Cour fédérale Federal Court

Date: 20141020

Docket: IMM-2036-13

Citation: 2014 FC 998

Ottawa, Ontario, on October 20, 2014

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

MEHREZ BEN ABDE HAMIDA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA], for judicial review of a decision of an immigration officer of Citizenship and Immigration Canada [CIC] dated July 16, 2012 [the decision], communicated to the applicant on October 31, 2012, and rejecting the applicant's application for permanent residence based on humanitarian and compassionate considerations [the H&C

application]. The applicant is seeking to have the decision set aside and referred back to another immigration officer.

[1] The Supreme Court of Canada's judgment in *Ezokola v Canada (Minister of Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 SCR 678 [*Ezokola*], which is the subject of this judicial review, was published after the officer's decision. This judgment has upset the long line of case law from the Federal Court on the inadmissibility of refugee protection claimants on the ground of complicity in crimes against humanity. Since the applicant's inadmissibility is the deciding consideration in the rejection of his H&C application, and given the injustice of being judged on principles lacking in fairness, the Court allows the application for the following reasons.

II. Facts

[2] The applicant, Mehrez Ben Abde Hamida, was born in Tunisia on October 8, 1967. He began working as a police officer in the Tunisian police force in July 1986; in 1991, he was promoted to the [TRANSLATION] "political security unit". He alleges that he lost his job and was subject to strict administrative monitoring because he had dared to feed political prisoners.

[3] On October 2, 1999, he was admitted to Canada as a visitor for six months. In 2003, he married a Canadian citizen.

[4] On January 20, 2000, he claimed refugee protection, alleging persecution by the Tunisian dictatorship and a fear of mistreatment after he was subject to administrative monitoring by his

country's secret police. On April 24, 2003, the Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada found the applicant to be excluded from the definition of refugee (inadmissible) under Articles 1(F)(*a*) and 1(F)(*c*) of the *Convention relating to the Status of Refugees* [Refugee Convention] and under subsection 35(1) of the IRPA on grounds of violating human or international rights. The RPD found that there were serious reasons for believing that the applicant was guilty of one of the indictable offences described in sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24. The applicant was employed by the political security unit, a department of the Tunisian government, for 10 years. The RPD pointed out that this unit is known for its brutality towards prisoners.

[5] On October 17, 2003, the applicant filed an application for leave and for judicial review of the RPD's decision, which was dismissed by this Court in docket IMM-3821-03. In March 2004, the applicant filed an application for permanent residence based on humanitarian and compassionate considerations as a result of his marriage to a Canadian citizen, but that application was rejected.

[6] On December 6, 2004, the applicant filed an application for a pre-removal risk assessment (PRRA), which was denied because he was not deemed to be at risk under section 97 of the IRPA. On March 24, 2005, he filed an application for leave and for judicial review of the PRRA decision with the Federal Court. To this application, he appended an application for a stay of his removal, which was allowed without a hearing. On September 16, 2005, the Federal Court allowed his application for leave and for judicial review by way of consent and ordered a reassessment of his PRRA application.

[7] On January 19, 2006, the applicant filed a second H&C application. A new PRRA officer was assigned to his case on February 16, 2006. On June 30, 2006, the reassessment of the PRRA and the second H&C application were rejected,

[8] On November 15, 2006, the applicant filed an application for leave and for judicial review of the decision reassessing his PRRA application and of the H&C application, dismissed by the Federal Court in dockets IMM-4445-06 and IMM-4447-06.

[9] On December 6, 2006, the applicant filed a second PRRA application. He also submitted a third H&C application, which was referred to the Case Management Branch to determine whether the applicant's inadmissibility could be waived on humanitarian and compassionate considerations.

[10] In the meantime, he was summoned by the Canada Border Services Agency (CBSA) for his removal from Canada, scheduled for January 30, 2007.

[11] On January 22, 2007, the application for a stay of the applicant's removal was denied. The applicant sent a request to the Human Rights Committee (HRC) of the Office of the United Nations High Commissioner for Refugees (UNHCR), alleging that the removal order made against him violated the *International Covenant on Civil and Political Rights* and the *Optional Protocol to the International Covenant on Civil and Political Rights*.

[12] The applicant's complaint was found to have merit. The UNHCR HRC concluded that the applicant would be at risk of torture if he was sent back to Tunisia and noted that the authorities had given substantial weight to the fact that the applicant was excluded from the scope of Article 1(F) of the Refugee Convention but had given insufficient consideration to the specific rights arising from the Convention against Torture. More specifically, the HRC questioned the fact that part of the documentary evidence was excluded on the basis that it had not been submitted to the RPD as part of the claim.

[13] On December 14, 2010, the PRRA officer responsible for the second PRRA application held a hearing in order to assess the danger of torture should the applicant be removed to Tunisia. On November 4, 2011, the applicant's permanent residence file was referred to the Case Management Branch to determine whether the applicant's inadmissibility could be waived for humanitarian and compassionate considerations.

