Federal Court  Cour fédérale

**Date: 20241209**

**Docket: IMM-9793-23**

**Citation: 2024 FC 1990**

**Ottawa, Ontario, December 9, 2024**

**PRESENT: The Honourable Mr. Justice Régimbald**

**BETWEEN:**

**IVO BANOVIC**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

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## I. Overview

[1] A Senior Immigration Officer found Mr. Banovic [the Applicant] inadmissible under paragraph 37(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. He seeks judicial review of this decision on the grounds that it was unreasonable, and that he suffered an abuse of process due to administrative delay.

[2] Having considered the record before the Court, including the parties' written and oral submissions, as well as the applicable law, I find that the Applicant has discharged his burden and demonstrated that the decision is unreasonable. For the reasons that follow, this application for judicial review is granted.

## II. Background Facts

[3] The Applicant is a Montenegrin national who arrived in 2005 as a permanent resident in Canada, alongside his wife and two daughters.

[4] In November 2012, the Canadian government extradited the Applicant to the United States, where he pled guilty to three offences: conspiracy to import eighty pounds (80 lb) of marijuana; conspiracy to launder monetary instruments; and aiding and abetting the crime of money

laundering. An American court sentenced him to “time served,” after which he was promptly returned to Canada in September 2013.

[5] Upon his return, two reports were prepared against the Applicant by virtue of subsection 44(1) of the *IRPA*. One report supported the Applicant’s inadmissibility under paragraph 36(1)(b) of the *IRPA*, a provision concerning permanent residents or foreign nationals who “[have] 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.” The other report suggested his inadmissibility under paragraph 37(1)(b) of the *IRPA*, which concerns permanent residents or foreign nationals who “on grounds of organized criminality” have “engag[ed], in the context of transnational crime, in activities such as people smuggling, trafficking in persons or laundering of money or other proceeds of crime.”

[6] Despite having both reports available to them, the Minister’s delegate proceeded with a referral to an admissibility hearing based solely on paragraph 36(1)(b) of the *IRPA*. An admissibility hearing at the Immigration Division of the Immigration and Refugee Board [IRB] was accordingly sought on this basis. The Immigration Division hearing proceeded in November 2016, and resulted in the Applicant losing his permanent resident status in Canada. A deportation order was issued the following day.

[7] At this juncture, the Applicant availed himself of several procedural steps in order to remain in Canada. He first applied for a pre-removal risk assessment, which was refused in November 2017. With his removal determined to be in progress, the Applicant then sought leave

at the Federal Court to defer it. He was successful. In August 2018, this Court granted him leave and deferred his removal (IMM-24-18).

[8] In the meantime, the Applicant pursued further avenues to regain his status and stay in Canada. In November 2017, he applied for permanent residence as the spouse of a Canadian citizen, in the context of which he requested relief from his inadmissibility to Canada under paragraph 36(1)(b) of the *IRPA*. He made this request pursuant to section 25 of the *IRPA*, under which the Minister may grant a foreign national permanent resident status if justified by humanitarian and compassionate [H&C] considerations.

[9] In July 2020, the Applicant received a procedural fairness letter [PFL] from Immigration, Refugees and Citizenship Canada [IRCC]. The purpose of this letter was to notify him that his application for permanent residence "[would] not be considered at this time" because he was found to be inadmissible to Canada under paragraph 36(1)(b) of the *IRPA*, and that there was a remedy to overcome his inadmissibility by way of a "rehabilitation" for crimes committed outside of Canada. The letter did not address his potential inadmissibility under paragraph 37(1)(b) of the *IRPA* (Certified Tribunal Record at 232).

[10] In May 2023, the Applicant received a second PFL. Like the first PFL, the purpose of this letter was to notify him that his application for permanent residence could be refused due to criminal inadmissibility Canada. However, the basis for this inadmissibility was now paragraph 37(1)(b) of the *IRPA*, with information available to IRCC suggesting that the Applicant could be

inadmissible for “engaging, in the context of transnational crime, in an activity such as drug smuggling” (Certified Tribunal Record at 207).

