not found guilty of an offence described in paragraph 36(1)(a) of the IRPA. He was held responsible for an indictable offence of which he was not convicted.

[43] According to the intervener, the right to be presumed innocent is being violated because a foreign national is being held responsible for an indictable offence. A foreign national is being deprived of a legal guarantee that charged persons have a right to. This is prejudicial to equality

before the law (equal protection and equal benefit of the law). The intervener insisted that [TRANSLATION] "the right of Canadian citizens to remain in Canada … can in no way justify that 'charged' foreign nationals be deprived of the same legal guarantees as 'charged' Canadian citizens" (Memorandum of Fact and Law, para 33).

[44] However, the intervener never even attempted to explain how paragraph 11(d) of the Charter is useful for the analysis. Indeed, this section does not differentiate between an offence prosecuted by way of summary conviction or by way of indictment. Every accused is entitled to be presumed innocent, in addition of course to benefiting from the constitutional right to be tried by an independent and impartial tribunal in a public hearing. Mr. Mvana was afforded this presumption. The presumption of innocence does not take on a different colour according to the mode of prosecution. There is no presumption of innocence for a trial by way of summary conviction and one for a trial by way of indictment. The essential elements of an offence do not change according to the mode of prosecution. Every person charged with an offence is entitled to be presumed innocent, and the prosecutor must prove all the essential elements of the offence regardless of the mode of prosecution. Rather, Parliament does not differentiate with respect to the mode of prosecution in terms of the immigration consequences that flow from such a conviction, whether the offence is prosecuted one way or another. Therefore, the very foundation of the argument is lacking.

[45] In addition, the AQAADI submitted that section 6 of the Charter is not relevant. What it is seeking is the respect of legal guarantees for charged persons. Charged foreign nationals cannot be deprived of the legal guarantees that charged Canadians enjoy. As we will see later on,

it seems to me that the Supreme Court's established jurisprudence in this regard must dispose of this case, and this jurisprudence is obviously binding on this court. Essentially, the existence of section 6 of the Charter prevents section 15, another constitutional provision, from applying according to the established jurisprudence of the Supreme Court of Canada unless perhaps under exceptional circumstances that are not present here. In any case, the presumption of innocence is applied to foreign nationals as well as to citizens. We will return to this. In any event, I note that the intervener did not seek to deal with these judgments, simply stating that it did not challenge the state's right to adopt a deportation scheme.

[46] Finally, the intervener discussed what it called [TRANSLATION] "the systematic and logical method of interpretation". It seems that the AQAADI is attempting to draw inspiration from the rules of statutory interpretation to claim a form of constitutional requirement to search for consistency among various laws which appear to be connected in some way.

[47] Therefore, the presumption of Parliament's rationality suggests that, within a given law, provisions may be interpreted in light of the fact that they form a consistent whole. It could even be said that different legal texts, dealing with related subjects, could be advantageously interpreted in relation to each other to elucidate Parliament's intention. However, as I noted at the hearing, there must be ambiguity or equivocation that requires interpreting the statute to determine Parliament's intention (*Rizzo &Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27). This is not a rule that allows challenging a legislative provision that is otherwise clear.

[48] However, what the intervener is proposing, if I understand it, is a form of intervention by the Court because it is claimed that subsection 36(3) of the IRPA is inconsistent with other provisions of the IRPA, other related laws and the justice system. It is the very logic of the system in place that is apparently distorted by subsection 36(3). For example, it is suggested that Parliament is interfering with the Crown attorney's quasi-judicial prosecutorial discretion, which is an "indispensable device for the effective enforcement of the criminal law" (*R v* Anderson**,** 2014 SCC 41, [2014] 2 SCR 167, para 37).

[49] What the AQAADI is trying to invite the Court to do is not clear. On the basis of a principle of statutory interpretation for giving meaning to legislative provisions, it seems that the intervener wants to be able to deal with the merits of a provision that it alleges introduces [TRANSLATION] "inconsistencies", what others would simply characterize as results that are neither desired, nor appreciated by one party to the litigation.

[50] Unless it is alleged and demonstrated that the claimed inconsistency violates the Constitution, it is not the role of a court of justice to try to review the merits of a provision. In this case, the constitutional issue before the Court is the claim that paragraph 36(3)(a) of the IRPA is unconstitutional because it is inconsistent with subsection 15(1) of the Charter. There would still have to be inconsistency and not only disagreement on the merits of a provision. It has not in any way been demonstrated how the alleged inconsistency would make the provision in question inconsistent with section 15. The law's ambiguity must be resolved through statutory interpretation. But this is not what the intervener is seeking. The inconsistency would be that Parliament has chosen to ignore the mode of prosecution in immigration matters while in

criminal matters the election of the mode of prosecution is omnipresent. Rather, it is claimed that an alleged inconsistency would be sufficient to lead a court to decide that an otherwise unambiguous text should be discarded. Here, it seems that the Court is being invited to set aside the otherwise clear language of paragraph 36(3)(a) on the pretext that, for the sole purpose of immigration, the election of the mode of prosecution is irrelevant. The Court must decline the invitation to look more closely at the merits of the policy that Parliament chose to adopt. In any case, the alleged inconsistency was not demonstrated.

