Federal Court of Appeal | Cour d'appel fédérale

Date: 20200728

Docket: A-235-19

Citation: 2020 FCA 126

[ENGLISH TRANSLATION]

CORAM: **BOIVIN J.A.**
DE MONTIGNY J.A.
LEBLANC J.A.

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

and

FATIH SOLMAZ

Respondent

and

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

Intervener

Online videoconference hearing organized by the Registry on June 16, 2020.

Judgment delivered at Ottawa, Ontario, on July 28, 2020.

REASONS FOR JUDGMENT BY: LEBLANC J.A.

CONCURRED IN BY: BOIVIN J.A.
DE MONTIGNY J.A.

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REASONS FOR JUDGMENT

LEBLANC J.A.

[1] The Minister of Citizenship and Immigration (the appellant or the Minister) is appealing against a judgment of the Federal Court (Mr. Justice Richard Bell) rendered on May 24, 2019, (*Solmaz v. Canada (Citizenship and Immigration)*, 2019 FC 736 (Judgment of the Federal Court)). Pursuant to that judgment, Bell J. allowed the respondent's application for judicial review of a decision of the Immigration Appeal Division (IAD) made under paragraph 67(1)(c) and subsection 68(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act). This decision denied the respondent special relief on humanitarian and compassionate grounds against a removal order made against him by the Immigration Division (ID) in February 2013.

[2] As allowed under subsection 74(d) of the Act, the Federal Court certified the following two questions for purposes of appeal:

> 1. Can the IAD consider the facts underlying criminal allegations for which the inadmissible individual was not convicted when exercising its discretion under paragraph 67(1)(c) and subsection 68(1) of the [Act]?
>
> 2. Can the IAD consider facts that demonstrate that the appellant is a member of a criminal organization in application of paragraph 37(1)(a) of the [Act] when exercising its discretion pursuant to paragraph 67(1)(c) and subsection 68(1) of the IRPA, if the only report and referral under section 44 of the [Act] is based only on serious criminality pursuant to paragraph 36(1)(a) of the [Act]?

[3] The respondent, a Turkish citizen with permanent resident status in Canada for some 15 years, is currently inadmissible on grounds of serious criminality, under paragraph 36(1)(a) of the Act, after being convicted of possession of cocaine for the purpose of trafficking, an offence punishable by imprisonment for life under paragraph 5(3)(a) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. As a result, a removal order was made against him.

[4] The issue in this case is that the IAD exercised its discretion under paragraph 67(1)(c) and subsection 68(1) of the Act, to admit into evidence charges that were either brought against the respondent and then withdrawn, or simply contemplated, or that might tend to show that the respondent had been a member, and even the directing mind, of a criminal organization in Canada.

[5] The Federal Court found it necessary to certify the first question because of "the divergence between the case law of the Federal Court and the Federal Court of Appeal" on the use of facts underlying criminal allegations for which the inadmissible individual was not convicted (Judgment of the Federal Court, Appeal Book (AB), volume 1, page 21, at para. 34). This question deserves to be addressed.

[6] However, this is not the case with the second certified question that the appellant and respondent both urged this Court not to consider on the grounds that it was not argued in writing or orally before the Federal Court, there were no requests that it be certified, and it had no connection with the conclusions drawn by the IAD.

[7] The question's wording calls into question the IAD's power to review the facts connecting the respondent to a criminal organization in the absence of an inadmissibility report to that effect. The question in fact arose from Bell J.'s finding that by focusing on the allegations that the respondent was a member of such an organization, the IAD attempted to create, as it were, a new ground of inadmissibility—set out in paragraph 37(1)(a) of the Act—when no report based on such allegations had previously been produced by the Minister.

[8] It is trite law of this Court that to be certified a question must be dispositive of the appeal and transcend the interests of the parties to the litigation, so that it can be considered of general importance (*Zhang v. Canada (Citizenship and Immigration)*, 2013 FCA 168, [2014] 4 F.C.R. 290, at para. 9). In addition, to meet the test for certification, the proposed question must have been raised before the Federal Court, which must have considered it in its decision. In other words, it must arise from the case and not from the reasons of the court of first instance alone; in this sense, certification should not serve as a reference to this Court (*Canada* (*Citizenship and Immigration) v. Liyanagamage*, (1994), 176 N.R. 4, at para. 4, [1994] F.C.J. No. 1637 (QL) (F.C.A); *Canada (Citizenship and Immigration) v. Zazai*, 2004 FCA 89, at para. 12; *Varela v. Canada (Citizenship and Immigration)*, 2009 FCA 145, [2010] 1 F.C.R. 129, at para. 29; *Lai v. Canada (Public Safety and Emergency Preparedness)*, 2015 FCA 21, at para. 4).

[9] In this case, there is no doubt that Bell J. addressed the question that was the subject of his second certified question. However, according to the parties' indications and as their factums to the Federal Court revealed, this question was not part of the issues raised before the Federal Court. As a result, the parties did not have the opportunity to address them as indicated in their factum filed in the Federal Court or orally at the hearing. They also pointed out that the IAD did not address the appeal before it from the standpoint highlighted by the concerns underlying this second certified question. Indeed, as the appellant stated in its Notice of Appeal, the IAD decision did not hold that the respondent was also inadmissible under paragraph 37(1)(a) of the Act. (Appeal Book (AD), volume 1, page 2).

[10] It seems clear to me that the second certified question arises solely from the reasons for the decision of the Federal Court, and not from the facts of the case. In this context, it is an application for reference to this Court. As we have seen, this does not meet the test for certification contemplated by subsection 74(d) of the Act, as interpreted by this Court. It will therefore not be considered in this appeal.

I. Background

[11] The respondent has held permanent resident status in Canada since March 22, 2005, after being sponsored by his then wife. A child was born from this union in 2006, but the couple divorced in 2008. That year, the respondent was found guilty of possession of cocaine for the purpose of trafficking, an offence for which he served six-months in pre-trial custody. He was then subject to a 12-month probation order with a firearms prohibition order.

[12] Following his conviction, a report was prepared for the Minister pursuant to subsection 44(1) of the Act. The report found that the respondent was inadmissible under paragraph 36(1)(a) of the Act. According to this provision, a permanent resident or a foreign national is inadmissible for having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed.

[13] This report persuaded the Minister to refer the matter to the ID for investigation pursuant to subsection 44(2) of the Act. As noted above, at the end of its investigation, the ID was

satisfied that the respondent met the criteria described in paragraph 36(1)(a) of the Act and was consequently inadmissible. It therefore made a removal order against him on February 12, 2013.

[14] The respondent appealed against this removal order to the IAD.

II. Decision of the IAD

[15] The IAD noted at the outset that the respondent was not challenging the validity of the removal order against him. Rather, he required special relief on humanitarian and compassionate grounds pursuant to the discretionary authority vested in it under paragraph 67(1)(c) and subsection 68(1) of the Act.

[16] It then identified the factors that should guide its analysis. The IAD specified that these factors, which it developed in *Ribic v. Canada (Minister of Employment and Immigration)*, [1985] I.A.B.D. No. 4 (QL), were not exhaustive. They were later approved by the Supreme Court of Canada in *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84 (the *Ribic* factors), i.e.:

1. The seriousness of the offence or offences leading to the removal order;
2. The rehabilitative potential;
3. The length of time that the respondent spent in Canada;
4. The impact that the respondent's removal would have on his family;
5. The support available to the respondent not only within the family, but also within the community;
6. The degree of hardship that the respondent would face in the country to which he would likely be removed.

[17] The IAD subsequently clarified that it had held six full-day sessions in connection with this appeal. During the appeal, it heard the testimony of the respondent and of his common-law partner, Salwa Haddadi. It also heard testimony on behalf of the Minister of Robert Balassa, a retired police officer, and Alexandre Leroux, a detective sergeant with the Ville de Montréal Police Department. Despite the respondent's objections, the IAD recognized Mr. Balassa as an expert witness based on his experience and qualifications. He provided testimony on the issue raised by the Minister regarding the existence of a Turkish / Kurdish criminal organization in the Montreal area and the respondent's connections with that organization.

[18] After this preliminary issue was resolved, the IAD analyzed each *Ribic* factor. It stated that considering the importance that the Act attaches to "the protection of the health of Canadians and the guarantee of their safety", it noted from the outset that in a case such as this one where the appeal concerned a criminal removal order, factors relating to the seriousness of the offence and rehabilitative potential were of "capital" importance (IAD Decision, AB, volume 1, page 43, at para. 11).