[11] The Applicant provided an extensive reply to this second PFL in June 2023, advancing a series of arguments against his inadmissibility pursuant to paragraph 37(1)(b) of the *IRPA*. At the heart of his reply is the claim that proceeding with inadmissibility under paragraph 37(1)(b) would be an abuse of process. The Applicant noted that his possible inadmissibility under paragraph 37(1)(b) had already been expressly considered and thoroughly canvassed by immigration officials. In referring only his inadmissibility under section 36 to a hearing, when section 37 was also presented to them, the Minister’s delegate clearly exercised their discretion not to refer the Applicant’s potential inadmissibility under section 37 to an admissibility hearing before the Immigration Division of the IRB.

[12] Moreover, he claimed that the delay in raising paragraph 37(1)(b) was in itself an abuse of process. The Applicant cited the three-step test set forth in *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 [*Blencoe*] and *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29 [*Abrametz*], arguing that the ten-year delay between the start of his immigration proceedings and the consideration of section 37 was (1) inordinate, (2) caused him significant prejudice, and (3) so manifestly unfair to him that it brought the administration of justice into disrepute. In support of these arguments, the Applicant also filed updated evidence supporting his request for exemption under H&C grounds and for a determination of rehabilitation. These included letters from his wife and children, each attesting to their close relationship with him and the difficulties that have arisen from these lengthy immigration proceedings. The Applicant then

filed evidence with respect to the earlier proceedings, including the reports that had been prepared for his case pursuant to subsection 44(1) of the *IRPA* (Certified Tribunal Record at 151).

[13] Altogether, the Applicant submitted that the Minister had been aware of his potential inadmissibility since 2013, had already considered the issue, and decided not to pursue this avenue. Raising this ground again 10 years later, and for the first time since 2016, would therefore cause him significant prejudice due to the delay.

## III. Decision under Review

[14] The Officer denied the Applicant's spousal application for permanent residence, determining that he was inadmissible under paragraph 37(1)(b) of the *IRPA*. With respect to this inadmissibility, the Officer made three key findings.

[15] First, the Officer found that H&C factors held no weight or relevance in an inadmissibility decision. The Officer made this finding in light of the Applicant's response to the second PFL letter, which the Officer characterized as mostly advancing H&C factors for the Applicant's stay in Canada or mitigation of his inadmissibility.

[16] Second, the Officer found that raising inadmissibility on paragraph 37(1)(b) was not an abuse of process. The Officer took note at the outset that the Applicant did indeed participate in an Immigration Division admissibility hearing on the sole basis of paragraph 36(1)(b), despite the Canada Border Service Agency [CBSA] reports suggesting paragraph 37(1)(b) as an alleged ground for inadmissibility. Nonetheless, the Officer found that "those institutions, although

partners, have different mandates and autonomy" (Certified Tribunal Record at 10). With these distinct roles in mind, the Officer found that considering paragraph 37(1)(b) as a ground for inadmissibility did not constitute an abuse of process.

[17] Third, the Officer found that paragraph 37(1)(b) of the *IRPA* included "the crime of drug smuggling," and that there were reasonable grounds to believe that the Applicant had engaged, in the context of transnational crime, in drug smuggling and money laundering, and was therefore inadmissible to Canada pursuant to paragraph 37(1)(b) of the *IRPA* (Certified Tribunal Record at 11).

[18] The Applicant now challenges these findings upon judicial review.

## IV. Issues and Standard of Review

[19] This application requires the Court to determine whether the decision under review was reasonable, and whether the Applicant suffered an abuse of process.

[20] In administrative proceedings, abuse of process is a question of procedural fairness (*Abrametz* at para 38, citing *Blencoe* at paras 105–107, 121). A finding of abuse of process does not, strictly speaking, impugn the merits of the inadmissibility decision, but it is rather a purely procedural question of whether the Officer would bring the administration of justice into disrepute by proceeding as they did where there has been an undue delay in bringing the application (*Ganeswaran v Canada (Citizenship and Immigration)*, 2022 FC 1797 at para 25 [*Ganeswaran*]). This does not completely remove deference from the equation, because deference may be given to

a decision maker in their procedural choices and findings of fact when relevant to the procedural issues (*Iwekaeze v Canada (Minister of Citizenship and Immigration)*, 2022 FC 814 at para 12). But the main question remains whether, on the facts of this particular case, the decision maker acted fairly toward the Applicant (*Aboudlal v Canada (Citizenship and Immigration)*, 2023 FC 689 at para 32).