[14] On July 16, 2012, the applicant's H&C application was rejected by CIC.

[15] On December 31, 2012, the PRRA officer rendered a negative decision.

[16] On July 19, 2013, the *Ezokola* decision was rendered by the Supreme Court of Canada.

III. Impugned decision

[17] The officer began by examining the applicant's arguments. First, he considered the applicant's family and his establishment in Canada, noting that he had been living with his wife,

a Canadian citizen, for over 10 years, and that he treated the children of his wife's daughter as if they were his own grandchildren. He also pointed out that the applicant's mother and his two sisters are Tunisian citizens, who live in Tunisia. The applicant supports his mother financially by sending her money.

[18] The officer also considered issues raised by international law and the *Canadian Charter of Rights and Freedoms* [the Charter], referring to the decision of the Supreme Court in *Canada (Minister of Employment and Immigration) v Chiarelli*, [1992] 1 SCR 711, 90 DLR (4th) 289, and concluding that the removal of a foreign national did not in itself outrage standards of decency. He stated that foreign nationals did not have an unqualified right to remain in Canada and that since the removal of the applicant from Canada did not in itself constitute cruel and unusual treatment or punishment under section 12 of the Charter, he had to determine whether the hardship that he might suffer should he return to Tunisia could constitute such treatment or punishment.

[19] Then the officer observed that the officer who had studied the permanent residence application had been of the opinion that there were sufficient humanitarian and compassionate considerations to justify waiving the requirement for the applicant to apply for permanent residence from outside Canada were it not for his inadmissibility.

[20] The officer argued that since the applicant was inadmissible, the humanitarian and compassionate grounds, such as family, the best interests of the child and the conditions in his

country of origin, had to be weighed in order to establish whether these were sufficient to overcome the applicant's inadmissibility.

[21] Regarding family and the best interests of the child, the officer noted that despite the applicant acting as a grandfather to his wife's grandchildren, should he return to Tunisia, this was a destination where the children would be able to visit him, should they so desire. Moreover, the applicant could stay in regular contact with the children through various means of telecommunications. Indeed, the officer pointed out that there was nothing on file to indicate that the children's mother was unable to continue taking care of them should the applicant have to leave.

[22] He also noted that the applicant's wife, even though she had suffered from depression as a result of their problems with CIC, has other relatives in Canada, including her daughter and her grandchildren, and has found a job. The applicant is therefore not the couple's sole breadwinner. The applicant's removal would entail the applicant being separated from his wife, but she could choose to leave with him and return to Canada on visits as often as she wished.

[23] The officer emphasized that while family reunification was an objective of the IRPA, so was denying access to persons who are criminals. The Canadian government's policy that Canada not become a safe haven for persons involved in war crimes or crimes against humanity is clear.

[24] Consequently, the officer concluded that despite the important role played by the applicant in his family, the humanitarian and compassionate considerations were not important enough to justify a waiver. He concluded that the applicant's inadmissibility on the basis of human or international rights violation and his particular circumstances would not cause unfair or unreasonable harm to the applicant, who still has family in Tunisia. It would therefore be possible for him to succeed in establishing himself in Tunisia.

[25] Regarding the conditions in Tunisia, the officer noted that the applicant had not updated his file since 2011, even though he had received a letter asking him to do so. He also found that it was his role to assess the difficulties the applicant might face should he return, and not the risks under sections 96 and 97 of the IRPA, which are probably different now from those mentioned by the UNHCR and counsel for the applicant in 2010.

[26] The officer considered the decision of the officer who had performed the last PRRA of the applicant, noting that the applicant's allegation that he is sought by the Tunisian government as a result of his alleged political opinions was not established by the evidence before the PRRA officer in 2006.

[27] He also considered the fact that the conclusions of the UNHCR according to which there were reasons to believe that the applicant would be at risk of torture in Tunisia were drawn in May 2010, that is, before the major changes brought about by the Arab Spring.

[28] Indeed, in its latest report on the situation in Tunisia, Amnesty International reports that human rights, the situation for political dissidents and freedom of expression were improving with the new government. This report also indicates that the Tunisian security forces, [TRANSLATION] "known for human rights excesses and their use of torture" have been dissolved. The officer also referred to a report of the U.S. State Department noting improvements in Tunisia from a human rights perspective.

[29] The officer therefore concluded that the objective evidence demonstrated a general improvement of the human rights situation in Tunisia, particularly with respect to opponents of the political regime. He noted that, generally speaking, conditions in Tunisia had greatly improved since the applicant left Tunisia or even since the 2006 PRRA.