C. *Respondent*

[51] The respondent argued that subsection 36(3) is not of no force or effect as it cannot violate subsection 15(1) of the Charter. He did not seek to justify its constitutionality under section 1 of the Charter.

[52] The respondent took the position that the applicant is seeking to establish a distinction between citizens and non-citizens that merely reflects the most fundamental principle of immigration legislation: unlike a citizen, a non-citizen has no constitutional right to enter or remain in Canada. The respondent cited *Charkaoui* in support of his submission that the Supreme Court of Canada has already disposed of the question by ruling that the discrimination complained of by the applicant is expressly authorized by another Charter provision, subsection 6(1).

[53] The Supreme Court of Canada has confirmed that Parliament can establish conditions a non-citizen must satisfy to remain in Canada. Section 36 of the IRPA is an integral part of a set

of provisions that constitute a deportation scheme. However, a deportation scheme can only affect a non-citizen, and subsection 6(1) of the Charter expressly allows such a difference in treatment.

V. Analysis

[54] The only issue in our case is to determine whether paragraph 36(3)(a) of the IRPA contravenes subsection 15(1) of the Charter. Put more prosaically, is paragraph 36(3)(a) unconstitutionally discriminatory, so as to be of no force and effect under the terms of section 52 of the Charter?

[55] The standard of review in this case was not addressed by the parties other than by reference to *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653, by the applicant, and to *Revell v Canada (Citizenship and Immigration)*, 2019 FCA 262, [2020] 2 FCR 355 [*Revell*]. As this is a constitutional question, the Court must apply the correctness standard.

[56] To do so, we must first establish what this provision is and the framework within which it lies. In its Division 4, the IRPA provides a series of sections that address cases where a person will be denied access to the country, that is, the circumstances under which a person will be "inadmissible" to Canada. Of course, this gives rise to the possibility of deportation from Canada.

[57] The possibility for Canada to choose who may enter and remain in Canada has been recognized explicitly at least since the Supreme Court of Canada's judgment in *Chiarelli*. It is in fact acknowledged as the fundamental principle of immigration law. *Chiarelli* appears to have confirmed the common law. The following is stated at page 733 of *Chiarelli*:

> Thus in determining the scope of principles of fundamental justice as they apply to this case, the Court must look to the principles and policies underlying immigration law. The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country. At common law an alien has no right to enter or remain in the country: *R. v. Governor of Pentonville Prison*, [1973] 2 All E.R. 741; *Prata v. Minister of Manpower and Immigration*, [1976] 1 S.C.R. 376.

[58] The Supreme Court has not gone back on its decision and has not made any amendments to it since then, repeating almost verbatim that this fundamental principle exists in *Medovarski* at paragraph 46:

> The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in Canada: *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711, at p. 733. Thus the deportation of a non-citizen in itself cannot implicate the liberty and security interests protected by s. 7 of the *Canadian Charter of Rights and Freedoms*.

[59] Division 4 of the IRPA provides for the inadmissibility of various categories of non-citizens. Section 34 deals with persons who have engaged in acts against or are a danger to security. Section 35 deals with cases of persons who are inadmissible on grounds of violating human or international rights. Section 37 looks at activities of organized crime. Health grounds that cause excessive demand on health or social services can result in inadmissibility. Section 39 deals with financial reasons that could lead to inadmissibility. A non-citizen can also be

inadmissible for misrepresentation under section 40. A foreign national who loses refugee protection is thereby inadmissible, according to section 40.1, as can be the case for failing to comply with the IRPA under section 41. Section 42 addresses the inadmissibility of family members.

[60] As can be seen, inadmissibility cases span a variety of circumstances where the Act determines that a foreign national can be inadmissible. I cannot detect a common denominator such that inadmissibility is necessarily due to the person being dangerous. In *Revell*, the Court of Appeal recalled that "[a] finding of inadmissibility is an administrative determination that a non-citizen failed to respect the conditions under which he or she was permitted to remain in Canada" (para 54). This is not a criminal law or even a quasi-criminal law procedure.

[61] The same holds for section 36 of the IRPA. The act declares inadmissible anyone who has been found guilty of "serious criminality" or "criminality". As for paragraph 36(1)(a), it applies to any foreign national, that is, to a non-citizen convicted of an offence that Parliament considers relatively serious given that it is punishable by imprisonment for 10 years, or to a non-citizen sentenced to a term of imprisonment of more than six months. For a foreign national who has not obtained permanent resident status, the threshold is lowered to anyone convicted of an offence under an Act of Parliament punishable by way of indictment, or of two offences under any Act of Parliament not arising out of a single occurrence. This is inadmissibility for "criminality".

[62] It is therefore sufficient for the offence to be "punishable" by way of indictment, as opposed to being punished following an indictment. Paragraph 36(3)(a) dispels any ambiguity given that Parliament has stated that a hybrid offence that can be the subject of an indictment is covered by paragraphs 36(1)(a) and 36(2)(a) "even if it has been prosecuted summarily". It is the alleged misconduct, with its essential elements, that counts, whether it is the subject of a summary procedure or of an indictment.