[21] Procedural review is a form of analysis that "focuses on the nature of the rights involved and the consequences for affected parties" (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 55 [*Canadian Pacific Railway*]). When dealing with matters of procedural fairness, the role of a reviewing court is to determine whether "the applicant knew the case to meet and had a full and fair chance to respond" (*Canadian Pacific Railway* at para 56). The Court thus conducts a "reviewing exercise… 'best reflected in the correctness standard' even though, strictly speaking, no standard of review is being applied" (*Canadian Pacific Railway* at para 54). Concretely speaking, this requires the Court to "assess the procedures and safeguards" in place to protect the rights of a party appearing before the administrative decision maker, and determine whether they have been followed in the Applicant's case. If they have not been followed, it is then incumbent on the Court to intervene. Such intervention is an essential part of safeguarding the fairness of the administrative process and holding administrative decision makers to account (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 13 [*Vavilov*]).

[22] In turn, on the substance of the decision, the applicable standard of review is that of reasonableness (*Vavilov* at paras 10, 25; *Mason v Canada (Citizenship and Immigration)*, 2023

SCC 21 at paras 7, 39–44 [*Mason*]). To avoid judicial intervention, the decision must bear the hallmarks of reasonableness—justification, transparency and intelligibility (*Vavilov* at para 99; *Mason* at para 59). A decision may be unreasonable if the decision maker misapprehended the evidence before it or failed to consider key issues or central arguments (*Vavilov* at paras 125–126, 128; *Mason* at paras 73–74). Reasonableness review is not a "rubber-stamping" exercise, it is a robust form of review (*Vavilov* at para 13; *Mason* at para 63). The onus of demonstrating that the decision is unreasonable lies with the Applicant (*Vavilov* at para 100).

[23] Overall, reviewing the merits on a reasonableness standard does not preclude the Court from considering whether the decision was unfair on a different standard (*Canadian Pacific Railway* at para 53).

## V. Analysis

### A. *Legislative Framework Relating to Sections 25 and 37 of the IRPA*

[24] It is trite law that non-Canadian citizens do not have an unqualified right to enter and remain in Canada. Subsection 11(1) of the *IRPA* requires foreign nationals to apply and obtain a visa (subject to some exceptions) before entering Canada.

[25] When foreign nationals apply for permanent residency status, one avenue open to them is to apply under section 25 when H&C considerations justify the granting of permanent residency. However, an application under section 25 is not available to individuals who are inadmissible

under sections 34, 35, 35.1 or 37 of the *IRPA*. This case turns on subsection 37(1) which provides:

| **Organized criminality** | **Activités de criminalité organisée** |
|---|---|
| **37 (1)** A permanent resident or a foreign national is inadmissible on grounds of organized criminality for | **37 (1)** Emportent interdiction de territoire pour criminalité organisée les faits suivants : |
| **(a)** being a member of an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment, or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence, or engaging in activity that is part of such a pattern; or | **a)** être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle se livre ou s'est livrée à des activités faisant partie d'un plan d'activités criminelles organisées par plusieurs personnes agissant de concert en vue de la perpétration d'une infraction prévue sous le régime d'une loi fédérale punissable par mise en accusation ou de la perpétration, hors du Canada, d'une infraction qui, commise au Canada, constituerait une telle infraction, ou se livrer à des activités faisant partie d'un tel plan; |
| **(b)** engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or laundering of money or other proceeds of crime. | **b)** se livrer, dans le cadre de la criminalité transnationale, à des activités telles le passage de clandestins, le trafic de personnes ou le recyclage des produits de la criminalité. |

[26] If an individual is inadmissible under subsection 37(1) of the *IRPA* and has no recourse to obtain permanent residency status for H&C considerations under section 25 of the *IRPA*, subsection 42.1(1) of the *IRPA* allows the Minister to declare that a person subject to a ruling under subsection 37(1) is not inadmissible because, in the circumstances, the events leading to the original inadmissibility ruling under subsection 37(1) are not contrary to national interests. Subsection 42.1(1) provides:

| **Exception — application to Minister** | **Exception — demande au ministre** |
|---|---|

| | |
|---|---|
| **42.1 (1)** The Minister may, on application by a foreign national, declare that the matters referred to in section 34, paragraph 35(1)(b) and subsection 37(1) do not constitute inadmissibility in respect of the foreign national if they satisfy the Minister that it is not contrary to the national interest. | **42.1 (1)** Le ministre peut, sur demande d'un étranger, déclarer que les faits visés à l'article 34, à l'alinéa 35(1)b) ou au paragraphe 37(1) n'emportent pas interdiction de territoire à l'égard de l'étranger si celui-ci le convainc que cela ne serait pas contraire à l'intérêt national. |

B. *Abuse of Process due to Administrative Delay in the Immigration Context: Basic Principles*

[27] Administrative decision makers are bound by a duty to act fairly. A corollary of this duty is the power to assess whether delay has amounted to an abuse of process in the context of an administrative proceeding (*Abrametz* at para 38).