[30] Ultimately, the officer found that the most serious humanitarian and compassionate considerations for the applicant were those related to establishment. Comparing these with Canada's commitment not to grant refugee protection to those who have committed crimes against humanity, the officer determined that more weight should be afforded to the latter factor. He therefore concluded that the applicant's inadmissibility was serious and reflected Canada's international commitments. For these reasons, he determined that, in the applicant's case, humanitarian and compassionate considerations did not override the applicant's failure to apply for permanent residence from outside Canada or his inadmissibility under paragraph 35(1)(*a*) of the IRPA.

[31] On July 19, 2013, the *Ezokola* decision was rendered by the Supreme Court of Canada.

[32] In light of *Ezokola*, this Court asked the parties to submit their positions on how the reasoning developed in *Ezokola* applied in this case.

[33] Subsequently, in light of the respondent's arguments on the application of *res judicata*, the Court asked the parties to make representations on the Court's discretion to apply *res judicata*.

IV. Issue

[34] The issue is the following: is *Ezokola* relevant to the matter at bar?

V. Standard of review

[35] An officer's decision on an H&C application is discretionary. The standard of review is therefore reasonableness, and the officer's decision must be given a great deal of deference according to the principles described in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190. This was reiterated recently, by Justice Kane of this Court, in the decision in *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2013 FC 802, 437 FTR 120, aff'd 2014 FCA 113, 372 DLR (4th) 539 [*Kanthasamy*], where she indicated at paragraph 10 that "[t]he standard of review of decisions under section 25 is reasonableness". (See also *Terigho v Canada (Minister of Citizenship and Immigration)*, 2006 FC 835, 150 ACWS (3d) 203.)

[36] That being said, the officer's decision cannot be challenged, be it under the correctness standard or that of reasonableness. In fact, the issue is not whether the decision was reasonable,

but whether it is in the interests of justice to make an exception to the principle of the finality of judgments which prohibits any reconsideration of a final decision.

[37] *Res judicata*, based on the sanctity of the finality of decisions, has one exception. According to my reading of *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44, [2001] 2 SCR 460 [*Danyluk*], and *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19, [2013] 2 SCR 125 [*Penner*], this exception comes into play when the Court is of the opinion that the legitimate need for the decision to be final works an injustice that exceeds what is acceptable in our legal system. This discretion must be guided by a three-pronged test established by the Supreme Court in *Danyluk* and *Penner*.

[38] In the matter at bar, the fact that the officer did not err with respect to the state of the law when he made his decision does not preclude departing from the *res judicata* rule in order to remedy an injustice. If the Court is satisfied that the conditions to waive *res judicata* when so required in the interests of justice, as established in *Danyluk* and *Penner*, are met, then the fact that *Ezokola* was rendered after the officer's decision does not preclude setting aside the decision.

[39] In these conditions, it is appropriate to ask the officer to reconsider his decision in light of the test reformulated in *Ezokola* for deeming a refugee protection claim inadmissible. More specifically, the officer must reassess the underlying rationale of his decision, the defence of Canada's international refugee commitments, in consideration of the rules for exclusion clarified in *Ezokola* and their application in this case.

VI. Analysis

A. *Retrospective application of Ezokola*

[40] At the hearing, the applicant submitted that the Supreme Court's decision in *Ezokola* should be examined by the Court as a ground for setting aside an officer's decision on an H&C decision even though the officer's decision was issued before the Supreme Court rendered its decision.

[41] The respondent did not dispute the application of *Ezokola* on the basis that it was rendered after the officer's decision. Rather, it challenged its application, in the event that the present matter is referred back to the officer who heard the H&C application, on the ground that this officer is bound by the RPD's conclusion on the applicant's inadmissibility and that therefore this issue has to be considered as being *res judicata*. However, even if the respondent had submitted to this Court that it should not consider *Ezokola* because it was rendered after the officer's decision, I would have rejected this argument. The issue concerns the exercise of the officer's discretion. Considering that *Ezokola* was rendered before this decision, the applicant could not raise the question of *Ezokola*'s application before the officer. The interests of justice would have required that I exercise my discretion and set aside the decision by giving the officer instructions to reconsider it. As long as this question is still "alive," in the sense that it has not been entirely concluded, and since it affects the outcome of the application, it is my opinion that the applicant has the right to be heard (see *R v Wigman*, [1987] 1 SCR 246 at para 29, 38 DLR (4th) 530).