[63] This means that Parliament has determined that, in addition to foreign nationals being inadmissible on health grounds (section 38), financial reasons (section 39) or for misrepresentations in immigration matters, or for having lost refugee status, a person convicted of offences having certain characteristics is inadmissible. The person is not punished. Rather, "Parliament can impose conditions on a permanent resident's right to remain in Canada, and can legitimately remove a permanent resident from the country if they have deliberately violated an essential condition under which they were permitted to enter and remain in Canada" (*Revell*, para 54). Of course, this is also the case for non-citizens who are not permanent residents.

[64] It follows from the above that this is a fundamental element of the IRPA's deportation scheme given that Parliament determines who can remain in Canada. This is its central element. As a matter of fact, Division 5 of the IRPA is entitled "Loss of Status and Removal" and deals with the report on inadmissibility, the admissibility hearing by the Immigration Division and the enforcement of the removal order. Undoubtedly, section 36 is part of the deportation scheme, which obviously flows from the most fundamental principle of immigration law, according to which a foreign national does not have an absolute right to remain in Canada. Parliament spoke

when it defined some categories of foreign nationals who can be removed because their presence is no longer desired. The applicant essentially argued that the selection of persons whose presence is no longer desired is unconstitutional.

[65] The applicant's thesis is based on three pillars. First, the Crown attorney's role in the election of the mode of prosecution is so fundamental that it must be respected by Parliament, which should not override it. Intimately related to the first pillar, the applicant submitted that only dangerous persons are subject to the scheme because the IRPA speaks in terms of "serious criminality". The use of this terminology allegedly means that section 36 should only deal with the inadmissibility of persons who represent a danger to security. However, when the Crown attorney elects to proceed summarily, it must be because the offence is less serious and the person charged does not present the same risk.

[66] In my opinion, neither of these pillars can stand up to analysis. I will come back to this. But the most significant obstacle that the applicant cannot overcome is the jurisprudence of the Supreme Court of Canada that excludes the IRPA's deportation scheme from review under section 15 of the Charter. This Court is clearly bound by this jurisprudence. The conjunction of sections 6 and 15 of the Charter ensures that permission to distinguish between citizens and non-citizens with respect to the right to enter and leave Canada is constitutionally permitted.

[67] *Chiarelli* dealt directly with the "comprehensive legislative scheme which governs the deportation of permanent residents who have been convicted of certain criminal offences" (page 719). Sopinka J, writing for a unanimous Supreme Court, had to rule on the constitutional

argument according to which the deportation scheme was discriminatory. Pages 733 and 734 read as follows:

> The distinction between citizens and non-citizens is recognized in the *Charter*. While permanent residents are given the right to move to, take up residence in, and pursue the gaining of a livelihood in any province in s. 6(2), only citizens are accorded the right "to enter, remain in and leave Canada" in s. 6(1).
>
> Thus Parliament has the right to adopt an immigration policy and to enact legislation prescribing the conditions under which non-citizens will be permitted to enter and remain in Canada. It has done so in the *Immigration Act*. Section 5 of the Act provides that no person other than a citizen, permanent resident, Convention refugee or Indian registered under the *Indian Act* has a right to come to or remain in Canada. The qualified nature of the rights of non-citizens to enter and remain in Canada is made clear by s. 4 of the Act. Section 4(2) provides that permanent residents have a right to remain in Canada except where they fall within one of the classes in s. 27(1). One of the conditions Parliament has imposed on a permanent resident's right to remain in Canada is that he or she not be convicted of an offence for which a term of imprisonment of five years or more may be imposed. This condition represents 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. The requirement that the offence be subject to a term of imprisonment of five years indicates Parliament's intention to limit this condition to more serious types of offences. It is true that the personal circumstances of individuals who breach this condition may vary widely. The offences which are referred to in s. 27(1)(*d*)(ii) also vary in gravity, as may the factual circumstances surrounding the commission of a particular offence. However there is one element common to all persons who fall within the class of permanent residents described in s. 27(1)(*d*)(ii). They have all deliberately violated an essential condition under which they were permitted to remain in Canada. In such a situation, there is no breach of fundamental justice in giving practical effect to the termination of their right to remain in Canada. In the case of a permanent resident, deportation is the only way in which to accomplish this. There is nothing inherently unjust about a mandatory order. The fact of a deliberate violation of the condition imposed by s. 27(1)(*d*)(ii) is sufficient to justify a deportation order. It is not necessary, in order to comply with fundamental justice, to look beyond this fact to other aggravating or mitigating circumstances.
>
> [Emphasis added.]

[68] The Court spoke specifically about section 15 of the Charter at page 736:

> Although the constitutional question stated by Gonthier J. raises the issue of whether ss. 27(1)(*d*)(ii) and 32(2) violate s.15 of the *Charter*, the respondent made no submissions on this issue. I agree, for the reasons given by Pratte J.A. in the Federal Court of Appeal, that there is no violation of s. 15. As I have already observed, s.6 of the *Charter* specifically provides for differential treatment of citizens and permanent residents in this regard. While permanent residents are given various mobility rights in s. 6(2), only citizens are accorded the right to enter, remain in and leave Canada in s. 6(1). There is therefore no discrimination contrary to s. 15 in a deportation scheme that applies to permanent residents, but not to citizens.
>
> [Emphasis added.]