[28] Delay can constitute an abuse of process in two ways: it can compromise the fairness of a hearing by impairing a party's ability to answer the case against them or, even in the absence of prejudice to that effect, can be so inordinate as to cause a significant prejudice to the party alleging abuse of process (*Abrametz* at paras 40–42; *Blencoe* at paras 102, 122, 132).

[29] With respect to this second category, a three-step test determines whether the delay amounts to an abuse of process. This test was set out in *Blencoe*, and recently revisited in *Abrametz* at paragraph 72 (see also paras 43, 101):

> First, the delay must be inordinate. This is determined on an assessment of the context overall. Second, the delay must have caused significant prejudice. When these two requirements are met, the court or tribunal is to conduct a final assessment as to whether abuse of process is established. This will be so when the

> delay is manifestly unfair to the party to the proceedings or in some other way brings the administration of justice into disrepute
>
> [Citations omitted]

[30] I will review each step in turn.

(1) Step One: Inordinate Delay

[31] The question of whether delay is inordinate is deeply contextual: "[t]hat a process took considerable time does not in itself amount to inordinate delay" (*Abrametz* at para 50). A lengthy process may nevertheless be fair.

[32] In determining whether delay is inordinate, *Abrametz* (at para 51) sets out a list of non-exhaustive contextual factors to be considered in a given case: "(a) the nature and purpose of the proceedings, (b) the length and causes of the delay, and (c) the complexity of the facts and issues in the case."

[33] The first contextual factor gives voice to the diversity of administrative proceedings in Canada. The administrative state is composed of hundreds of discrete bodies and agencies, some of which have been entrusted with decision making authority and the various responsibilities that it entails. These responsibilities may vary considerably from decision maker to decision maker, and from decision to decision. Some cases are more complex than others. One decision may hinge on extremely technical considerations, requiring the decision maker to deploy all the expertise at their disposal. For other decisions, "common sense and an understanding of the practicalities of

ordinary life [may] suffice" (*Abrametz* at para 52; *Vavilov* at para 88). These contextual variations will necessarily affect the Court's assessment of delay.

[34] The second contextual factor requires courts to consider the duration and causes of the delay. No length of time is *per se* inordinate, in and of itself. The analysis remains rooted in the specific context of the case at hand, including the behaviour of the parties involved. For instance, if the delay was caused by the party who now complains about that delay, it cannot amount to an abuse of process (*Abrametz* at para 62; *Blencoe* at para 125). Likewise, delay can be waived by the parties (*Abrametz* at para 62, citing *Diaz-Rodriguez v British Columbia (Police Complaint Commissioner)*, 2020 BCCA 221 at para 51). In any event, the administrative body dealing with the matter must use its resources efficiently to ensure the integrity of the process (*Abrametz* at para 62).

[35] The third factor recognizes how the complexity of the facts and issues before the decision maker can affect the time required to properly address the matter. In this regard, *Abrametz* reminds courts that a large record does not always translate into complexity, especially for "routine" cases within the decision maker's expertise (*Abrametz* at para 66). The assessment of inordinate delay remains a context-specific exercise.

(2) Step Two: Serious Prejudice

[36] The doctrine of abuse of process is primarily concerned with the integrity of the administration of justice, and less on the specific rights and interests of the parties involved (*Abrametz* at para 36). Even so, "[i]t is only where there is detriment to an individual that a court

or a tribunal will conclude that there has been an abuse of process" (*Abrametz* at para 67; *Blencoe* at para 109). Delay may, in some circumstances, benefit the affected party. A finding of abuse of process rests on a factual finding of genuine detriment to the individual (*Abrametz* at paras 67–69).

[37] The kind of detriment envisaged by *Abrametz* and *Blencoe* is fairly diverse, though circumscribed by the requirement of it being caused by the inordinate delay itself. For the sake of illustration, examples of serious prejudice "include significant psychological harm, stigma attached to the individual's reputation, disruption to family life, loss of work or business opportunities, as well as extended and intrusive media attention, especially given technological developments, the speed at which information can travel today and how easy it is to access" (*Abrametz* at para 69).