B. *Determinative reason for the officer's decision*

[42] In arriving at his final decision, the officer considered the factors weighing in favour of revoking the applicant's inadmissibility. I am satisfied that the decisive factor in the officer's decision was not the applicant's inadmissibility alone, but also the importance given by the officer to the international human rights instruments to which Canada is signatory and with which it has to comply. He concluded that the applicant's inadmissibility overrode humanitarian and compassionate considerations, as described below:

> [TRANSLATION]
>
> Conclusion and disposition
>
> When comparing [establishment] with Canada's commitment not to offer refugee protection to those who have committed crimes against humanity, I afford more weight to the latter factor. I refer to the relevant objectives of the IRPA in this respect.
>
> 3. (1) The objectives of this Act with respect to immigration are
>
> . . .
>
> (*i*) to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks; and . . .
>
> (3) This Act is to be construed and applied in a manner that
>
> (*a*) furthers the domestic and international interests of Canada;
>
> . . .
>
> (*f*) complies with international human rights instruments to which Canada is signatory.
>
> In light of these objectives and notwithstanding Mr. Hamida's establishment and family life in Canada, and the hardship he might face in Tunisia, I find that his inadmissibility is serious and reflects Canada's international commitments. For these reasons, I conclude that the humanitarian and compassionate considerations in this case do not override Mr. Hamida's failure to comply with the Act

> and to apply for permanent residence from outside Canada, or his inadmissibility under paragraph 35(1)(*a*) of the IRPA. [Emphasis added.]

C. *Conclusion on the applicant's complicity in crimes against humanity*

[43] The officer's conclusion on the applicant's complicity in certain crimes against humanity was based on the RPD's 2003 decision. The RPD applied the test set out in *Ramirez v Canada (Minister of Employment and Immigration)*, [1992] 2 FC 306 at para 24, 89 DLR (4th) 173, where the Federal Court of Appeal defined complicity in terms of membership in an organization "principally directed to a limited, brutal purpose" in the conduct of its affairs. This reasoning and the case law that ensued were explicitly rejected by the Supreme Court in *Ezokola*.

[44] In *Ezokola*, at para 81, the Supreme Court rejected the test according to which "a concept of complicity [can leave room] for guilt by association or passive acquiescence". The Court stated that this test violated fundamental international and Canadian criminal law principles pursuant to Article 1(F)(*a*) of the *Refugee Convention*. The Court therefore set out a test that requires evaluating whether the accused "has voluntarily made a significant and knowing contribution to the organization's crime or criminal purpose" (*Ezokola* at para 84).

D. *Application of res judicata*

[45] A wealth of decisions of the Federal Court of Appeal and this Court support the application of *res judicata*, pointing out that the Minister's discretion with respect to H&C applications cannot be applied directly or indirectly to review the facts or the RPD's conclusions. The courts have also held that applicants cannot raise subsequent changes to the case law to benefit from a change in the law and therefore undermine *res judicata*. This situation arises in

the present matter with respect to the RPD's decision on the applicant's inadmissibility. The recent decision in *Yeager v Day*, 2013 FCA 258 (CanLII), is relevant here:

> [10] . . . Upon expiry of the deadline for filing a notice of appeal, and in the absence of a motion to extend the time to appeal, the matter became *res judicata*. Upon becoming *res judicata*, the order is presumed to be valid, absent proof of fraud in its making, even if there is a later change in the law: see, e.g., *Régie des rentes du Québec v. Canada Bread Company Ltd.*, 2013 SCC 46 (CanLII) at paragraph 55, citing *Roberge v. Bolduc*, 1991 CanLII 83 (SCC), [1991] 1 S.C.R. 374 at page 403. For example, where a person is convicted of a criminal offence, is sitting in jail, and has not appealed his conviction, he cannot take advantage of a later, favourable court decision: *R. v. Wigman*, 1985 CanLII 1 (SCC), [1987] 1 S.C.R. 246 at paragraph 21. Accordingly, having not appealed the Deputy Judge's order, Mr. Yeager could not benefit from any subsequent changes in the law, such as the change wrought by *Felipa*, *supra*.
>
> . . .
>
> [14] Mr. Yeager's claim does not fit within these three principles. Indeed, the principle of finality of judgments and orders embraced by the concept of *res judicata* is an integral part of the second principle, the preservation of order. . . . [Emphasis added.]

[46] According to the case law referred to by the respondent, *res judicata* is paramount. The issue of the panel exercising its discretion in order to lessen the strict operation of *res judicata* has never been considered in the context of a highly discretionary decision on humanitarian and compassionate considerations. It is precisely this issue that must be disposed of here.

E. *Discretion in applying res judicata*

[47] In *Danyluk*, the Supreme Court established a two-prong test for determining whether issue estoppel, the subdivision of *res judicata* we are discussing here, has to be applied (*Danyluk* at para 33):

> [33] The rules governing issue estoppel should not be mechanically applied. The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case. (There are corresponding private interests.) The first step is to determine whether the moving party (in this case the respondent) has established the preconditions to the operation of issue estoppel set out by Dickson J. in *Angle, supra*. If successful, the court must still determine whether, as a matter of discretion, issue estoppel *ought* to be applied: *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 1998 CanLII 6467 (BC CA), 50 B.C.L.R. (3d) 1 (C.A.), at para. 32; *Schweneke v. Ontario* (2000), 2000 CanLII 5655 (ON CA), 47 O.R. (3d) 97 (C.A.), at paras. 38-39; *Braithwaite v. Nova Scotia Public Service Long Term Disability Plan Trust Fund* (1999), 1999 CanLII 4553 (NS CA), 176 N.S.R. (2d) 173 (C.A.), at para. 56. [Emphasis added.]