[69] The summary of comments by Pratte J of the Court of Appeal is at page 727:

> Pratte J.A. held that the combination of ss. 27(1)(*d*)(ii) and 32(2) of the Act does not violate s. 15 of the *Charter* because they do not impose a punishment. Section 32(2) is the corollary of the limits imposed by s. 4 of the Act on the right of a permanent resident to come to and remain in Canada. Similarly he held that they do not violate s. 7 since there is no injustice in requiring the deportation of a person who has lost the right to remain in Canada. Finally there is no violation of s. 15. Section 6 of the Charter specifically provides for different treatment of citizens and permanent residents regarding the right to remain in Canada. Nor does a distinction between permanent residents who have been convicted of an offence described in s. 27(1)(d)(ii) and other permanent residents amount to discrimination within the meaning of s. 15.
>
> [Emphasis added.]

[70] As can be seen, the deportation scheme cannot be challenged because section 6 of the Charter stands in the way of such allegations. Some refinements were later added, but the basic proposition has not changed. Section 15 is not violated *per se* by the deportation scheme.

[71] In *Lavoie*, the issue was a restriction on employment in the federal public service for non-citizens or, put another way, the preference given by law to Canadian citizens. Here is how Bastarache J, writing for a plurality of the Court, articulated the concept at paragraph 37 and, further on, at paragraph 44:

> 37 This Court has twice considered the relationship between citizenship and s. 15(1) of the *Charter*. The first time was *Andrews*, *supra*, which concerned a provincial law barring non-citizens from access to the legal profession; the law was struck down as a violation of s. 15(1) and was not saved under s. 1. The second time was *Chiarelli v. Canada (Minister of Employment and Immigration)*, 1992 CanLII 87 (SCC), [1992] 1 S.C.R. 711, which, by contrast, involved a federal law authorizing the deportation of permanent residents convicted of serious criminal offences; as s. 6 of the *Charter* specifically authorized differential treatment of non-citizens for immigration purposes, the law was held not to be discriminatory (p. 736). This case has much in common with both *Andrews* and *Chiarelli*. Like *Andrews*, it involves differential treatment in employment that is not explicitly authorized by the *Charter*; like *Chiarelli*, it involves a federal law that is part of a recognized package of privileges conferred on Canadian citizens. This combination of factors makes it difficult to decide whether, at the end of the day, the law conflicts with the purpose of s. 15(1) of the *Charter*. Based on this Court's recent s. 15(1) jurisprudence, I conclude that it does.
>
> …
>
> 44 In this case, to the extent non-citizens are differently situated than citizens, it is only because the legislature has accorded them a unique legal status. In all relevant respects — sociological, economic, moral, intellectual — non-citizens are equally vital members of Canadian society and deserve tantamount concern and respect. The only recognized exception to this rule is where the Constitution itself withholds a benefit from non-citizens, as was the case in *Chiarelli*, *supra*. In such a case, it may be said that the *Charter* itself authorizes differential treatment, and that finding a s. 15(1) violation would amount to finding the *Charter* in violation of itself. Such is not the case in the present appeal. On the contrary, the distinction in this case finds no authorization in the *Charter* and, more broadly, is not made on the basis of any "actual personal differences between individuals": see *Law*, *supra*, at para. 71. If anything, the distinction places an additional burden on an already disadvantaged group. Such a distinction is

> impossible to square with this Court's finding in *Andrews*, *supra*, at p. 183, which held that "[a] rule which bars an entire class of persons from certain forms of employment, solely on the grounds of a lack of citizenship status and without consideration of educational and professional qualifications or the other attributes or merits of individuals in the group, would … infringe s. 15 equality rights".
>
> [Emphasis added.]

[72] Basically, two provisions of the Constitution cannot conflict: the Constitution cannot contradict itself. This is certainly the case with sections 6 and 15. It cannot be argued that citizens and non-citizens are treated differently regarding the removal of non-citizens when this difference is permitted by the Constitution.

[73] Similarly, in *Medovarski* at paragraph 46, McLachlin CJ wrote on behalf of a unanimous Court that "the deportation of a non-citizen in itself cannot implicate the liberty and security interests protected by s. 7 of the *Canadian Charter of Rights and Freedoms*".

[74] I would add that the principle that the Charter cannot be used to override other provisions of the Constitution has been recognized elsewhere in constitutional law. This issue was raised in *Adler v Ontario,* [1996] 3 SCR 609 and *Reference Re Bill 30, An Act to Amend the Education Act (Ont.),* [1987] 1 SCR 1148. In those cases, the issue was the financing of education, as dealt with in section 93 of the Constitution Act, 1867 and section 15 of the Charter. The following excerpt from paragraphs 38 and 39 of *Adler* is relevant to our case and sufficient for our purposes:

> 38 Wilson J. went on to address the claim that the government's choice to fund Roman Catholic separate schools but not other religious schools contravened s. 15(1) of the *Charter*. The Adler and Elgersma appellants are advancing what amounts to the same argument in the present case. Wilson J. rejected this argument for