[38] Administrative proceedings, especially in the context of inadmissibility and removal, can disrupt the lives of those who are subject to them. This is a normal outcome of the immigration administrative system. It does not in and of itself constitutes a serious prejudice to the individual. With that said, the otherwise normal consequences of such proceedings can indeed be exacerbated by delay, thus causing a serious prejudice to the individual. Courts and administrative decision makers must be conscious of this (*Abrametz* at para 68).

(3) Step Three: The Final Assessment

[39] When these two requirements are met, the court or decision maker must conduct a final assessment as to whether an abuse of process has occurred. At this stage, the core consideration is

whether the delay has been manifestly unfair to the party or brought the administration of justice into disrepute (*Abrametz* at para 72). Once more, this analysis is flexible and context-dependent (*Abrametz* at para 35).

(4) Immigration Officers and Abuse of Process

[40] It is not contested by the parties that an IRCC Officer has the power to consider whether an abuse of process has arisen out of their proceedings. Immigration Officers are a type of administrative decision maker (*Vavilov* at para 88). As such, they are bound by a duty to act fairly. The doctrine of abuse of process being a question of procedural fairness, Immigration Officers must therefore have the power to assess whether an undue delay has amounted to an abuse of process in the context of their proceedings (*Abrametz* at para 38; *Ganeswaran* at para 21).

[41] Part of the role played by administrative decision makers is to interpret the precise content of the statutory schemes they administer. This is an exercise in statutory interpretation, an exercise in which decision makers like Immigration Officers are entitled to engage (*Vavilov* at para 108). Decision makers are expected to interpret relevant provisions in a manner consistent with their text, context, and purpose, all while "applying [their] particular insight into the statutory scheme at issue" (*Vavilov* at para 121).

[42] Administrative decision makers can therefore decide certain questions of law and procedural fairness (*Vavilov* at paras 4, 88, 108, 110, 121, 135; *Abrametz* at paras 30–31), and it is well within their powers to set their own procedure and determine evidentiary issues (*Herbert*

*v Canada (Attorney General)*, 2022 FCA 11 at para 18). This power to consider certain questions of law is not to be confused with an administrative decision maker's power to consider a constitutional question, which requires the statutory power to decide questions of law and for constitutional jurisdiction not to have been clearly withdrawn (*R v Conway*, 2010 SCC 22 at paras 77–82).

[43] This Court has already affirmed the Refugee Protection Division's and the Immigration Division's power to consider abuse of process as a procedural fairness issue, as part of their power to control their own procedure (*Ganeswaran* at paras 27–28, 37–43; *Canada (Public Safety and Emergency Preparedness) v Najafi*, 2019 FC 594 at paras 15, 26, 34–36, 40 [*Najafi*]; *Naimi v Canada (Public Safety and Emergency Preparedness)*, 2024 FC 1294 at para 27 [*Naimi*]).

[44] Although these decisions concern various divisions of the IRB and not Immigration Officers as such, as a basic principle of Canadian administrative law, administrative decision makers are empowered to ensure fair proceedings and to duly respond to allegations of abuse (*Council of Canadians with Disabilities v VIA Rail Canada Inc*, 2007 SCC 15 at para 231; see also *Sachdeva v Canada (Citizenship and Immigration)*, 2024 FC 1522 at para 15).

[45] In this case, the Immigration Officer is best placed to determine whether the delay constitutes an abuse of process. Immigration Officers control their own process and must accordingly ensure that their processes comply with the rules of procedural fairness, and be responsive to allegations of abuse. The Immigration Officer is the proper forum in which the

Applicant could bring his allegations of abuse of process at this stage of the immigration proceedings (*Najafi* at para 26; *Naimi* at para 27).

[46] In the present case, the Applicant made two claims of abuse of process before the Officer. He repeats those same claims upon judicial review.