[48] The three preconditions at the first stage of issue estoppel described in *Danyluk* have indisputably been fulfilled: that the question has already been decided; that the judicial decision was final; and that the parties to the judicial decision or their privies were the same persons as the parties to the proceeding in which the estoppel is raised. However, it is the second stage of the *Danyluk* test that is relevant in the matter at bar: is it in the interests of justice that the Court exercises its discretion to apply this form of estoppel?

[49] When reviewing the second stage in *Penner*, the Supreme Court developed the test established in *Danyluk* for the fairness analysis, pointing out that the courts should focus their analysis on the differences between the goals sought by the two proceedings to which issue estoppel may apply. The following excerpt from this decision reflects the reasoning of the majority (*Danyluk* at para 42):

> [42] The second way in which the operation of issue estoppel may be unfair is not so much concerned with the fairness of the prior proceedings but with the fairness of using their results to

> preclude the subsequent proceedings. Fairness, in this second sense, is a much more nuanced enquiry. On the one hand, a party is expected to raise all appropriate issues and is not permitted multiple opportunities to obtain a favourable judicial determination. Finality is important both to the parties and to the judicial system. However, even if the prior proceeding was conducted fairly and properly having regard to its purpose, injustice may arise from using the results to preclude the subsequent proceedings. This may occur, for example, where there is a significant difference between the purposes, processes or stakes involved in the two proceedings. We recognize that there will always be differences in purpose, process and stakes between administrative and court proceedings. In order to establish unfairness in the second sense we have described, such differences must be significant and assessed in light of this Court's recognition that finality is an objective that is also important in the administrative law context. As Doherty and Feldman JJ.A. wrote in *Schweneke v. Ontario* (2000), 2000 CanLII 5655 (ON CA), 47 O.R. (3d) 97 (C.A.), at para. 39, if courts routinely declined to apply issue estoppel because the procedural protections in the administrative proceedings do not match those available in the courts, issue estoppel would become the exception rather than the rule. [Emphasis added.]

[50] The Supreme Court also indicated that when determining whether issue estoppel applies, the courts must look at the parties' legitimate and reasonable expectations and consider whether issue estoppel would affect the efficacy and policy goals of the administrative proceeding. At paragraph 43 of *Penner*, the Court explained that legitimate and reasonable expectations had to be examined in relation to the wording of the statute in question, as follows:

> [43] Two factors discussed in *Danyluk* — "the wording of the statute from which the power to issue the administrative order derives" (paras. 68-70) and "the purpose of the legislation" (paras. 71-73), including the degree of financial stakes involved — are highly relevant here to the fairness analysis in this second sense. They take into account the intention of the legislature in creating the administrative proceedings and they shape the reasonable expectations of the parties about the scope and effect of the proceedings and their impact on the parties' broader legal rights: *Minott*, at pp. 341-42. [Emphasis added.]

[51] In *Danyluk*, at paragraphs 67 and following, the Supreme Court sets out an open list of factors that may be considered in the exercise of discretion at the second stage of the test, explaining that these factors may vary from case to case:

(1) The wording of the statute from which the power to issue the administrative order derives;
(2) The purpose of the legislation;
(3) The availability of an appeal;
(4) The safeguards available to the parties in the administrative procedure;
(5) The expertise of the administrative decision maker;
(6) The circumstances giving rise to the prior administrative proceedings; and
(7) The potential injustice.

[52] The factors described in *Danyluk* will therefore have to be analyzed in order to determine whether issue estoppel should operate in this case.

(1) Refugee protection legislation

[53] The Supreme Court noted that the wording and the purpose of the legislative scheme shape the parties' reasonable expectations with respect to the scope and effect of the administrative proceeding, as described in paragraph 47 of *Penner*:

> [47] Thus, the text and purpose of the legislative scheme shape the parties' reasonable expectations in relation to the scope and effect of the administrative proceedings. They guide how and to what extent the parties participate in the process. Where the legislative scheme contemplates multiple proceedings and the purposes of those proceedings are widely divergent, the application

> of the doctrine in such circumstances might not only upset the parties' legitimate and reasonable expectations but may also undermine the efficacy and policy goals of the administrative proceedings by either encouraging more formality and protraction or even discouraging access to the administrative proceedings altogether.