> two reasons. First, she found that, in the event that Bill 30 was passed pursuant to s. 93(1), it would fall "fairly and squarely" (at p. 1196) within s. 29 of the *Charter* which explicitly exempts from *Charter* challenge all rights and privileges "guaranteed" under the Constitution in respect of denominational, separate or dissentient schools. Second, she found that, in the event that Bill 30 was passed pursuant to the opening words of s. 93 and s. 93(3), it was nonetheless "immune" from *Charter* review because it was "legislation enacted pursuant to the plenary power in relation to education granted to the provincial legislatures as part of the Confederation compromise". See *Reference Re Bill 30*, at p. 1198. This was true regardless of the fact that this unequal funding might, as I mentioned above, "sit uncomfortably with the concept of equality embodied in the *Charter*". In other words, Wilson J. at p. 1197 refused to use one part of the Constitution to interfere with rights protected by a different part of that same document: "It was never intended, in my opinion, that the *Charter* could be used to invalidate other provisions of the Constitution … ."
>
> 39 Following the same line of reasoning used by Wilson J. in the *Reference Re Bill 30*, I find that public funding for the province's separate schools cannot form the basis for the appellants' *Charter* claim.
>
> [Emphasis added.]

[75] The same rule was applied by a unanimous Supreme Court in *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350 [*Charkaoui*]. In that case, the security certificate system under the IRPA was under review. Regarding the violation of the right to equality, the Court concluded that there was none, but the system was determined to be constitutionally deficient for other reasons.

[76] The Court stated that "[w]hile the deportation of a non-citizen in the immigration context may not *in itself* engage s. 7 of the *Charter*, some features associated with deportation, such as detention in the course of the certificate process or the prospect of deportation to torture, may do

so" (para 17). The fairness of the process involved questions of liberty and security, such that section 7 could be applied.

[77] As for the application of section 15 of the Charter, the Court always makes the same equation: section 6 precludes a violation of section 15:

> 129 The appellant Mr. Charkaoui argues that the *IRPA* certificate scheme discriminates against non-citizens, contrary to s. 15(1) of the *Charter*. However, s. 6 of the *Charter* specifically allows for differential treatment of citizens and non-citizens in deportation matters: only citizens are accorded the right to enter, remain in and leave Canada (s. 6(1)). A deportation scheme that applies to non-citizens, but not to citizens, does not, for that reason alone, violate s. 15 of the *Charter*: *Chiarelli*.

[78] Some have tried to see in this paragraph from *Charkaoui* the possibility of invoking section 15 in spite of everything, thanks to the phrase "for that reason alone". Could this be a winning argument in certain circumstances?

[79] Professor Donald Galloway, in an article critical of current jurisprudence entitled *Immigration, Xenophobia and Equality Rights*, (2019) Dalhousie L.J. vol 42, p. 17, notes the presence of that phrase. A reading of these terms might superficially suggest the possibility of showing that there is something going on here beyond the mere creation of rules defining access to the country. But the author concludes that this reading, whose contours are completely amorphous, is the wrong one. Non-citizens cannot claim unconstitutional discrimination if their claim pivots on differential treatment between citizens and non-citizens. Instead, another ground of discrimination must be invoked: ethnic origin or religion, for example. Since *Chiarelli* has not been disavowed, especially the categorical paragraphs at page 736 of *Chiarelli* on the application

of section 15, which I have reproduced in paragraphs 68 and 69 of these reasons, it is clear that the possibilities are limited at best.

[80] I am inclined to agree with Professor Galloway on the reading that should be given to *Charkaoui* and the jurisprudence that preceded it. I do not know how any aspect of the deportation scheme could render it inconsistent with section 15 of the Charter, given section 6. But I would not state outright that it would be perfectly impossible. However, no matter which reading of *Charkaoui* is accepted, in this case, it would still have to be shown that there is something that could go beyond the creation of rules defining access to the country.

[81] In *Charkaoui*, the Supreme Court relied on a reservation regarding the application of section 7 of the Charter to challenge the constitutionality of the removal scheme. Accordingly, it stated that the deportation of a non-citizen does not in itself engage section 7 of the Charter (para 17). But certain features associated with deportation may trigger review under section 7. The Court gave as examples detention pending the issuance of a security certificate, or removal to a country where there is a risk of torture. In fact, in *Charkaoui*, the problem lay with the issuance of an inadmissibility certificate based in part on secret documents, without the participation of an independent agent to protect the named person's interest. It was not the deportation scheme that was unconstitutional, but rather the features associated with it.

[82] One might suspect that the remark in *Charkaoui*, at paragraph 129, that "[a] deportation scheme that applies to non-citizens, but not to citizens, does not, for that reason alone, violate s. 15 of the *Charter: Chiarelli*" might introduce the same kind of possibility as in relation to

section 7. Features associated with deportation, such as, by analogy, the possession or use of secret documents without participation on behalf of the named person, in the context of a section 7 challenge, could open the door to a section 15 challenge. Just think, for example, of a deportation scheme targeting a particular ethnic group. But nothing of the sort is presented or argued here.

[83] It would have been necessary to identify a feature of the deportation scheme other than the simple fact that it differentiates between citizens and non-citizens in order to challenge its constitutionality. Put another way, we can define who can be inadmissible because this is still consistent with section 6 of the Charter, but associated features may perhaps not be consistent with the Charter.