[47] First, the Applicant claims that it was an abuse of process for the Officer to consider paragraph 37(1)(b) of the *IRPA*. He argues that the decision to raise the issue of inadmissibility so late in the proceedings—and outside the context of an IRB hearing—is in fact an attempt to re-litigate an issue that had already been determined when the Minister's delegate referred him to an inadmissibility hearing on the sole basis of paragraph 36(1)(b), and not paragraph 37(1)(b) of the *IRPA*. In advancing this argument, the Applicant cites this Court's decision in *Beltran v Canada (Citizenship and Immigration)*, 2011 FC 516 [*Beltran*], in which Justice Harrington found that a delay was inexcusable because the Minister had failed to act despite having knowledge of relevant information for many years. The core claim the Applicant advances in this respect is that the Minister had the opportunity to pursue the inadmissibility allegation against him in 2013, and made a clear decision not to do so in 2015. To do so now is abusive.

[48] Second, the Applicant claims that the administrative process has become abusive due to inordinate delay. He frames this argument within the "second category" of abuse set forth in *Abrametz*, namely the abuse of process that may occur if significant prejudice has come about due to inordinate delay, even when there is no prejudice to the opportunity to provide an adequate defence. Following this framework, he submits arguments along *Blencoe*'s three-step test and

supplements them with evidence as to the serious prejudice he has thus far suffered due to the administrative delay in these proceedings. The Applicant contends that there is "nothing inherently complex about the inadmissibility allegation that required 10 years to proceed" (Applicant's Memorandum at para 80). The Applicant adds that he has organized his life under the understanding that IRCC officials had decided not to pursue the section 37 allegation, which is precisely what led him to file the application for permanent residence as a spouse in Canada with a H&C exemption request. No longer having access to section 25 of the *IRPA*, he submits, is quite a serious prejudice in this respect.

[49] In response to the first claim, the Respondent notes that there is no requirement to send an applicant to the Immigration Division for an admissibility hearing prior to making a decision on an application for permanent residence, and that it falls well within the jurisdiction of the Officer on an application for permanent residence under H&C considerations to determine whether an applicant is inadmissible under paragraph 37(1)(b) of the *IRPA*. Further, it is not as if this ground of inadmissibility emerged out of nowhere, as might have been the case in *Beltran*. In the Respondent's view, the Applicant triggered the statutorily required admissibility analysis when he applied to be sponsored to Canada, and thus subjected himself to the possibility of inadmissibility based on his previous convictions. The Applicant was aware, or ought to have been aware, that paragraph 37(1)(b) of the *IRPA* was in play due to those convictions.

[50] In response to the second claim, the Respondent contends that whatever administrative delay has occurred has been the fruit of the Applicant's conduct. The Respondent argues this point in part by relying on *Naredo v Canada (Citizenship and Immigration)*, 2022 FC 1543 [*Naredo*], a

decision in which Justice Rochester (as she then was) ruled that it was not abusive *per se* to find inadmissibility based on facts known to the Minister for 40 years. This was because the applicants had availed themselves of every procedural step open to them in order to remain in Canada over those many decades, such that the individuals' activities remained a live issue throughout the process, even if the process was very lengthy. The Respondent claims that the facts of this case are analogous, with an even smaller delay in play. The Respondent points to the various procedural steps taken by the Applicant over the years, arguing that even if it was within his right to pursue them, he cannot then complain of the delay that has transpired in their wake. In short, the Respondent relies on *Abrametz* (at para 62) in asserting that delay caused by the party who complains about it cannot amount to an abuse of process.

C. *The Officer Could Consider s. 37(1)(b) of the IRPA in Rendering the Decision*

[51] The Applicant submits that the CBSA and the Minister's delegate, having decided not to proceed with an admissibility hearing before the Immigration Division of the IRB in relation to paragraph 37(1)(b) of the *IRPA*, precludes the IRCC Officer from considering the same potential ground for inadmissibility under an application made pursuant to section 25 and for H&C considerations. In the Applicant's view, since the Minister would have the burden to prove his inadmissibility in an admissibility hearing before the Immigration Division, and the Applicant would be provided with a fair oral hearing and an opportunity to respond, it would be an abuse of process for the IRCC Officer to now consider the inadmissibility without those safeguards.

[52] The issue as to whether the Officer could consider paragraph 37(1)(b) of the *IRPA* where the CBSA and a Minister's delegate had already considered an inadmissibility issue and decided

not to refer it to an admissibility hearing before the Immigration Division was canvassed in *Naredo*.