[19] In terms of the seriousness of the offence, the IAD noted the "very serious" nature of the offence of which the respondent was found guilty, especially given the "serious harm to consumers, those around them and society in general" caused by the trafficking of hard drugs like cocaine. As an aggravating factor, it also noted that it was reasonable to believe that, "in one way or another", this type of trafficking "had to involve participation in organized crime" (IAD Decision, AB, volume 1, page 45, at para. 16).

[20] It pointed out that even though the respondent ultimately received a suspended sentence for the crime that he committed, he still served more than six months in pre-trial custody, an exceptional measure in criminal matters. He was also subject to a 10-year firearms prohibition order, which, it said, added to the aggravating circumstances of the offence (IAD Decision, AB, volume 1, pages 10-11, at paras. 17-18).

[21] The IAD then turned to the factor of rehabilitative potential on which it focused much of its analysis. Despite the years that had passed since the commission of offence giving rise to the respondent's removal order, it found that his rehabilitative potential was low.

[22] This conclusion was based on a number of findings. On the one hand, the IAD considered that the remorse expressed by the respondent lacked sincerity. The respondent had again blamed the cocaine trafficking offence on his former spouse, as he had during the preparation of the report to the Minister that led to the removal order made against him. It also found the remorse expressed by the respondent brief and general and did not show that the respondent had reflected on his criminal behaviour.

[23] The IAD further noted that although the offence that led to the removal order was the only one for which the respondent had been convicted, it was not his only experience with the criminal justice system. In that regard, it identified four incidents from police reports produced by the Minister. These incidents were related to spousal violence and intra-family conflicts involving the respondent's former in-laws; they occurred between June 2007 and April 2010. In one case, assault charges were allegedly laid against the respondent and subsequently withdrawn.

In another, he was acquitted of charges of uttering death threats against his former wife and members of her family. In the other two cases, he was not summoned to trial.

[24] According to the IAD, when the respondent was confronted with the contents of these police reports, he provided vague and confused answers and was unable to provide a reasonable explanation. Instead, he suggested that these stories were fabricated by his former wife and her family.

[25] Based on the respondent's "multiple dealings with the police", the IAD drew an adverse inference regarding his rehabilitative potential (IAD Decision, AB, volume 1, page 50, at para. 27). It then dealt extensively with the Minister's allegations that the respondent was not only a member of a Turkish/Kurdish criminal organization that focused on trafficking heroin in the Montreal area, but that he in fact appeared to be the head of the organization.

[26] Noting that there were no allegations before the ID that the respondent was also inadmissible under section 37 of the Act regarding organized criminality, the IAD nevertheless expressed its opinion that the question of the respondent's association with a criminal organization remained relevant for the purposes of determining whether special relief was warranted in the light of all the circumstances of the case (IAD Decision, AB, volume 1, page 50, at para. 28).

[27] It said it had found that, on a balance of probabilities, these allegations were valid on the basis of Mr. Balassa's report and his testimony, Mr. Leroux's testimony, the statements of

members of this criminal organization—known as Birol and Baybars—gathered during the "Narkotik" police operation, and based on the decision of the criminal court regarding the release procedure for six of the 11 people arrested, accused and later convicted, as a result of this operation (IAD Decision, AB, volume 1, page 50, at para. 29).

[28] According to the IAD, when the respondent was confronted with this evidence, he provided "vague and evasive" answers, and was generally not credible. Also according to the IAD, he was unable to provide reasonable explanations for the considerable discrepancy between his reported income and his lifestyle – luxury cars, three to four annual trips abroad and mortgage loans that were inconsistent with his income. This suggested that he earned income from the activities of the organization in question (IAD Decision, AB, volume 1, pages 57-58, at para. 52).

[29] The IAD generally held that the respondent presented a very high potential of dangerousness. In its opinion, this put Canadian society in danger and constituted an aggravating factor militating against special relief from the removal order against him (IAD Decision, AB, volume 1, pages 58-59, at para. 55).

[30] Continuing with its analysis of the *Ribic* factors, the IAD expressed the view that the degree to which the respondent was established in Canada was low given the number of years he had spent here. It considered that the discrepancy between the respondent's lifestyle and his reported income undermined his credibility and tended to show that his assets came from his criminal activities (IAD Decision, AB, volume 1, page 59, at para. 57).

[31] The IAD considered the impact that the respondent's removal could have on the members of his family in Canada. With respect to the child that the respondent had with his former spouse in 2006, the IAD indicated that it would clearly be in the child's best interests to remain with both parents in Canada. However, based on the evidence adduced before it, the IAD concluded that this positive factor was mitigated by the fact that the respondent, who did not have custody of the child, did not demonstrate how often he saw the child or how he contributed concretely to the child's financial needs. Regarding the impact that removal would have on the respondent's current spouse, the IAD noted that she testified that she was willing to follow the respondent to Turkey, where she had previously travelled with him and had not felt that she was in danger. The IAD found that the respondent's spouse would not suffer undue hardship if the respondent were to be removed from Canada (IAD Decision, AB, volume 1, pages 60-61, at paras. 60-61).

[32] In terms of the degree of hardship that the respondent could experience in the country to which he would be deported, the IAD rejected the respondent's claim that he felt at risk if he were to return to Turkey because of the political and economic instability in Turkey. The IAD noted that the respondent, who still had family in Turkey, did not produce any evidence to corroborate the difficulties that he apprehended. The IAD also noted that he had travelled there many times, sometimes staying several months, since he had obtained permanent resident status in Canada. (IAD Decision, AB, volume 1, page 61, at para. 62).

[33] Finally, the IAD observed that the respondent did not appear to have a significant support network in Canada. It pointed out that only his current common-law partner came to testify on

his behalf at the hearings. It drew an adverse inference from these facts (IAD Decision, AB, volume 1, page 61, at para. 64).

[34] After having weighed this set of factors, the IAD concluded as follows:

> [TRANSLATION]
>
> [65] I find that the degree of seriousness of the criminal offence underlying the removal order, the appellant's dealings with the police since 2007, the low degree to which the appellant is established, the low degree of family and community support in Canada and the failure to demonstrate that removal to his country of nationality would cause him undue hardship, especially given the presence of close and extended family members in Turkey, override the best interests of the child, especially in the light of the court's findings regarding the appellant's connections with a criminal organization.
>
> [66] I have reviewed the possibility of staying the removal order subject to special conditions. The appellant admitted that he had failed to comply with some legal requirements in the past, for example an order not to approach his ex-wife. Given the appellant's dangerousness arising from his connection to a criminal organization and the objectives of the law, which are to protect the security of Canadians, I find it inappropriate to stay the removal order within the framework of this appeal.
>
> [67] I find that, on a balance of probabilities, and taking into account the best interests of the child, there are not sufficient humanitarian and compassionate grounds to warrant special relief either allowing the appeal or staying the removal order, in the light of all the circumstances of the case.

III. Judgment of the Federal Court

[35] Bell J. noted at the outset that the facts admitted into evidence before the IAD were "complex", disputed in some respects, but generally "highly prejudicial to [the respondent]" (Judgment of the Federal Court, AB, volume 1, page 7, at para. 2).

[36] After having listed the *Ribic* factors considered by the IAD, Bell J. stated that he would limit his comments and analysis to the factor of rehabilitative potential, given that he found the IAD's approach to the issue of rehabilitation unreasonable (Judgment of the Federal Court, AB, volume 1, pages 8-9, at para. 6). In this regard, he found that the IAD had considered the respondent's criminal record, although it included several charges for which he was not convicted, and that, in the absence of a report issued to that effect under subsection 44(1) of the Act, it had also considered allegations that the respondent had ties to a criminal organization as defined in paragraph 37(1)(a) of the Act (Judgment of the Federal Court, AB, volume 1, pages 10-11, at paras. 10-11).

[37] Applying the standard of review of reasonableness, Bell J. first analyzed the language of sections 33 to 37 of the Act to show that, unlike cases of inadmissibility provided for in sections 34, 35, 36(1)(c) and 37 of the Act, the provisions governing serious criminality set out in paragraphs 36(1)(a) and 36(1)(b) could only be raised against non-citizens upon proof of a conviction.