[54] The respondent submits that Parliament's intention in this respect is clear since section 15 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR], stipulates as follows:

Immigration and Refugee Protection Regulations, SOR/2002-227	Règlement sur l'immigration et la protection des réfugiés, DORS/2002-227
15. For the purpose of determining whether a foreign national or permanent resident is inadmissible under paragraph 35(1)(a) of the Act, if any of the following decisions or the following determination has been rendered, the findings of fact set out in that decision or determination shall be considered as conclusive findings of fact:	15. Les décisions ci-après ont, quant aux faits, force de chose jugée pour le constat de l'interdiction de territoire d'un étranger ou d'un résident permanent au titre de l'alinéa 35(1)a) de la Loi:
. . .	[...]
(b) a determination by the Board, based on findings that the foreign national or permanent resident has committed a war crime or a crime against humanity, that the foreign national or permanent resident is a person referred to in section F of Article 1 of the Refugee Convention; or	b) toute décision de la Commission, fondée sur les conclusions que l'intéressé a commis un crime de guerre ou un crime contre l'humanité, qu'il est visé par la section F de l'article premier de la Convention sur les réfugiés;
. . .	[...]

[55] I agree that, under the IRPR, the RPD's findings on the applicant's inadmissibility are *res judicata*.

[56] However, the previous version of subsection 25(1) of the IRPA, which governs the H&C application under review, clearly created the reasonable expectation that humanitarian and compassionate considerations would apply even in the event of inadmissibility. In fact, before the recent amendments to the IRPA, subsection 25(1) read as follows:

Immigration and Refugee Protection Act, SC 2001, c 27	*Loi sur l'immigration et la protection des réfugiés, LC* 2001, ch 27
25. (1) The Minister must, on request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected. [Emphasis added.]	25. (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché. [Je souligne.]

[57] There is a further, related issue: if *Ezokola* had been before the officer, would his reasoning on the applicant's inadmissibility have been the same, namely that he was bound by the RPD's decision? In the present matter, the officer noted that the principles of international law underlying inadmissibility findings obliged him to deny the application despite the degree of the applicant's establishment in Canada, which the officer deemed high. Yet the officer enjoys broad discretion under section 25 of the IRPA. In light of *Ezokola*, his reasoning, with respect to the applicant's inadmissibility, runs counter to current theories in international criminal law. Although I would not go as far as saying that the RPD's inadmissibility finding should be set aside, I believe that the humanitarian and compassionate considerations in this case would have obliged him to depart from the principles in international criminal law he referred to and which underlie the applicant's inadmissibility. The officer insisted on complying with the international criminal law principles underlying the applicant's inadmissibility, since, in his opinion, the RPD's decision followed these principles. However, in light of *Ezokola*, the RPD's decision violated these principles. Without these principles, the main reasons for the officer's decision disappear, and he is left with his conclusion that the applicant should be granted permanent residence on the basis of his establishment in Canada.

(2) The purpose of the legislation

[58] The respondent submits that section 15 of the IRPR has the force of ending any discussion on whether *Ezokola* applies with respect to *res judicata* in the context of an H&C application. I disagree. The purpose of an H&C application, as provided in the previous version of section 25 of the IRPA, which takes precedence over the IRPR, is to determine whether permanent residence status should be granted to an applicant on humanitarian and compassionate

considerations despite the applicant's inadmissibility. If we accept the respondent's argument, there would have been no need for the amendments to section 25 made by Bill C-43 to prevent inadmissible persons from availing themselves of humanitarian and compassionate considerations.

[59] In *Penner*, the Supreme Court states at paragraph 62 that the risk of undermining the legislative scheme by applying issue estoppel is an important consideration. If the inadmissibility finding takes precedence over humanitarian and compassionate considerations, the purpose of the administrative scheme for applications for humanitarian and compassionate considerations is likely to be undermined. Consequently, the former version of section 25 of the IRPA clearly indicates that inadmissibility should not be seen as a decisive obstacle, but as one of the factors to be weighed.

(3) The availability of an appeal

(4) The safeguards available to the parties in the administrative procedure

(5) The expertise of the administrative decision maker

[60] The fact that the guiding principles that led the RPD to find the applicant inadmissible were later deemed as not complying with principles of international and criminal law means that the availability of an appeal, the expertise of the panel and the safeguards available have no relevance here.

(6) The circumstances giving rise to the prior administrative proceedings

[61] The respondent submits that the fact that, through his H&C application, the applicant is seeking a special benefit under an exceptional scheme implies that the Court should not exercise its discretion not to apply issue estoppel. In my view, this argument is not relevant to the analysis of the circumstances that gave rise to the original administrative proceeding, namely, the proceeding before the RPD. The exceptional nature of an H&C application is irrelevant when, such as in this case, the initial decision is ill-founded.

[62] Under this heading, I also reject the argument that the fact that the H&C application being challenged in this judicial review is not the first H&C application weighs against the applicant. *Ezokola* had not yet been rendered when the first H&C application was made.