[84] On closer inspection, all the applicant did is express dissatisfaction with the framework Parliament has chosen for deporting undesirables. He would like the descriptions of non-citizens thus targeted to be narrower and more restrictive. But insofar as the deportation scheme only differentiates between citizens and non-citizens, when this differentiation is permitted by the Constitution, to see this as unconstitutional discrimination means that one provision of the Charter could be used to invalidate another (*Adler*) or, put another way, it amounts to finding the Charter in violation of itself (*Lavoie*). This principle, repeated on several occasions by the Supreme Court of Canada, is of course binding on this Court.

[85] With all due respect, the applicant never offered anything that could have exceeded the conditions required for deportation, that would go beyond immigration issues. Nothing of the

sort was even attempted. Seeking some inspiration in *Charkaoui*, the applicant did say that other facts relating to deportation could constitute a violation of section 15, such as the conditions of deportation, detention prior to deportation or the arrangements made for deportation. Assuming that this would be fair under section 15 of the Charter, something similar would have to be presented. Such is not the case here.

[86] As the Court attempted to demonstrate, a person can be found to be inadmissible under the Act in a variety of situations. “Criminality” and “serious criminality” are just two of them, creating part of the framework that Parliament considers should allow for the removal of undesirable persons. When Parliament defines them so that the maximum penalty that can be imposed for the offence is a decisive criterion, regardless of the mode of prosecution eventually elected, it is only determining the framework that can lead to inadmissibility, such as financial reasons, immigration misrepresentation or loss of refugee protection. In my opinion, the applicant has not shown how, despite *Chiarelli*, *Adler*, *Medovarski*, *Lavoie* and *Charkaoui*, section 15 of the Charter can apply in this case, even though section 6 allows the difference between citizens and non-citizens of which he complained.

[87] The other two pillars of the applicant’s argument do not stand up to analysis either. Repeatedly, it is stated that for paragraph 36(3)(a) to be valid, the person concerned had to pose a threat to Canadian society, to be a dangerous criminal. Only dangerous individuals, according to the applicant, should be inadmissible since, after all, we are talking about “serious criminality”. According to the argument, a person who is summarily prosecuted is not a dangerous criminal and should not be treated and perceived as such.

[88] In all fairness, this is a misunderstanding of offences punishable by ten years' imprisonment for "serious criminality", the term used in the IRPA. A great many offences under the *Criminal Code* are punishable by heavy sentences, without the offender constituting a threat to security or becoming a dangerous criminal. A review of *Criminal Code* offences shows that not every offence results in a "dangerous offender" for having committed an offence punishable by ten years' imprisonment, or even life imprisonment. What section 36 of the Act identifies are offences against federal statutes that are of such a serious nature that Parliament would make them punishable by ten years' imprisonment in the case of paragraph 36(1)(a). The seriousness of an offence may, of course, depend on the harm done to a victim. This may require denunciation even if the offender has not become a dangerous offender. One example among many would be the offence of criminal negligence (showing wanton or reckless disregard for the safety of others) causing bodily harm: the offence (section 221 of the *Criminal Code*) is a hybrid one with a maximum penalty of ten years' imprisonment. There is no equation between the seriousness of the offence and the fact that the offender is a dangerous offender. There was no intent to cause bodily harm. There was criminal negligence resulting in harm to a victim. Behaviour demonstrating wanton or reckless disregard is denounced.

[89] It is also worth noting that for a foreign national who is not a permanent resident, the bar is set even lower under paragraph 36(2)(a) of the Act, for being inadmissible (an indictable offence). The marginal note refers to "criminality". It is difficult to see why the dangerousness of a non-citizen would be a factor under paragraph 36(1)(a) and not under paragraph 36(2)(a). In either case, a person is declared inadmissible for mixed offences. Of course, not all hybrid offences in federal statutes create dangerous offenders upon conviction. In my opinion, section

36 in no way implies that the person must be dangerous. What is envisaged is simply a regime enabling the removal from the country of people who are no longer desirable because they have not complied with the conditions laid down for being allowed to remain in Canada.

[90] What is more, as mentioned earlier, inadmissibility is not intended to punish. Parliament is merely outlining the circumstances in which a person would be inadmissible and could therefore be deported. The dangerousness of the person does not enter into the equation. I note, moreover, that the IRPA provides for mechanisms to take due account of the particular circumstances of individuals who are otherwise inadmissible.

[91] As a result, the emphasis on security and the person's dangerousness is misplaced. In my opinion, there is no justification for claiming that [TRANSLATION] "the purpose of the criminal inadmissibility system set out in subsection 36(1) of the IRPA is to protect Canadian society from persons who pose a threat to security" (Applicant's Memorandum of Fact and Law at para 53). The purpose is to identify undesirable persons, as is the case with the other provisions of the Act that define inadmissibility. It is not an additional penalty, nor is it a quasi-criminal measure. It is no more required for section 36 of the IRPA than it is for inadmissibility for financial reasons or immigration misrepresentation.

[92] The final pillar supporting the applicant's argument, as I understand it, is that a non-citizen would be deprived of the enjoyment of the fundamental mechanism of criminal law whereby election of the mode of prosecution is the prerogative of the prosecuting attorney. It seems that the applicant sees in subsection 36(3) an inappropriate incursion by Parliament into

the role played by the Crown prosecutor. A citizen would be subject to Crown election, and this would be an advantage, whereas the non-citizen does not have the same advantage, since Parliament has chosen not to consider the mode of prosecution when describing the offences that may result in inadmissibility. This, says the applicant, changes the underlying nature of the offence.

[93] The applicant cited *Dudley*. In that case, the issue was what happens to an offence that is prosecuted summarily and found to be time-barred because it was brought more than six months after the alleged commission of the offence. Three Supreme Court judges ruled that the limitation period (six months at the time) does not run for hybrid offences, since these offences are deemed to be indictable offences by virtue of section 34 of the *Interpretation Act*, RSC 1985 c I-21. The other six judges arrived at essentially the same result for a different reason: they agreed that "the Crown may proceed afresh by indictment except where the court is satisfied that this would amount to an abuse of process" (*Dudley*, para 5; see also paras 31, 43 and 44).

[94] The argument that [TRANSLATION] "paragraph 36(3)a) of the IRPA, in equating hybrid offences with indictable ones, is contrary to this principle and deprives litigants who are not Canadian citizens of the benefit of the concrete effects of the Crown attorney's choice" is therefore difficult to understand. Indeed, *Dudley* recognizes that, in terms of limitation periods, Crown election can be reversed in order to proceed by indictment. Not only is the limitation period set aside, but the mode of prosecution reverts to indictment, and the maximum sentence reverts accordingly to the one provided for. The argument that the underlying nature of the offence has changed by virtue of electing one mode of prosecution cannot stand if the

prosecution can revert to another mode of prosecution when prosecution by summary conviction is found to be time-barred. In fact, *Dudley* does not support the applicant's argument that the mode of prosecution changes the underlying nature of the offence. Rather, the opposite is true. The mode of prosecution does not alter this underlying nature.

[95] At a more fundamental level, *Dudley* reminds us that the Crown election for hybrid offences, "which exist nowhere — and everywhere — on the landscape of Canadian criminal procedure" (para 13), is a policy choice. As stated in *Dudley*:

> [16] Moreover, hybrid offences are by no means a uniquely Canadian phenomenon. Elsewhere, however, the decision whether to proceed summarily or on indictment is not generally a matter of prosecutorial discretion. In England and Wales, for example, it is the presiding magistrate who decides: *Magistrates' Courts Act* 1980 (U.K.), 1980, c. 43, s. 19. And in certain Australian states, including New South Wales, the accused may apply to be tried summarily, subject to the consent of the Crown: *Crimes Act 1900* (N.S.W.), ss. 475A and 475B.
>
> [17] Even in Canada, it was at one time explicitly provided that certain offences were punishable on indictment or on summary conviction *at the option of the accused*: see, for example, s. 501 of the *Criminal Code*, R.S.C. 1927, c. 36; *R. v. Richards*, [1934] 2 W.W.R. 390 (B.C.C.A.). But all such provisions have long since been repealed and, as mentioned earlier, the choice is now the Crown's: *Smythe v. The Queen*, [1971] S.C.R. 680, at pp. 685-87, per Fauteux C.J.

[96] The applicant relied on an essential feature of criminal justice, which is to allow the Crown to elect the mode of prosecution. I agree that there must be someone who chooses the mode of prosecution: in this sense, the role of the Crown prosecutor is essential. I am also not in any doubt that Crown counsel performs a function that requires decisions to be made in the public interest. There is abundant case law in this regard. However, no authority has been

offered, and I know of none, that the common law which gives the Crown the right to elect the mode of prosecution has acquired such a status that Parliament's choice to adopt paragraph 36(3)(a) of the IRPA would be inappropriate, or even unconstitutional. As things stand, there is nothing to prevent Parliament from dealing with hybrid offences in the same way as it has done in enacting paragraph 36(3)(a) with respect to immigration consequences. The status of Crown counsel and the role it plays do not change the fact that this could be changed. Moreover, in paragraph 59 of his memorandum, the applicant cited the minority judges in *Dudley*, who stated that "discretion, including prosecutorial discretion, is an "essential feature of the criminal justice system' which will not be lightly interfered with". In any case, Parliament did not even touch the function of the Crown prosecutor. It has not changed the role played in the criminal justice system by enacting paragraph 36(3)(a) of the IRPA. We are not dealing here with criminal justice, but rather with administrative matters, where Parliament has chosen not to distinguish between modes of prosecution in determining which cases merit inadmissibility. The role of the Crown prosecutor is not at stake. He or she continues to determine the mode of prosecution. Rather, in immigration matters, Parliament has chosen not to consider the mode of prosecution in determining who has become an undesirable person. The applicant has not shown how this choice by Parliament could be the subject of an intervention by the Court.

VI. Conclusion

[97] The application for judicial review must be dismissed mainly because the allegation that paragraph 36(3)(a) of the IRPA violates subsection 15(1) of the Charter has not been established, given the existence of section 6 of the Charter and the Supreme Court's consistent jurisprudence.

[98] The Court also finds that the purpose of section 36 of the IRPA cannot be to exclude "dangerous offenders", but is rather, as with the other provisions of Division 4 of the IRPA, to identify undesirable persons who may therefore be inadmissible. Finally, there is nothing to prevent Parliament from disregarding the mode of prosecution elected by prosecuting counsel in a criminal trial in determining the conditions that may give rise to immigration inadmissibility.

[99] The applicant submitted that a serious question of general application should be submitted to the Federal Court of Appeal under section 74 of the IRPA. The respondent does not object to the question being certified, nor to the wording proposed by the applicant.

[100] A question will be certified if it is dispositive of the appeal, transcends the interests of the parties and raises an issue of broad significance or general importance (*Canada (Citizenship and Immigration) v Laing*, 2021 FCA 194). In my opinion, the question raised meets these conditions. The Court proposes a slightly amended version of the question submitted by the applicant:

> Does paragraph 36(3)(a) of the *Immigration and Refugee Protection Act* violate subsection 15(1) of the *Canadian Charter of Rights and Freedoms*, despite subsection 6(1) of the Charter, and is it therefore of no force or effect under section 52 of the Charter?

JUDGMENT in IMM-5522-21

THIS COURT ORDERS as follows:

1. The application for judicial review is dismissed.

2. The following serious question of general importance is certified:

   Does paragraph 36(3)(a) of the *Immigration and Refugee Protection Act* violate subsection 15(1) of the *Canadian Charter of Rights and Freedoms*, despite subsection 6(1) of the Charter, and is it therefore of no force or effect under section 52 of the Charter?

"Yvan Roy"
Judge

Certified true translation
Michael Palles

ANNEX

36 (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	36 (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :
(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;	a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;
(b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or	b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;
(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.	c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.
(2) A foreign national is inadmissible on grounds of criminality for	(2) Emportent, sauf pour le résident permanent, interdiction de territoire pour criminalité les faits suivants :
(a) having been convicted in Canada of an offence under an Act of Parliament punishable by way of indictment, or of two offences under any Act of	a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions à toute loi fédérale

Parliament not arising out of a single occurrence;

qui ne découlent pas des mêmes faits;

(b) having been convicted outside Canada of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, or of two offences not arising out of a single occurrence that, if committed in Canada, would constitute offences under an Act of Parliament;

b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions qui ne découlent pas des mêmes faits et qui, commises au Canada, constitueraient des infractions à des lois fédérales;

(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an indictable offence under an Act of Parliament; or

c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation;

(d) committing, on entering Canada, an offence under an Act of Parliament prescribed by regulations.

d) commettre, à son entrée au Canada, une infraction qui constitue une infraction à une loi fédérale précisée par règlement.

(3) The following provisions govern subsections (1) and (2):

(3) Les dispositions suivantes régissent l'application des paragraphes (1) et (2) :

(a) an offence that may be prosecuted either summarily or by way of indictment is deemed to be an indictable offence, even if it has been prosecuted summarily;

a) l'infraction punissable par mise en accusation ou par procédure sommaire est assimilée à l'infraction punissable par mise en accusation, indépendamment du mode de poursuite effectivement retenu;

(b) inadmissibility under subsections (1) and (2) may not be based on a conviction in respect of which a record suspension has been ordered and has not been revoked or

b) la déclaration de culpabilité n'emporte pas interdiction de territoire en cas de verdict d'acquittement rendu en dernier ressort ou en cas de suspension du casier — sauf

ceased to have effect under the *Criminal Records Act*, or in respect of which there has been a final determination of an acquittal;

cas de révocation ou de nullité — au titre de la *Loi sur le casier judiciaire*;

(c) the matters referred to in paragraphs (1)(b) and (c) and (2)(b) and (c) do not constitute inadmissibility in respect of a permanent resident or foreign national who, after the prescribed period, satisfies the Minister that they have been rehabilitated or who is a member of a prescribed class that is deemed to have been rehabilitated;

c) les faits visés aux alinéas (1)b) ou c) et (2)b) ou c) n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui, à l'expiration du délai réglementaire, convainc le ministre de sa réadaptation ou qui appartient à une catégorie réglementaire de personnes présumées réadaptées;

(d) a determination of whether a permanent resident has committed an act described in paragraph (1)(c) must be based on a balance of probabilities; and

d) la preuve du fait visé à l'alinéa (1)c) est, s'agissant du résident permanent, fondée sur la prépondérance des probabilités;

(e) inadmissibility under subsections (1) and (2) may not be based on an offence

e) l'interdiction de territoire ne peut être fondée sur les infractions suivantes :

(i) designated as a contravention under the *Contraventions Act*,

(i) celles qui sont qualifiées de contraventions en vertu de la *Loi sur les contraventions*,

(ii) for which the permanent resident or foreign national is found guilty under the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985, or

(ii) celles dont le résident permanent ou l'étranger est déclaré coupable sous le régime de la Loi sur les jeunes contrevenants, chapitre Y-1 des *Lois révisées du Canada* (1985),

(iii) for which the permanent resident or foreign national received a youth sentence under the *Youth Criminal Justice Act*.

(iii) celles pour lesquelles le résident permanent ou l'étranger a reçu une peine spécifique en vertu de la *Loi sur le système de justice pénale pour les adolescents*.

FEDERAL COURT

SOLICITORS OF RECORD

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