[53] In that case, Justice Rochester (as she then was) relied on *Guzelian v Canada (Immigration, Refugees and Citizenship)*, 2021 FC 460 [*Guzelian*], in holding that there was no obligation to proceed with an admissibility hearing before the Immigration Division in the context of an inadmissibility under paragraph 35(1)(a) of the *IRPA*. The rationale supporting that conclusion is that subsection 44(1) of the *IRPA* grants the Minister the discretion to refer the issue for an admissibility hearing, but no obligation to do so (at para 69). Justice Rochester also dismissed the notion that an abuse process could arise out of the difference in procedural safeguards between an Officer's consideration of an H&C application and an admissibility hearing before the Immigration Division. *Naredo* ultimately held that, notwithstanding the consideration of a potential admissibility hearing at an earlier stage, the later consideration by an Officer of the inadmissibility issue in the context of an H&C application did not constitute an "end-run" around the admissibility hearing provisions, nor an abuse of process (at paras 72–75, 79–80, 84–85).

[54] While *Naredo* was in the context of an inadmissibility under paragraph 35(1)(a), the same context applies in relation to paragraph 37(1)(b) of the *IRPA*. There is therefore no requirement, statutory or otherwise, to send the Applicant to the Immigration Division for an admissibility hearing prior to making a decision on an application for permanent residence on H&C grounds. The Officer, in considering an application under H&C considerations, was entitled to determine whether the Applicant was inadmissible under the *IRPA*, including under paragraph 37(1)(b) of

the *IRPA* (*Naredo* at paras 70–71; see also *Guzelian* at paras 1, 18, 20–21; *Subramaniam v Canada (Citizenship and Immigration)*, 2020 FCA 202 at para 31; *Ahmed v Canada (Citizenship and Immigration)*, 2020 FC 791 at paras 68–74; *Kumarasekaram v Canada (Citizenship and Immigration)*, 2010 FC 1311).

[55] The Applicant, in applying for permanent residence and seeking discretionary relief under H&C considerations, "triggered" the necessary inadmissibility analysis and had the onus to demonstrate that he was not inadmissible (*Naredo* at para 70, 74; *Guzelian* at para 21). The Officer therefore had a separate mandate and obligation to apply the *IRPA* and consider inadmissibility. While the Officer could consider any prior procedure followed by a CBSA officer or a Minister's delegate in the past, the Officer was not bound by it and had to discharge their obligations under the *IRPA* (*Naredo* at para 85).

[56] In my view, had the Officer considered the inadmissibility issue under paragraph 37(1)(b) of the *IRPA* shortly after the application for permanent residence was filed, such as when the first PFL letter was sent in July 2020, there may not have been an abuse of process in considering the issue, notwithstanding CBSA's and the Minister's delegate's previous strategy to only refer the alleged inadmissibility under paragraph 36(1)(b) of the *IRPA* to an admissibility hearing before the Immigration Division of the IRB.

[57] However, as discussed below, this issue is distinct from the other issue as to whether an abuse of process arose by the failure to raise the ground of inadmissibility under paragraph

37(1)(b) before 2023, when the Minister was aware of the facts of the case since at least 2013, and failed to raise the issue in the first PFL letter in July 2020.

D. *The Officer Reasonably Considered paragraph 37(1)(b) of the IRPA in Rendering the Decision*

[58] The Applicant argues that the Officer's application of paragraph 37(1)(b) of the *IRPA* to the facts of his case was unreasonable in two ways. First, the Applicant suggests that the Officer erred in interpreting paragraph 37(1)(b) of the *IRPA* so expansively as to include the crime of "drug smuggling." Second, he claims that the Officer ignored a central piece of evidence in the Applicant's favour by failing to consider the fact that he did not know his co-defendants and acted as a smuggler on only one occasion. Not knowing his co-defendants, the Applicant could not have engaged in "organized criminality" as understood under subsection 37(1).

[59] The Officer did not err in these regards.

[60] First, the Officer was bound by this Court's jurisprudence in *Canada (Citizenship and Immigration) v Dhillon*, 2012 FC 726 where at paragraph 66, this Court held that "the words of paragraph 37(1)(b), when read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of IRPA, the object of IRPA, and the intention of Parliament include the activity of transnational drug smuggling." As the Applicant had been convicted of drug smuggling in the United States of America, the Officer had to apply this Court's jurisprudence accordingly, making a decision consistent with the factual and legal constraints before them. I see no reason to intervene.

[61] Moreover, there is no dispute that the Applicant committed the crimes for which he was convicted. He pled guilty in 2013 to three offences in the United States of America including for conspiracy to import marijuana and conspiracy to launder monetary instruments and money laundering, and has repeatedly expressed his remorse for that ever since. Even if "drug smuggling" was not within the scope of paragraph 37(1)(b), the Applicant could remain inadmissible because of his conviction for "money laundering" which is specifically included in paragraph 37(1)(b), and for which the Officer also ruled that the Applicant was inadmissible (Certified Tribunal Record at 11).

[62] As for the second argument on whether the offences were in the context of "organized criminality," the charges for which the Applicant pled guilty include conspiracy, which includes co-conspirators, and is therefore within the scope of "organized" criminality. The Officer's interpretation of subsection 37(1) was reasonable, justified, and transparent on the basis of the facts and evidence as presented.

E. *The Officer Failed to Consider the Applicant's Claim of Prejudice Because of Undue Delay*

[63] The Applicant submits that it was abusive for the Officer to proceed, because of the prejudice he suffered as a result of the undue delay in raising his inadmissibility under paragraph 37(1)(b) of the *IRPA*.

[64] Although the Officer addressed the question of whether raising inadmissibility under paragraph 37(1)(b) was an abuse of process because the Minister had already considered and

conclusively decided not to pursue this ground in 2016 (as discussed above), the Officer's decision is completely silent on the second prong of the argument relating to the question of undue delay.

[65] In this case, the Applicant went to great lengths to argue that the administrative delay that has characterized these proceedings constituted an abuse of process. He repeatedly cited the relevant tests and factors in *Blencoe* and *Abrametz*, supporting his claims with substantial legal arguments and evidence (Certified Tribunal Record at 151, 153, 156, 159, 160, 164, 167). The latter included letters from his wife and children dated in 2023, each attesting to their close relationship with the Applicant and the difficulties that have arisen from these lengthy immigration proceedings.

[66] There are no reasons in the decision under review indicating that the issue of undue delay as a potential abuse of process was considered. *Blencoe* and *Abrametz* are neither mentioned nor relied upon. Evidence was submitted to the Officer as to the impact of the delay on the Applicant and his family; nothing in the reasons demonstrates that it was considered. The Officer omits these aspects of the Applicant's case without providing any transparent or intelligible reason for doing so. This leaves the reviewing Court with an accordingly incomplete sense of whether the Officer genuinely considered the arguments and evidence submitted to them in relation to the Applicant's claims.

[67] A decision that does not meaningfully account for the parties' central issues and concerns will not be justified and transparent. This notion of sufficiency of reasons is related to procedural fairness. Individuals affected by a decision have the right to be heard and present their case fully,

and reasons are the primary mechanism whereby a decision maker demonstrates that they actually listened to the case before them. Decision makers must therefore be responsive to the central issues presented to them in the parties' submissions (*Vavilov* at para 127). This is especially the case the "more important the decision is to the lives of those affected and the greater its impact on that person or those persons" (*Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at para 25; *Vavilov* at para 133). Of course, reviewing courts cannot expect administrative decision makers to respond to every argument submitted to them. However, the core issue is that "a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it" (*Vavilov* at para 128). Abiding by a "culture of justification" means guarding against such a failure (*Vavilov* at para 14).

[68] Consequently, and although "omissions are not stand-alone grounds for judicial intervention," the aspect omitted from the analysis in this case is crucial and has caused this Court to lose confidence in the outcome reached by the Officer (*Vavilov* at para 122).

## VI. Conclusion

[69] The application for judicial review is granted. The decision is set aside and the matter is remitted for redetermination before a different Officer.

[70] Neither party proposed a question for certification, nor does any such question arise here.

[71] I would like to thank counsel on both sides for their detailed and able submissions.

**JUDGMENT in IMM-9793-23**

**THIS COURT'S JUDGMENT is that**

1. The application is granted.
2. The decision is set aside and the matter is remitted for redetermination before a different Officer.
3. There is no question for certification.

"Guy Régimbald"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | IMM-9793-23 |
| **STYLE OF CAUSE:** | IVO BANOVIC v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO (ONTARIO) |
| **DATE OF HEARING:** | NOVEMBER 20, 2024 |
| **JUDGMENT AND REASONS:** | RÉGIMBALD J. |
| **DATED:** | DECEMBER 9, 2024 |

**APPEARANCES:**

| | |
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| James Todd | FOR THE RESPONDENT |

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| Attorney General of Canada<br>Toronto (Ontario) | FOR THE RESPONDENT |