(7) The potential injustice

[63] In *Danyluk*, the Supreme Court notes at paragraph 80 that the potential injustice is the most important factor and that the Court should therefore "stand back and, taking into account the entirety of the circumstances, consider whether application of issue estoppel in the particular case would work an injustice".

[64] The respondent submits that there are three reasons why issue estoppel ought to apply. First, the officer had already considered the applicant's degree of involvement in the acts committed by the Tunisian secret police by referring to the notes of the RPD officer and the panel's record.

[65] This argument has no merit in that it fails to consider the fact that the only thing that was preventing the H&C application from being allowed seems to have been the RPD's conclusion on the applicant's inadmissibility in comity with international law. There are no half measures in a decision making a crime against humanity finding. In *Ezokola*, the Supreme Court held that, when determining whether a refugee protection claimant participated in crimes against humanity, the RPD must analyze whether the claimant's contribution to the crime or criminal purpose was voluntary, knowing and significant. These requirements were not known and therefore not considered by any officer before *Ezokola*, which was rendered in July 2013. Furthermore, the reference to the PRRA officer's notes which imply that the applicant had ties to the Tunisian administration is irrelevant and does not support the RPD's conclusion intending to establish that he committed crimes against humanity thus making him inadmissible: this reasoning was rejected in *Ezokola*.

[66] Second, the respondent submits that the applicant failed to establish the injustice entailed in the operation of issue estoppel. It refers to this Court's recent decision in *Khapar v Air Canada*, 2014 FC 138 at para 11, 239 ACWS (3d) 984 [*Khapar*]:

> [11] While *Penner* may encourage the Courts to take a more liberal view of what constitutes unfairness in exercising its discretion to not apply issue estoppel, it does not overthrow the principle that finality in proceedings remains an important objective for the administration of justice. To justify the exercise of discretion to relieve against issue estoppel and other related common law doctrines, an applicant cannot merely assert or speculate about unfairness without any evidence and without any attempt to provide evidence which would support such assertions. [Emphasis added.]

[67] In addition to confirming the more liberal approach represented by *Penner*, in *Khapar*, the Court emphasizes the importance of demonstrating unfairness. In my opinion, *Ezokola* fully addresses this concern. The conclusion that the applicant committed crimes against humanity, which has very harmful consequences for him, and which was based on an analysis that does not meet the requirements of fundamental justice, is sufficient to establish injustice. Moreover, I find that the Supreme Court's decisions in *Penner* and *Ezokola* support changes in the law that put fairness before finality and feasibility when these principles come into conflict.

[68] Regarding the finality of decisions with respect to underlying policies, I believe that the goal of this principle is to preserve the integrity of our legal system. We do not want to have to bring defendants to justice twice on the same issue, but that is not the issue here. Similarly, it is desirable for the outcome of a dispute to be clear: this is clearly an important concern in the area of immigration and refugee protection law, where claimants have many ways of obtaining permanent residence and where there is a real possibility of abuse. This concern is implied in the respondent's arguments in the matter at bar, where the Court hears the application of someone who, with the passing of time, has been able to properly establish himself in Canada, when he could have returned to Tunisia 10 years ago.

[69] Normally, this would be an important argument with merit. However, in the matter at bar, the situation is anomalous. In fact, I expect to see few similar cases where *Ezokola* will affect previous decisions. Moreover, the fact that the applicant has exceeded the time limit for his right to stay in Canada is mitigated by the unfairness of the RPD's decision, without which he probably would have been able to become a permanent resident and remain in Canada.

[70] Third, the respondent suggests that the officer already noted that the applicant would not suffer any harm if he was removed to Tunisia. The only relevant harm under subsection 25(1.3) of the IRPA relates to "the hardships that affect the foreign national". A return to Tunisia on the ground of an inadmissibility finding made on the basis of reasoning that is contrary to fundamental criminal and international law requirements would cause hardship that is "unusual" (not provided or addressed by the IRPA or the IRPR); "undeserved" (caused by circumstances beyond the applicant's control); and "disproportionate" (having an unreasonable impact on the applicant because of his or her personal situation, preventing the applicant from being exempted from statutory obligations in order for his application for permanent residence to be processed in Canada) (see *Kanthasamy*).

[71] Lastly, regarding the potential injustice, I note that the applicant referred to the recent decision in *Joseph v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1101 [*Joseph*], where Justice O'Reilly was faced with an application for *mandamus* following the RPD's decision. In that case, the applicant had not filed for judicial review of the RPD's decision. On the contrary, the applicant had requested a PRRA immediately. When the PRRA was delayed, the applicant applied for an order of *mandamus* to force the PRRA officer to proceed.