[38] He then asked if, once the requirements of paragraph 36(1)(a) of the Act are met, as in the case at bar, the Minister can nonetheless "use other troubles with the law as evidence of alleged serious criminality" (Judgment of the Federal Court, AB, volume 1, page 14, at para. 19). Bell J. answered this question in the negative. In his view, the doctrine of the Federal Court and even the IAD's case law hold that charges where there had been no convictions could not be relied upon to support a finding of criminal history.

[39] To come to this conclusion, Bell J. distinguished *Sittampalam v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 326, [2007] F.C.R. 198, (*Sittampalam*), where this Court recalled that "evidence surrounding withdrawn or dismissed charges can be taken into consideration at an immigration hearing" insofar as the charges are not used "in and of themselves, as evidence of an individual's criminality" (Judgment of the Federal Court, AB, volume 1, page 15, at para. 21; *Sittampalam*, at para. 50).

[40] He recalled that, in that case, two reports had been prepared pursuant to subsection 44(1) of the Act, one, as in the case at bar, regarding serious criminality, and another, unlike in this case, regarding organized crime, where the Minister's burden of proof, under section 33 of the Act, was less onerous and required only that there be reasonable grounds to believe that the facts—acts or omissions—mentioned in subsection 37(1) of the Act, in particular, have occurred, are occurring or may occur. According to Bell J., withdrawn or dismissed criminal charges in connection with Mr. Sittampalam's alleged participation in the activities of a criminal organization became relevant in such a context and could therefore be taken into consideration (Judgment of the Federal Court, AB, volume 1, pages 15-16, at para. 23).

[41] Bell J. also endeavoured to distinguish another case decided by this Court in *Balathavarajan v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 340 (*Balathavarajan*). Considering that it was "very difficult to reconcile the observations of the Federal Court of Appeal in [this case] with the case law of the Federal Court", he nevertheless held that the result of his analysis remained the same, because, he said, contrary to *Balathavarajan*, the IAD used the allegations of the respondent's involvement in a criminal

organization to try to find another ground of inadmissibility (Judgment of the Federal Court, AB, volume 1, page 18, at para.27).

[42] In short, Bell J. held that the IAD had committed a reviewable error in using evidence relating to the troubles that the respondent had had with the law, which did not result in convictions, and evidence related to the allegations of organized crime, in order to broaden the basis for having found him inadmissible, without any inadmissibility reports having been prepared in connection with these troubles and allegations.

[43] In the last case, more particularly, he held that the IAD could not assume this jurisdiction simply because it was called upon to decide whether special relief was warranted on the basis of humanitarian and compassionate considerations under the circumstances of this case. He was of the opinion, for the sake of transparency, that if a permanent resident is not facing inadmissibility on a specific ground, this ground of inadmissibility should not be raised against him for the first time before the IAD (Judgment of the Federal Court, AB, volume 1, page 20, at para. 32).

IV. Positions of the parties

[44] The appellant submits that the IAD has broad discretion in considering an appeal to it under paragraph 67(1)(c) of the Act. He pointed out that although the exercise of discretion is governed by the *Ribic* factors, derived the from case law, these factors are not exhaustive and the weight to be given to them may vary according to the circumstances of each case.

[45] He also stated that pursuant to the doctrine of this Court, when the IAD is considering whether humanitarian and compassionate grounds warrant the lifting of a removal order in a case, like the one before us, involving inadmissibility on grounds of serious criminality, it may take into account all the relevant circumstances of a case, including circumstances relating to the behaviour and actions of the individual involved. This information is used to assess this person's rehabilitative potential.

[46] For this purpose, according to the appellant, this Court, in *Sittampalam*, propounded a general rule that evidence surrounding withdrawn or dismissed charges can be taken into consideration in any immigration case, and not only inadmissibility cases where proof of the person's guilt is not required, as decided by the Federal Court in that case, provided that these charges are not used as evidence of the individual's criminality.

[47] He said that, in this case, the IAD did not rely simply on the fact that dismissed or withdrawn charges had been laid against the respondent in assessing his rehabilitative potential. As it was entitled to, the IAD relied on police reports and witness statements, among other things, and on the respondent's lack of credibility during his testimony.

[48] He added that the Federal Court was also bound by this Court's judgment in *Balathavarajan*, a case involving facts similar to the ones in this case insofar as Mr. Balathavarajan was found criminally inadmissible, and was denied special relief on the basis of humanitarian and compassionate considerations because the IAD had found that, based on the

evidence provided by an unidentified informant for the purposes of assessing his rehabilitative potential, he was a member of a criminal organization.

[49] The appellant concluded that the IAD had the discretion to consider the evidence underlying the dismissed or withdrawn charges against the respondent, and the allegations of organized crime against him to determine whether his actions since he had been granted permanent resident status revealed that he had real rehabilitative potential, given the seriousness of the offence of which he had been found guilty.

[50] As for the respondent, he argues that by assessing his rehabilitative potential based on a series of accusations and unsubstantiated or withdrawn evidence to taint his character and his credibility, the IAD had ignored “unanimous and extensive case law” which, according to him, prohibits the use of this type of evidence in assessing this *Ribic* factor. He also said this was especially true because he only had one conviction from a dozen years ago, and that the last charge against him – which was later withdrawn – was laid in 2010. Based on this case law, he submits that reliance on a withdrawn charge, in and of itself, was a reviewable error.

[51] He also argues that, in the event that this Court were to be of the view that relying on this type of evidence is legitimate in assessing the rehabilitative potential of an inadmissible person requesting special relief pursuant to paragraph 67(1)(c) of the Act, this Court should nevertheless disturb the IAD’s finding of his alleged involvement in a criminal organization because the evidence in the record precludes such a finding.

[52] Finally, in the further alternative, the respondent submits that this Court would nevertheless also be required to examine the reasonableness of the IAD's findings regarding the other *Ribic* factors that it analyzed. Bell J. did not consider these factors because he was of the view that the errors made by the IAD in its examination of the rehabilitative potential were sufficient to render the decision invalid. In this regard, the respondent submits that the IAD erred in its analysis of these other factors because he provided evidence of his rehabilitation, the presence of his wife and two daughters in Canada, the fact that he holds stable employment and his contribution to Canadian society.

V. Applicable legal framework

[53] From the outset, it should be recalled, as the Supreme Court of Canada pointed out in *Medovarski v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 S.C.R. 539 (*Medovarski*), that the reform of the immigration and refugee protection system in Canada, which culminated in the passage of the Act in 2001 prioritized public safety and security (*Medovarski* at para. 10). This is reflected, in particular, in the guiding principles set out in section 3 of the Act. Some of these principles are stated at paragraphs 3(1)(h) and 3(1)(i) of the Act. They include maintaining the security of Canadian society, as well as promoting international justice and security "by denying access to Canadian territory to persons who are criminals or security risks".

[54] In this regard, sections 33 to 43 of the Act state various grounds of inadmissibility, some of which—those provided for in sections 34 to 37—are directly related to these two guiding principles. Section 34 of the Act deals with cases where there are reasonable grounds to believe

that, here as elsewhere, the individuals concerned pose a threat to security, whereas section 35 of the Act deals with cases where there are reasonable grounds to believe that the individuals concerned have been guilty of or complicit in crimes against humanity or war crimes.

[55] Section 36 of the Act defines cases of inadmissibility on grounds of "serious criminality" and "criminality." Subsection 36(1) of the Act identifies three grounds of inadmissibility for "serious criminality." The first ground—pursuant to which the respondent was declared inadmissible—deals with cases involving non-citizens who have been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed. The second and third grounds provided for in paragraphs 36(1)(b) and 36(1)(c) of the Act deal with cases involving crimes committed abroad. Thus, a non-citizen is inadmissible for having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years. This is also the case where there are reasonable grounds to believe that a non-citizen has committed this same type of offence outside of Canada.

[56] Subsection 36(2) of the Act does not apply to permanent residents. It identifies grounds of inadmissibility for "criminality." A foreign national is inadmissible on grounds of criminality for having been convicted in Canada of an offence under an Act of Parliament punishable by way of indictment, or of two offences under any Act of Parliament not arising out of a single occurrence (paragraph 36(2)(a) of the Act). Also, a foreign national is inadmissible on grounds

of criminality for having been convicted outside Canada of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, or of two offences not arising out of a single occurrence that, if committed in Canada, would constitute offences under an Act of Parliament; (paragraph 36(2)(b) of the Act), , also carries an inadmissibility for "criminality".

[57] Finally, inadmissibility can also be based on connections that a non-citizen has with a criminal organization. As we have already seen, pursuant to paragraph 37(1)(a) of the Act, a non-citizen can be declared inadmissible if he is “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.”

[58] The procedure for implementing the inadmissibility provisions is provided for in sections 44 to 53 of the Act. Under subsection 44(1) of the Act, this procedure is initiated when an immigration officer who considers that a non-citizen is inadmissible prepares a detailed report. This report is sent to the Minister. If the Minister is of the opinion that the report is well-founded, he may refer the matter to the ID for an admissibility hearing, pursuant to subsection 44(2) of the Act.

[59] When the case has been referred to the ID, and the ID has concluded its admissibility hearing, if there is evidence that the grounds for the inadmissibility referred to in the immigration officer's report have been met, the ID may make the applicable removal order against the non-citizen pursuant to paragraph 45(d) of the Act. Pursuant to section 48 of the Act, this measure then becomes enforceable, unless it is appealed against or stayed pursuant to section 50 of the Act.

[60] While a non-citizen generally has the right to appeal against a removal order to the IAD, this right is restricted by subsection 64(1) of the Act, which does not allow appeals in cases where a non-citizen has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality. For the purposes of subsection 64(1), in the specific case of inadmissibility pursuant to paragraph 36(1)(a) of the Act, the phrase "serious criminality" must be with respect to an offence that was punished in Canada by a term of imprisonment of at least six months, in accordance with subsection 64(2) of the Act.

[61] When it hears an appeal against a removal order, the IAD may allow the appeal if, pursuant to paragraphs 67(1)(a) and (b) of the Act, it is satisfied that the removal order decision is wrong in law, or fact or mixed law and fact, or was rendered in violation of a principle of natural justice.

[62] Furthermore, paragraph 67(1)(*c*) of the Act, on the basis of which, I recall, the respondent's action was well founded, empowers the IAD to allow an appeal brought before it when it is of the view that, taking into account the best interests of the child directly affected,

there are humanitarian and compassionate grounds that warrant special relief. Subsection 68(1) of the Act also gives the IAD the power to stay the removal order, on the same basis. These two provisions read as follows:

Appeal allowed	**Fondement de l'appel**
67 (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,	**67 (1)** Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :
[…]	[...]
(c) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.	**c)** sauf dans le cas de l'appel du ministre, il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.
[…]	[...]
Removal order stayed	**Sursis**
68 (1) To stay a removal order, the Immigration Appeal Division must be satisfied, taking into account the best interests of a child directly affected by the decision, that sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.	**68 (1)** Il est sursis à la mesure de renvoi sur preuve qu'il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.

[63] Finally, it is important to note that in the exercise of its jurisdiction, the IAD is required to observe the principles of natural justice (*Yiu v. Canada (Public Safety and Emergency Preparedness)*, 2017 FC 480, at para. 18). However, as provided for in paragraph 175(1)(b) of the Act, the IAD is not bound by any legal or technical rules of evidence. Also, under paragraph 175(1)(c) of the Act, the IAD may receive, and base a decision on, evidence adduced in the proceedings that it considers credible in the circumstances.

VI. Issue and standard of review

[64] The issue here is whether the IAD was authorized to consider the charges laid against the respondent that did not lead to convictions, including the allegations of organized criminal activity against him, when it decided, on the basis of the powers vested in it pursuant to paragraph 67(1)(c) and subsection 68(1) of the Act, whether humanitarian and compassionate considerations warranted lifting or staying the removal order against the respondent.

[65] The law is well settled : when this Court hears an appeal against a judicial review decision of the Federal Court, our role is to determine whether the correct standard of review was used and whether it was applied properly: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 SCR 559, at para. 47). In other words, once it has been decided that the correct standard of review was applied, this Court should “step into the shoes” of the Federal Court and focus on the administrative decision that is the subject of the judicial review (*Canada (Citizenship and Immigration) v. Singh*, 2016 FCA 96, [2016] 4 F.C.R 230, at para. 22; *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23, at para. 247).

[66] In this case, Bell J. determined that the deferential standard of reasonableness was appropriate on judicial review of an essentially discretionary decision rendered by the IAD pursuant to paragraph 67(1)(c) and subsection 68(1) of the Act. The parties do not dispute the choice of the applicable standard of review, but disagreed on the manner Bell J. applied it.

[67] I am of the view that the Federal Court applied the appropriate standard and that the Supreme Court's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (*Vavilov*), rendered subsequently to the Federal Court judgment, did not change the standard of review to be applied in this case. Indeed, in *Vavilov*, the Supreme Court confirmed the presumption that reasonableness is the applicable standard in all cases, subject to a number of exceptions that—and the parties did not argue otherwise—do not apply in this case (*Vavilov* at paras 10 and 25).

[68] Since, on appeal from a judicial review decision, this Court should "step into the shoes" of the Federal Court, I will also have to rule, if I answer in the affirmative the main question raised by this appeal, on the reasonableness of the IAD's decision as a whole, even though this Court does not have the benefit of Bell J.'s position on the other *Ribic* factors considered by the IAD (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 12; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at para. 25; *Canada (Citizenship and Immigration) v. Tennant*, 2018 FCA 132, at para. 9).

[69] It should be noted at this point that the Court has authorized the Association québécoise des avocats et avocates en droit de l'immigration (AQAADI) to intervene in this appeal in order

to contribute to the debate on [TRANSLATION]"the powers (or limitation of powers) of the [IAD], pursuant to sections 67(1)(c) and 68(1) of the [Act], to consider criminal allegations that have not been proven in a criminal or penal court in the context of an appeal from an inadmissibility decision pursuant to subsection 36(1)(a) of the [Act]" (Order authorizing the AQAADI to intervene, at para. 3).

[70] The AQAADI essentially took up the respondent's defence. I will come back to this later.

VII. Analysis

A. In exercising its discretion under paragraph 67(1)(c) and subsection 68(1) of the Act, was the IAD authorized to consider the facts underlying the criminal allegations for which the respondent was not convicted?

[71] This question involves the real scope of the doctrine propounded by this Court in *Sittampalam* and *Balathavarajan* and its bearing on the doctrine of the Federal Court in this field. I would reiterate that Bell J. saw a discrepancy between these two cases and this doctrine. As for the respondent, in assessing his rehabilitative potential, accusations and unsupported or withdrawn evidence were relied on to impugn the morality and credibility of an admissible non-citizen. This is contrary to a [translation] "unanimous and extensive case law" (Respondent's memorandum of fact and law, at para.4).

[72] What exactly is involved here?

(1) The scope of *Sittampalam*

[73] As Bell J. pointed out, in *Sittampalam* this Court held that, according to its own doctrine, evidence surrounding charges that have been withdrawn, dismissed or simply contemplated can be taken into consideration "at immigration hearings." However, such charges cannot be used, "in and of themselves, as evidence of an individual's criminality" (*Sittampalam* at para. 50).

[74] In that case, Mr. Sittampalam, a permanent resident, faced a deportation order issued by the ID on such grounds as organized criminality pursuant to paragraph 37(1)(a) of the Act. This decision—which deprived Mr. Sittampalam of his right of appeal to the IAD by reason, as we have seen, of subsection 64(1) of the Act—was challenged in the Federal Court, which did not find any grounds to interfere.

[75] Before this Court, Mr. Sittampalam argued that the ID, and the Federal Court after it, had incorrectly interpreted some of the statutory requirements giving rise to inadmissibility on grounds of organized crime. He also argued that the Federal Court had erred in endorsing the ID's appeal, regarding its assessment of the inadmissibility report that he was facing, and the content of certain police officers' reports and testimony not followed by charges, let alone convictions. He criticized them in particular for having determined that these reports and testimony demonstrated that he and the organization with which he was associated were involved in criminal activities (*Sittampalam*, at paras. 4 and 48).

[76] As we have seen, Bell J. limited the scope of this doctrine to cases where the inadmissibility at issue did not require evidence of a conviction. This is the case with the inadmissibility referred to in paragraph 37(1)(a) of the Act, but not the case with the

inadmissibility referred to in paragraph 36(1)(a) of the Act. Because the respondent's inadmissibility in this case was based only on paragraph 36(1)(a), Bell J. found that *Sittampalam* did not apply.

[77] In my view, and this is said with respect, this interpretation cannot be accepted.

[78] On the one hand, it is based on an unduly narrow reading of the Court's comment that evidence surrounding withdrawn or dismissed charges can be taken into consideration "at an immigration hearing." As the appellant noted, the Court, in support of this comment, referred to two Federal Court cases as examples of situations where this type of evidence was taken into consideration at immigration hearings : *Veerasingam v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1661 (*Veerasingam*) and *Thuraisingam v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 607 (*Thuraisingam*).

[79] *Veerasingam* involved a situation similar to the one in the case at bar. It involved the judicial review of an IAD decision rendered, as in this case, pursuant to what is now paragraph 67(1)(c) of the Act, based on a finding of inadmissibility on grounds of criminality, the validity of which, as in this case as well, was not challenged before the IAD. In *Thuraisingam*, pursuant to what is now subsection 115(2) of the Act, the Minister had issued an opinion on danger to the public against a person who was found inadmissible on grounds of serious criminality.

[80] Clearly, the scope of *Sittampalam,* on whether evidence surrounding withdrawn or dismissed charges can be used at immigration hearings, is not limited to cases where the inadmissibility at issue does not require evidence of a conviction.

[81] *Veerasingam* and *Thuraisingam* are useful aids as to the real scope of this comment in *Sittampalam*. In particular, they provide us with indications of what is to be understood from the reservation expressed by the Court, the reservation that this type of evidence cannot be used to prove a person's criminality, if that is the only evidence available.

[82] In *Veerasingam*, the applicant submitted that the Federal Court was divided as to whether or not evidence in support of charges that are later withdrawn was admissible for use at the IAD. He cited *Bakchiev v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1881, *Bertold v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 1492, *La v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 649, and *Lau v. Canada (Minister of Employment and Immigration)*, [1984] 1 F.C. 434, as examples of cases where the Federal Court held that this type of evidence was inadmissible. I note that the respondent also cited the same cases herein.

[83] Drawing on the words of Madam Justice Anne Mactavish (now a judge in our Court), in *Thuraisingam*, Madam Justice Snider, writing for the Federal Court, disposed of this argument as follows:

> [5] Having reviewed the jurisprudence, I am not persuaded that there is a divergence of view in this Court. Rather, I would conclude from the cases that there is a unanimous view that a withdrawn charge, in and of itself, may not be relied on. Whether the IAD did so is a matter of the particular facts before the

> reviewing judge. Having reviewed the cases referred to, I would conclude that the process of review of this Court is based on two considerations.
>
> Firstly, reliance on the withdrawn charge, in and of itself, would constitute a reviewable error.
>
> The second aspect to be assessed is whether the evidence underlying the charge, and upon which the IAD's decision was based, is reliable and credible. I note that the IAD is not being called upon to determine whether the Applicant is guilty of a crime under the *Criminal Code*, where a standard of proof beyond a reasonable doubt would be required. In the context of its assessment of all the circumstances, the evidence does not have to reach a standard as would be required for a criminal conviction; rather the analysis of the IAD must meet a standard of reasonableness. Stated another way, I must be satisfied that the Board's conclusion in regard to any aspect of the claim is supported by credible and reliable evidence.

[84] This approach, which draws a distinction "between reliance on the fact that someone has been charged with a criminal offense, and reliance on the evidence that underlies the charges in question" (*Thuraisingam*, at para. 35), and which therefore does not exclude, contrary to what the respondent claimed, the use of evidence surrounding charges that have been withdrawn, dismissed or contemplated, when certain conditions are met, remains deeply rooted in the doctrine of the Federal Court. It has been followed in various contexts related to the implementation of the Act, including the context of decisions based on humanitarian considerations, as was the case in *Veerasingam* (*Ali v. Canada (Citizenship and Immigration)*, 2018 FC 588, at para. 18; (*Daniels v. Canada (Citizenship and Immigration)*, 2018 FC 463 at para. 24; (*Muneeswarakumar v. Canada (Citizenship and Immigration)*, 2013 FC 80 at para. 21; (*Clarke v. Canada (Citizenship and Immigration)*, 2012 FC 910 at para. 31-32; *Tran v. Canada (Public Safety and Emergency Preparedness)*, 2014 FC 1040, at para. 22; (*Sirisena Kalansyriyage v. Canada (Citizenship and Immigration)*, 2011 FC 183 at para. 12-13 (*Kalansyriyage*); *Abde Kharrat c. Canada (Citizenship and Immigration)*, 2007 FC 842, at para. 21; (*Younis v. Canada (Citizenship and Immigration)*, 2008 FC 944 at para. 46 and 54).

[85] The requirements governing the use of evidence underlying charges that have been withdrawn, dismissed or contemplated are that this evidence cannot, in and of itself, be used to establish the criminality of the inadmissible person, because the mere fact that charges may have been laid against this person does not, in itself, prove anything, and that, in the opinion of the decision-maker, the evidence be credible and trustworthy (*Sittampalam*, at para. 49). It goes without saying that this evidence must be brought to the attention of the person concerned, and the person must be able to respond to it. It also goes without saying that the conclusions drawn from this evidence must be the result of an independent review by the decision-maker. They cannot simply be based on the fact that charges have been laid or are pending (*Thuraisingam*, at para. 35).

[86] In *Kalansyriyage*, Mr. Justice Russel Zinn was correct in saying that the whole issue of the admissibility of evidence surrounding withdrawn or dismissed charges that arises from time to time in proceedings before the Immigration and Refugee Board, had been resolved by this Court in *Sittampalam* and that the rule stated by the Court at paragraph 50 of that judgment was an accurate statement of the law (*Kalansyriyage*, at para. 12).

[87] More recently, the approach advocated in *Veerasingam* and *Thuraisingam*, and approved by this Court in *Sittampalam*, was again followed in *McAlpin v. Canada (Public Safety and Emergency Preparedness)*, 2018 FC 422, [2018] 4 F.C.R. 225 (*McAlpin*). Although it pertained to a challenge of the Minister's decision to refer an inadmissibility report to the ID pursuant to subsection 44(2) of the Act, that case contains useful and up-to-date reminders of the law,

derived from *Sittampalam*, concerning the use of evidence surrounding charges withdrawn, dismissed or contemplated for deciding immigration matters.

[88] The error of the Minister's delegate, in that case, was to characterize and treat the withdrawn charges against the applicant as evidence of "criminal history", and therefore, of his criminality, clearly in contradistinction to the principles laid down in *Sittampalam* (*McAlpin*, at para. 98 to 101).

[89] However, Chief Justice Crampton, citing *Sittampalam* and Mr. Justice Mactavish's opinion in *Thuraisingam*, found it necessary to clarify that the conclusion he had just drawn "should not be interpreted as suggesting that evidence of pending or withdrawn charges cannot be considered by an officer or a ministerial delegate in exercising the very limited discretion contemplated by subss. 44(1) and (2) of the [Act]" (*McAlpin*, at para. 102).

[90] He was careful to point out, in this regard, that provided this evidence was deemed credible and trustworthy, it "[could] be considered in this and certain other contexts that arise under the [Act]" (*McAlpin*, at para. 102). (Emphasis added)

[91] Chief Justice Crampton added that where a priority must be placed on the security of Canadians, it was appropriate to review official police records to assess the history of an inadmissible individual's interactions with the police, which form part of the totality of circumstances that may be relevant to consider, "particularly when the individual advances H&C considerations in support of a request not to be referred to an admissibility hearing":

> [103] In this particular context, where a priority must be placed upon the safety and security of Canadians, I consider that it is entirely appropriate for an officer or a ministerial delegate to consider official police records of an inadmissible individual's interactions with the police, in exercising the discretion contemplated by subss. 44(1) and (2). In the absence of any evidence to impugn the credibility or trustworthiness of a particular official police record as evidence of an interaction with the police, it is not immediately apparent why such a record should not be considered to be credible and trustworthy for that purpose.
>
> [104] An individual's interactions with the police form part of the totality of circumstances that may be relevant for an officer or a ministerial delegate to consider, particularly when the individual advances H&C considerations in support of a request not to be referred to an admissibility hearing. In brief, in considering the extent to which an individual warrants relief from the normal operation of the IRPA on compassionate grounds, the extent of that individual's interactions with the law can be very relevant. Stated differently, it may be difficult to have much compassion for an individual who has a history of interaction with the law. This is especially so when the individual is also inadmissible on grounds of "security" (s. 34), "violating human or international rights" (s. 35), "serious criminality" (subs. 36(1)), "criminality" (subs. 36(2)) and "organized criminality" (subs. 37(1)).
>
> [105] Considering the foregoing, it would have been reasonably open to the officer and the Delegate to take Mr. McAlpin's withdrawn charges and associated police reports into account for the purpose of assessing his history of interaction with the law. In the absence of evidence to suggest that the police may have had any reason to fabricate such charges and reports, the fact that they had laid such charges and made associated reports was credible and trustworthy evidence of Mr. McAlpin's past interactions with the law. . . . "

[92] The Federal Court again followed this approach just a few weeks ago. On July 9, 2020, in *Pascal v. Canada (Citizenship and Immigration),* 2020 FC 751, at paragraph 22, the Court reiterated the distinction to be made between relying on the charges themselves, which is inadmissible, and reliance on the evidence that underlies the charges at issue, which is permitted.

[93] With all due respect, I do not see any divergence between the doctrine of the Federal Court and this Court's doctrine on this issue, and I completely fail to see any "unanimous and extensive" line of cases that departs from the principles established in *Sittampalam*. What I do

see is the opposite. Neither has the respondent persuaded me that these principles do not apply in cases of inadmissibility on grounds of serious criminality or where the IAD is called upon to exercise its discretion under paragraph 67(1)(c). of the Act. *Veerasingam*, cited with approval, I repeat, in *Sittampalam*, and by this Court in *Balathavarajan*, to which I will return, provide prime examples of the application of these principles to these two contexts.

[94] In addition, I see nothing in the Act that would limit the power of the IAD, when hearing an appeal brought under paragraph 67(1)(c) of the Act, involving inadmissibility on grounds of serious criminality, the validity of which is not contested, to consider, within the limitations set in *Sittampalam*, the evidence underlying the charges withdrawn, dismissed or even contemplated in its assessment of the *Ribic* factors, in particular, and above all, the factor regarding rehabilitative potential.

[95] As Chief Justice Crampton noted in *McAlpin*, in the exercise of the Minister's discretion to refer someone who is inadmissible to Canada to an admissibility hearing, it may be entirely appropriate for the Minister to "place significant weight on the number of interactions that an inadmissible person has had with the law", given the priority that Parliament has placed on public safety and security (*McAlpin*, at para. 6).

[96] If this applies to the Minister, when called upon to exercise the power conferred on him under subsection 44(2) of the Act, a power with very limited discretion (*McAlpin*, at para. 58, relying on *Sharma v. Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 319, [2017] 3 F.C.R. 492, at paras. 23-24), the same must apply to the IAD, when exercising the

discretion vested in it pursuant to paragraph 67(1)(c), a broad power, which goes without saying (*Santiago v. Canada (Public Safety and Emergency Preparedness)*, 2017 FC 91, [2018] 1 F.C.R. 166, at para. 28; *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84, at para. 66 (*Chieu*); *Ramiro Gonzalez v. Canada (Citizenship and Immigration)*, 2006 FC 1274, at para. 36; *Altiparmak v. Canada (Citizenship and Immigration)*, 2018 FC 776, at para. 18; *Karshe v. Canada (Citizenship and Immigration)*, 2015 FC 530, at para. 22; *Tong v. Canada (Citizenship and Immigration)*, 2018 FC 6, at para. 27).

[97] This must be so because in such a context, the IAD is called upon to exercise this power whereas the validity of the inadmissibility at issue is a given; the person concerned is in fact claiming an exemption from the application of the Act; that person does so on the basis of a very broad concept, that of humanitarian and compassionate considerations; and this exercise must be focused on public safety and security, unlike, for example, cases where requests for exemptions are filed under section 25 (*McAlpin*, at para. 65).

[98] However, the respondent argues that, in the context of an appeal brought under paragraph 67(1)(c) of the Act, the Minister cannot rely on allegations of organized crime before the IAD, if, pursuant to section 44 of the Act, they were not first the subject of an inadmissibility report based on paragraph 37(1)(a) of the Act. This report must then have been referred to the ID for an inadmissibility hearing. Otherwise, he said, the person seeking leniency from the IAD would be at a disadvantage in terms of their ability to respond to such allegations.

[99] This argument cannot be accepted. As I have mentioned, the most basic rules of procedural fairness and natural justice require that the IAD bring these allegations to the attention of the person concerned and that the person be given the opportunity to respond to them. In the case at bar, I note that the IAD hearings took several days. At most of these, evidence was submitted regarding the organized crime allegations against the respondent as part of the examination of his rehabilitative potential.

[100] One can always question the Minister's decision not to have opted for the drafting of an inadmissibility report against the respondent based on paragraph 37(1)(a) of the Act. Whatever his reasons for making this choice in this case, the Minister placed a more onerous burden of proof on himself than if he had opted to declare the respondent formally inadmissible on such a basis. Indeed, under section 33 of the Act, it would have been sufficient for him to show that there were reasonable grounds to believe that the facts, acts or omissions underlying the alleged inadmissibility had occurred, were occurring or could occur. In this case, he had to meet a more onerous burden. On a balance of probabilities (*Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100, at para. 114), and in a proceeding—an appeal pursuant to paragraph 67(1)(c)—to which the respondent would not otherwise have had access under subsection 64(1) of the Act, he had to demonstrate that the respondent's rehabilitative potential was low because of his involvement in a criminal organization.

[101] Be that as it may, as we shall see, this argument is difficult to defend in the light of *Balathavarajan*.

(2) The impact of *Balathavarajan*

[102] Bell J.'s interpretation of *Sittampalam* also runs counter to *Balathavarajan*, where, in the context of an appeal based on paragraph 67(1)(c) of the Act, as in this case, this Court upheld the power of the IAD to consider the testimony of an unidentified informant in order to determine, in its examination of the *Ribic* factors, whether Mr. Balathavarajan, also inadmissible on grounds of serious criminality, belonged to a criminal gang (*Balathavarajan*, at paras. 11-12). This evidence was reviewed for the limited purpose of verifying the capacity that Mr. Balathavarajan said he had to rehabilitate himself (*Balathavarajan*, at para. 13). As in the case at bar and in *Veerasingam*, the examination of whether Mr. Balathavarajan was a member of a criminal organization had not been preceded by a report regarding inadmissibility on grounds of criminality issued under subsection 44(1) of the Act.

[103] Recognizing that "[it was] impossible to distinguish Balathavarajan as [he had] with *Sittampalam*", Bell J. nevertheless distanced himself from it on the basis of the caveat that the use of this type of evidence was legitimate provided it was not intended to "find another grounds of inadmissibility" (*Balathavarajan*, at para. 13). Believing that this was precisely the IAD's error in this case, Bell J. held that *Balathavarajan* did not alter the result of his analysis.

[104] I could not agree with this point of view either. Indeed, it seems clear to me that the IAD considered the evidence of the respondent's involvement with the justice system, but that did not lead to charges or convictions, for the sole purpose of verifying the capacity that the respondent said he had to rehabilitate himself. The legality of the inadmissibility having been determined, and, therefore, the legality of the subsequent removal order, and since the respondent was not

contesting either of them under his appeal, it is not clear why the IAD would have had to raise an additional ground of inadmissibility in order to dispose of the appeal.

[105] Having heard an appeal under paragraph 67(1)(c) of the Act, the IAD was only called upon to decide whether, taking into account the best interests of a child directly affected, humanitarian and compassionate grounds warranted special relief from the removal order, in the light of all the circumstances of the case. Unlike in an appeal under paragraph 67(1)(a), for example, the IAD was not required to rule on the merits of the removal order and the inadmissibility underlying it.

[106] Unlike Bell J., I am therefore unable to convince myself that the IAD looked into the evidence underlying the dismissed or withdrawn charges against the respondent, and the organized crime allegations against him, in an attempt to strengthen the basis for the removal order by adding to it the inadmissibility based on paragraph 37(1)(a) of the Act. This, I repeat, was never the respondent's contention.

[107] The intervener, AQAADI, did not shake this conviction. Indeed, on the one hand, the intervener submitted that, when hearing an appeal brought under paragraph 67(1)(c) of the Act, the Act prohibits the IAD from taking facts into account other than those used by the ID to render its decision on inadmissibility. In other words, it would not be open to the Minister to present new evidence before the IAD.

[108] This argument is without merit because hearings at the IAD are held *de novo*, and the IAD must consider the whole case before it, including any new relevant evidence put before it (*Islam v. Canada (Citizenship and Immigration Canada)*, 2018 FC 80, at para. 11). I recall that, in this context, the IAD enjoys a very broad discretionary power and it is left to the IAD, in exercising its discretion, to determine, pursuant to paragraph 67(1)(c) of the Act, both what constitutes relevant humanitarian and compassionate grounds and how special relief would be warranted in the light of all the circumstances (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, at para. 57 (*Khosa*)).

[109] On the other hand, the AQAADI argued that taking into account withdrawn or even dismissed charges within the framework of the examination of an inadmissible person's rehabilitative potential not only runs counter to the case law cited by Bell J., but also how the Act deals with the concept of rehabilitation.

[110] This argument cannot succeed either. Apart from what I have already said about the applicable case law, in my opinion, there is nothing in the Act that defines the concept of rehabilitation in a manner that would restrict the IAD's power to consider the evidence surrounding withdrawn or dismissed charges where the inadmissibility referred to is based on paragraph 36(1)(a) of the Act.

[111] Although, as the intervener argued, the rehabilitation of a person inadmissible on grounds of serious criminality or criminality is determined, as contemplated by paragraph 36(3)(b) of the Act and its regulations, the *Immigration and Refugee Protection Regulations*, SOR/2002-227, by

the mere passage of time and the absence of subsequent offences, this is not the case with the rehabilitation of the inadmissible person referred to in paragraph 36(1)(a) of the Act, which is not mentioned in paragraph 36(3)(b). In other words, this provision only covers certain cases of inadmissibility on grounds of serious criminality or criminality, cases based on an offence committed outside Canada or a conviction outside the country. It is therefore clear that Parliament did not intend to limit the issue of rehabilitation of persons inadmissible under paragraph 36(1)(a) of the Act to these factors alone.

[112] The intervener also argued that, intrinsically, applications based on humanitarian considerations are intended to favour the person relying on them. Ultimately, no doubt, but an appeal based on humanitarian grounds remains "exceptional relief" (*Khosa*, at para. 57) whose onus, as in this case, is on the individual facing a valid removal order (*Chieu*, at para. 57). This is so because such a person has no right to remain in Canada, unless that person has some special privilege. In other words, that person is not attempting to assert a right, but, rather, is seeking a discretionary privilege, and in this specific case, with a focus on the prioritization of public safety and security. (*Prata v. Minister of Manpower and Immigration*, [1976] 1 S.C.R. 376, at page 377; *McAlpin*, at paragraph 65). This argument does not advance the respondent's case. As Chief Justice Crampton aptly pointed out, "it may be difficult to have much compassion for an individual who has a history of interaction with the law," especially "when the individual is also inadmissible on grounds of . . . 'serious criminality' . . ." (*McAlpin*, at para. 104).

[113] Finally, the AQAADI argued that the position put forward by the appellant in the case at bar was likely to produce results that infringe certain rights guaranteed by the *Canadian Charter*

of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the *Canada Act 1982 (UK)*, 1982, c. 11. These arguments were not raised either before the IAD or the Federal Court. They therefore go well beyond the parameters of the order authorizing the AQAADI to intervene in the proceedings. These arguments will be set aside.

[114] For all these reasons, I conclude that the IAD may, within the limitations propounded in *Sittampalam*, consider the facts underlying criminal allegations for which the inadmissible individual was not convicted, when exercising its discretion under paragraph 67(1)(c) and subsection 68(1) of the Act.

[115] These limitations, I repeat, are as follows:

a. In and of themselves, the facts underlying criminal allegations for which the inadmissible individual was not convicted must not be used to establish an inadmissible individual's criminality;

b. The facts must be based on credible and trustworthy evidence and be brought to the attention of the individual concerned, who must be offered the opportunity to respond; and

c. The decision-maker's findings must be the product of an independent review on his or her part, not based on the simple fact that charges have been brought against this individual.

[116] I must now determine whether the IAD acted within these limitations and, if so, whether the decision it rendered meets the requirements of reasonableness.

B. Is the IAD's decision consistent with the instructions in *Sittampalam* and, if so, is it reasonable?

[117] I recall that the IAD relied on the following of evidence to make its determination regarding the respondent's rehabilitative potential. First, there was the evidence underlying the charges of assault and uttering threats brought against the respondent and subsequently withdrawn. These charges were related to four incidents of spousal violence and intra-family conflict that occurred between 2007 and 2010. Secondly, there was the evidence underlying the allegations that the respondent was a member of a criminal organization involved in drug trafficking and that he was even the head of the organization.

[118] With regard to the charges laid, then withdrawn, the IAD's decision shows that it had examined the police reports prepared following these four incidents, which contained the statements of various witnesses. The IAD's decision also reveals that it confronted the respondent with the content of these reports. However, it was dissatisfied with the explanations he provided, in which he essentially accused his former spouse and his in-laws of fabricating these stories.

[119] The IAD acknowledged that it could not rely on the mere fact that charges had been laid against the respondent in connection with these incidents in its review of humanitarian and compassionate grounds. However, based on all the evidence adduced before it, which it deemed credible and trustworthy, the IAD held that the respondent had had multiple interactions with police authorities. This, along with a reference to *McAlpin*, provided a rationale for drawing an adverse inference regarding the respondent's rehabilitative potential. (IAD Decision, AB, page 59, at para. 56).

[120] Contrary to the reasons for which the Minister's delegate was criticized in *McAlpin*, the IAD neither characterized nor treated these charges as evidence of a "criminal history" and never attempted to use the charges as evidence of the respondent's criminality.

[121] I am therefore of the view that the IAD used the evidence underlying the charges against the respondent relating to these four incidents of spousal violence and intra-family conflict, in a manner consistent with the principles propounded in *Sittampalam*.

[122] We will now turn to the actual treatment of the evidence. Was it reasonable? I am of the view that it was.

[123] As this Court pointed out in *Sittampalam*, pursuant to former section 173 (now paragraph 175(1)(b)) of the Act, the IAD is not bound by strict rules of evidence and "is uniquely situated to assess credibility of evidence in an inadmissibility hearing," so that its credibility determinations "are entitled to considerable deference upon judicial review and … cannot be overturned unless they are perverse, capricious or made without regard to the evidence . . ." (*Sittampalam*, at paras. 49 and 53).

[124] As it also noted in *Balathavarajan*, it is up to the IAD, not the Court to decide the weight to be given to the evidence (*Balathavarajan*, at para. 12). In this regard, I agree with Chief Justice Crampton's comments in *McAlpin* regarding the weight that official police records should be given: "In the absence of any evidence to impugn the credibility or trustworthiness of a particular official police record as evidence of an interaction with the police, it is not immediately

apparent why such a record should not be considered to be credible and trustworthy for that purpose" (*McAlpin*, at para. 103).

[125] Since the issue of the IAD's treatment of the evidence before it regarding the incidents of spousal violence and intra-family conflicts that led to the charges at issue is eminently factual, I would add, as the Supreme Court of Canada pointed out in *Vavilov*, "absent exceptional circumstances", reviewing courts must refrain from modifying the factual findings of the administrative decision-maker, nor is it for reviewing courts to "[reassess] the evidence considered by the decision-maker"(*Vavilov*, at para. 125).

[126] The respondent focused his efforts on the issue of the IAD's own power to consider the evidence underlying the charges of assault and uttering threats laid against him. He failed to persuade me that the findings of the IAD or the acceptance of this evidence was perverse or capricious.

[127] In my opinion, the same findings are warranted with respect to the treatment of the evidence underlying the allegations that the respondent was a member of a criminal organization. Here, I repeat, the IAD received the testimony of police officers Balassa and Leroux. Officer Balassa testified as an expert on the Turkish / Kurdish criminal organization established in the Montreal area and with which the respondent was associated. Officer Leroux testified as a police investigator who was involved in operation "Narkotik". This operation, carried out by the Ville de Montréal Police Department between October 2016 and May 2017, targeted violent crimes and organized crime in the Montreal area.

[128] The IAD found that Mr. Leroux had provided credible testimony about this operation. He testified that it had identified a criminal organization led by the respondent involved in heroin trafficking in Montreal (IAD Decision, AB, volume 1, page 52, at para. 35). The IAD found that Mr. Balassa's report and his testimony corroborated several aspects of the details of Operation "Narkotik". The IAD gave them significant probative value, even though Mr. Balassa's testimony suffered from some inaccuracies (IAD Decision, AB, volume 1, page 53, at para. 37).

[129] In addition to the testimony provided by these two officers, the IAD also relied on the findings of a June 2017 order made by the Court of Québec dealing with applications for release following the arrests made during operation "Narkotik". According to the IAD, in its order, the Court of Québec considered that the evidence showing that the respondent was the head of the criminal organization in question was trustworthy (IAD Decision, AB, volume 1, page 57, at para. 50).

[130] The IAD also considered the content of the sworn statements of the persons known as Birol and Baybars who were both arrested during Operation "Narkotik". In these statements, those persons admitted having trafficked heroin on behalf of an organization headed by the respondent (IAD Decision, AB, volume 1, page 53, at para. 38). I will come back to this later.

[131] The IAD confronted the respondent with all of this evidence, but was not satisfied with his answers. It believed that his answers regarding his relationship with the members of the organization were rather vague and evasive. It also determined that the respondent's credibility was tainted by the evidence regarding his lifestyle adduced by the Minister. The IAD found that

his lifestyle was inconsistent with his reported income and suggested that he had benefited from the organization's illegal activities (IAD Decision, AB, volume 1, pages 55 and 57, at paras 46 and 52).

[132] In my view, the IAD used this evidence in a manner consistent with *Sittampalam*. It did not use this evidence to establish the respondent's criminality. It was satisfied that this evidence was based on credible and trustworthy evidence. It confronted the respondent with this evidence and gave him an opportunity to respond to it. The conclusions that it drew from the evidence were clearly the result of an independent examination on its part. They were not based on the mere fact that criminal charges could have been laid against the respondent in connection with this evidence.

[133] Regarding the reasonableness of the IAD's treatment of this evidence, the respondent submitted that the IAD had no tangible evidence connecting him in any capacity to this criminal organization. He said the conclusions drawn by the IAD were only a "serious series of speculations, circumstances and unfounded allegations . . ." and were therefore unreasonable (The respondent's memorandum of fact and law, at para. 57).

[134] He also pleaded that it was necessary, in particular, to exclude the evidence from the statements of the individuals known as Birol and Baybars, because pursuant to a judgment rendered by the Superior Court of Québec in June 2019, these two persons were convicted of defamation in connection with the content of these statements. I note that this judgment is subsequent to the decision of the IAD. Consequently, the IAD cannot be criticized for not having

taken it into account. I also note that it was the result of a settlement. Therefore, it was not based on conclusions drawn by the court itself. Rather, it was based on motives unknown to us.

[135] At any rate, I am of the view that when the court's decision is properly reviewed on a reasonableness standard, even if I were to disregard the statements of these two individuals, the IAD had sufficient evidence to find as it did.

[136] Indeed, it had Mr. Balassa's report, which indicated that the information held by the police authorities described the respondent as "no longer a soldier, but the head of Turkish/Kurdish organized crime" (AB, volume 2, page 885) and the information indicated that the victims of two attempted murders in 2014 had wanted to leave the group led by the respondent (AB, volume 2, page 888). Mr. Balassa also pointed out that since 2013, the respondent had been less visible, "which was consistent with a leader's behaviour" (AB, volume 2, page 894) and that he "held an important position within Turkish organized crime" (AB, volume 2, page 894). It should be noted that Mr. Balassa's report was based on information that did not come from the statements of the individuals known as Birol and Baybars. Indeed, I would also point out that Mr. Balassa testified before the IAD as an expert on organized crime and that the IAD found both Mr. Balassa's report and his testimony to be credible. However, the respondent has neither challenged this characterization before the Federal Court nor before this Court.

[137] The IAD also had a surveillance report indicating that the respondent was present at the location where law enforcement authorities suspected the organization was carrying out most of

its heroin trafficking operations and where a large quantity of drugs and weapons was found during the search conducted in May 2017 (AB, volume 3, pages 1049 and 1154-1155). Finally, it had Mr. Leroux's testimony according to which the ultimate target of Operation "Narkotik" was still the respondent, and that, based on experience, the investigators should have been aware that it would "never" be possible to catch the respondent "red handed with narcotics", given his role as the head of the organization (AB, volume 4, page 1607).

[138] Ultimately, the respondent is now asking this Court to reassess the evidence that was before the IAD, which, as I have already mentioned, is inconsistent with this Court's role when it hears an appeal from a disposition of an application for judicial review (*Balathavarajan*, at para. 12; *Singh*, at para. 22, *Merck Frosst*, at para. 47).

[139] It should again be noted here, that the IAD is not bound by the strict rules of evidence and that it may rely on evidence that has not resulted in a criminal conviction insofar as the evidence is trustworthy (*Balathavarajan*, at para. 12; *Thuraisingam*, at para. 23; *Legault v. Canada (Secretary of State)* (1997), 219 N.R. 376 (F.C.A.), at para. 9). In other words, it does not have to meet the burden of proof applicable in criminal cases. In this case, the IAD applied, correctly in my opinion, the applicable standard of proof in civil cases, that of the balance of probabilities, and made findings, in the light of the evidence before it, that fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Vavilov*, at para. 85; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at para. 47).

[140] There is therefore no need to interfere with the IAD's findings regarding the respondent's low rehabilitative potential.

[141] The respondent also challenged the IAD's refusal to stay the removal order against him. He considered this refusal unreasonable given the changes in his personal situation since he was convicted in December 2008. In this regard, he referred to the stable relationship he has with Ms. Haddadi, the child he had with her and the cook and manager position that he has held at a pizzeria since 2015. In support of his complaints, he cited a number of IAD decisions in which the IAD showed more openness than it did towards him.

[142] The IAD reviewed these various elements as part of its examination of the other *Ribic* factors, i.e. the degree to which the respondent was established in Canada, the impact that his removal could have on his family members in Canada and the support available to the respondent not only within the family but also within the community.

[143] After considering these factors one by one, the IAD found that none of them were sufficient to warrant special relief or a stay of removal based on humanitarian and compassionate grounds.

[144] I repeat, the IAD has broad discretion in this matter, and unless I were to review these factors myself in order to draw my own conclusions, which I cannot do, I see no reason to interfere with the manner in which the IAD treated these elements of the respondent's appeal. We must not lose sight of the fact that the IAD also dismissed the appeal before it based on the

seriousness of the offence to which the respondent pleaded guilty, the absence of sincere remorse, his low rehabilitative potential and the fact that the respondent did not demonstrate that a possible return to Turkey would cause him undue hardship given his personal situation.

[145] As for the best interests of the child directly affected, the IAD considered the situation of the child that the respondent had with his former spouse in 2006 and who was in his former spouse's sole custody. The respondent did not appear to challenge the IAD's finding on this point. However, as we have seen, he now raised the best interests of the child that he had with Ms. Haddadi. According to the record before this Court, this child was born in April 2019, well after the hearings held by the IAD and well after the decision that it rendered. The IAD cannot therefore be criticized for not having considered the best interests of this child.

[146] It is up to the IAD to give the various *Ribic* factors the weight and importance that it believes the circumstances of each case require (*Balathavarajan*, at para. 12). Therefore, I cannot say, in this instance, that it committed an error in assessing all the circumstances of the case at bar that would warrant the intervention of the Court.

[147] For these reasons, I would allow the Minister's appeal, without costs. I would set aside decision 2019 FC 736 of the Federal Court and render the decision that the Federal Court should have rendered, and I would dismiss the respondent's application for judicial review, also without costs. As to the first question certified by Bell J., the only question this Court was required to answer, I would answer in the affirmative.

"René LeBlanc"
J.A.

"I agree.
Richard Boivin J.A. "

"I agree.
Yves de Montigny J.A. "

FEDERAL COURT OF APPEAL

COUNSEL OF RECORD

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