[72] Justice O'Reilly examined the evidence that was before the RPD when the officer decided that the applicant was inadmissible because she was "a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in" terrorism under paragraph 34(1)(*f*) of the IRPA. In light of these facts, Justice O'Reilly had the following to say at paragraphs 13 to 15 of the decision:

> [13] However, I must also note that, after the ID's decision on her inadmissibility, the Supreme Court of Canada rendered its decision in *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40. There, the Court emphasized that individuals should not be held responsible for crimes committed by a particular group just because they are associated with that group, or acquiesced to its objectives (at para 68).
>
> [14] In my view, while *Ezokola* dealt with the issue of exclusion from refugee protection, the Court's concern that individuals should not be found complicit in wrongful conduct based merely on their association with a group engaged in international crimes logically extends to the issue of inadmissibility. At a minimum, to exclude a person from refugee protection there must be proof that the person knowingly or recklessly contributed in a significant way to the group's crimes or criminal purposes (at para 68). Similarly, it seems to me that to find a person inadmissible to Canada based on his or her association with a particular terrorist group, there must be evidence that the person had more than indirect contact with that group.
>
> [15] In light of *Ezokola*, it seems highly unlikely that Ms Joseph could now be found inadmissible to Canada based on membership in a terrorist group. *Ezokola* teaches us to be wary of extending rules of complicity too far. To my mind, that includes the definition of "membership" in a terrorist group. I doubt the ID, based on *Ezokola*, would now conclude that Ms Joseph was a "member" of the LTTE.

[73] There is no indication that issue estoppel was raised or considered in *Joseph* and, consequently, this decision cannot be cited in support of this principle. For the purposes of this case, *Joseph* is important inasmuch as it represents a proceeding where a respected judge of this Court expressed the opinion that decisions dealing with refugee protection claimants' inadmissibility that are not in line with and that predate *Ezokola* have little weight when inadmissibility is raised in a later refugee determination proceeding.

VII. Conclusion

[74] The circumstances of this case require a nuanced decision. It is impossible to disregard the power of section 15 of the IRPR, which results in the RPD's decision on the applicant's inadmissibility being final. The officer could not ignore this conclusion.

[75] However, the previous version of subsection 25(1) of the IRPA clearly created a legitimate and reasonable expectation that humanitarian and compassionate considerations might apply even in the face of inadmissibility. Consequently, it was necessary to weigh the implications of inadmissibility against the other relevant factors, namely, the humanitarian and compassionate considerations.

[76] I share Justice O'Reilly's opinion that the applicant would no longer be found inadmissible according to the reasoning in *Ezokola*. I also note that the officer formulated his decision in such a manner that, if the applicant had not been found inadmissible, his application would probably have been granted.

[77] The decision in *Penner* implies that, when issue estoppel applies, the Court, in the interests of justice, reserves some discretion in interpreting a current statutory provision. The Court may therefore set aside a tribunal's decision on the grounds of humanitarian and compassionate considerations in order to allow a reassessment of the applicant's situation in light of current legal tenets of fairness and justice that were unknown at the time the tribunal made its decision.

[78] I am satisfied that if *Ezokola* had been before the officer, the officer would not have been able to state [TRANSLATION] "that [Mr. Hamida's] inadmissibility is serious and reflects Canada's international commitments" and describe it as a decisive factor in his decision. He would have recognized that the principles underlying the RPD's decision violated Canada's actual international commitments towards refugee protection claimants.

[79] For this reason, I allow the application. I refer the matter back to the same officer who rejected the applicant's H&C application. I see no reason why he cannot reassess the applicant's application given that he has already fully reviewed the file. However, I refer it back to the officer with the direction that he must exercise his discretion in consideration of *Ezokola* when assessing the humanitarian and compassionate considerations.

VIII. Certified question

[80] The parties submitted that no question should be certified given that no issues of broad significance or general application are raised. I agree.

[81] In light of Bill C-43, applications for permanent residence for humanitarian and compassionate considerations may no longer be submitted by claimants who were previously found inadmissible under sections 34 to 36 of the IRPA. However, Bill C-43 allows the continued processing of applications made under the previous legislation in the case of applications on which no decision had been made when the amendments to subsection 25(1) came into effect. This type of application will therefore be of very limited significance in the future.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is allowed;

2. The matter is referred back to the same officer who heard the H&C application originally with the direction that he must exercise his discretion in consideration of *Ezokola* when assessing the humanitarian and compassionate considerations; and

3. There is no question to be certified.

"Peter Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2036-13
STYLE OF CAUSE:	MEHREZ BEN ABDE HAMIDA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	FEBRUARY 24, 2014
JUDGMENT AND REASONS BY:	ANNIS J.
DATED:	OCTOBER 20, 2014

APPEARANCES:

Stewart Istvanffy Anne Castagner	FOR THE APPLICANT
Sherry Rafai Far	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Étude Légale Stewart Istvanffy Montréal, Quebec	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT