Federal Court  Cour fédérale

Date: 20180109

Docket: IMM-1710-17

Citation: 2018 FC 13

Ottawa, Ontario, January 9, 2018

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

FANG CHEN

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for judicial review of the decision of the Immigration Division of the Immigration and Refugee Board of Canada [ID or Board], dated March 27, 2017 [Decision], which found the Applicant inadmissible to Canada on grounds of serious criminality and organized criminality.

II. BACKGROUND

[2] The Applicant is a citizen of China. She arrived in Canada as a permanent resident on June 2, 2007. The Applicant was sponsored by her former husband.

[3] After the Applicant's first marriage broke down, she began residing with her current spouse in December of 2008. On June 17, 2009, police investigating a marijuana grow op ring raided the Applicant's house. The police arrested the Applicant, her spouse, and two other people who were at the Applicant's house.

[4] On January 15, 2010, the Applicant and her spouse pleaded guilty to the following offences:

- conspiracy, *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*], s 465(1)(c), to produce marijuana, a substance listed on Schedule II of the *Controlled Drugs and Substances Act*, SC 1996, c 19 [*CDSA*], contrary to s 7(1) of the *CDSA*;
- possession for the purpose of trafficking, *CDSA*, s 5(2);
- theft of energy exceeding five thousand dollars, *Criminal Code*, s 326(1)(a); and
- theft of water exceeding five thousand dollars, *Criminal Code*, s 334.

[5] The Applicant was sentenced to time served for the 135 days she spent in pre-trial custody and a six-month conditional sentence.

[6] The Applicant now alleges that she only pleaded guilty because of her circumstances at the time. She says she was represented by ineffective counsel who was not independent from her husband. The Applicant sought to appeal her convictions in the Ontario Court of Appeal but after the hearing of this application it was brought to the Court's attention that her appeal was dismissed.

[7] In 2015, the Canada Border Services Agency [CBSA] referred the Applicant to the ID for an admissibility hearing to determine whether she is a person described in either ss 36(1)(a) or 37(1)(a) of the Act.

III. DECISION UNDER REVIEW

[8] The ID begins by considering the allegation that the Applicant is a permanent resident who is inadmissible under s 36(1)(a) of the Act on grounds of serious criminality. After establishing the Applicant's identity, the ID lists the Applicant's criminal convictions and sentence. The ID finds that it is "clear and undisputed" that the Applicant was convicted of offences in Canada which carried a maximum term of imprisonment of at least ten years and that a term of imprisonment of more than six months was imposed. The ID therefore finds that the Applicant is inadmissible for serious criminality and makes a deportation order against her.

[9] The ID then considers whether the Applicant is inadmissible under s 37(1)(a) of the Act on grounds of organized criminality. The ID concludes that the Applicant is inadmissible for organized criminality and makes a deportation order against her.

[10] The ID acknowledges that the Applicant's testimony recanted the admissions made before the criminal court in which she was convicted. But the ID finds that the Applicant's testimony "is inconsistent with her other statements, which are implausible and inconsistent with the evidence as a whole and is therefore not credible." The ID also finds that the Applicant's argument that the Board may ignore the Applicant's admissions and criminal convictions is an impermissible attempt to relitigate the Applicant's convictions. The ID says that the Applicant's claim that she was granted an extension of time to file an appeal of her convictions was not established in the evidence. The Decision states that the ID "is required to find that [the Applicant] committed the acts underlying her conviction and those admitted in her guilty plea."

[11] The ID catalogues the factual findings upon which the ID bases its organized criminality finding. It finds that the Huang criminal organization began purchasing homes in eastern Ontario in January 2007, before the Applicant became a member. After receiving a money transfer from China on December 2, 2008, the Applicant purchased the house at 30 Amanda Drive in Toronto where she was later arrested. The house was found to contain parts of a dismantled grow op, and receipts and real estate documents related to the grow op. The Applicant also leased two vans used in the operation, one of which was parked at her home when she was arrested. Other members of the Huang criminal organization had property at the Applicant's home when she was arrested and it was agreed, as part of her guilty plea, that the house was used as a base of operations by the organization.

[12] The ID finds implausible the Applicant's explanation that her husband and a friend of his who resided at her home as a tenant were involved in the operation without her knowledge.

Materials related to the criminal conspiracy were found throughout the house, some of which were in bedrooms containing the Applicant's identification, and some were openly displayed in the kitchen. Because the materials were widely distributed, the ID finds that the Applicant knew or was wilfully blind to the criminal activity in her house. The ID concludes that if the Applicant had not been trusted by the Huang organization then material would not have been left in the open in her house. The ID notes the Applicant's claim made to a CBSA officer that she had been "dragged into" the conspiracy by her husband and that she had no knowledge of it.

[13] The ID finds that facts admitted as part of the Applicant's guilty plea and conviction contradict her testimony. The inconsistencies between the Applicant's testimony, her prior statements, and the evidence as a whole reduce her credibility. The ID notes that, when first questioned, the Applicant provided different names for the tenants who resided at her house other than the friend of her husband. But she testified at the hearing that she never knew the names of the other tenants. The ID points out that tenants who lived at the Applicant's house were not arrested but that persons who were present during the police raid were. The ID concludes that the persons arrested were at the Applicant's house because she made it available as a base of operations for the Huang organization.

[14] The ID clarifies that a van leased by the Applicant was observed visiting two of the active grow op sites. The vehicle was not for the Applicant's personal use, as she already owned a sedan. A second van was registered in the name of her husband and also visited active grow ops. The ID finds that the Applicant's testimony at the hearing was inconsistent with her statements to police about the vans in 2009, and this further lessened her credibility.

[15] After recounting details of the police investigation into the grow op ring, the ID makes more detailed findings about materials found in the Applicant's house on the day of her arrest. The ID mentions that officers discovered real estate documents located in a locked bag in the Applicant's locked closet along with her identification, but that the officers' notes do not specify which properties the documents related to. During her testimony, the Applicant claimed that the documents she placed in the bag were only related to her Toronto home and a condominium she purchased. But the ID finds that she acknowledged that other real estate documents were placed in the bag without her knowledge. When arrested, the Applicant was in possession of two cell phones and four more were located in her bedroom, though she denied that they were hers. Police located a wallet in the Applicant's bedroom that contained over $2,300 in cash. The ID notes that the receipt for a storage unit found on the kitchen table in the Applicant's house led to the police finding equipment for a grow op stored at the unit. Video surveillance showed the Applicant's husband renting the unit. The ID finds that the evidence as a whole leads to the conclusion that the Applicant's house "played a central role in executing the organization['s] operations." The Applicant's claim that she was not aware of this is not plausible because of the open display of materials and because some of the documents were found in a locked bag in the Applicant's locked closet.

[16] The ID notes that the Huang organization continued its activities even after the Applicant's initial arrest. A subsequent police investigation revealed that she was a director of a numbered company that had purchased rural property east of Kingston. This property did not contain an active grow op. The Applicant had made no mention of this purchase during her testimony. But other active grow ops were discovered at properties purchased by members of the

organization through other numbered companies. The Applicant was arrested again for violating her surety after being observed residing at her house instead of with her surety.

[17] The ID recognizes that the Applicant and her husband were represented by the same counsel when they pleaded guilty on January 15, 2010. The Applicant had remained in custody for 135 days following her second arrest. As part of the Applicant's guilty plea, she agreed that her home served as a base of operations for the group, that receipts for building materials associated with the grow ops were found in her bedroom closet, and that the van she leased was used in the criminal operation. She accepted that properties in Belleville, Kingston, and Brighton were used by the Huang organization and that she was responsible for the theft of hydro and water. The ID finds that the Applicant did not appeal her conviction or her counsel's conduct at the time and continued her relationship with her husband upon her release.

[18] The ID notes that the Applicant eventually filed a notice of appeal of her conviction on February 17, 2016, after the CBSA had referred the Applicant to the ID for an admissibility hearing. The ID finds that "[e]ven if the Appeal were granted the evidence would still establish the allegation."

[19] The ID then reviews the evidence related to the existence of the Huang crime organization and find that facts about the organization are not fundamentally in dispute. A real estate agent, Mr. Huang, was found to have played a significant leadership role but other trusted members of the organization carried out operations necessary to produce marijuana and maintain the operations. The ID concludes that the Applicant's specific role was to provide financial

support, transportation, and a base of operations for the organization and that she knowingly provided her home for that purpose. The Applicant's home was unique in that it was more directly related to supporting marijuana production than other locations where police found documents related to the organization. The ID finds that this supports the conclusion that the house was the organization's operational base. Since the ID accepts that the Applicant knowingly provided her house to facilitate these operations, it finds that she was a trusted member of the Huang organization. Regardless of how the Applicant initially purchased the property, the ID points out that the court ordered the house seized as it had likely been used in committing the offences.

[20] The ID accepts that no evidence shows that the Applicant attended the actual locations of the grow ops but, like her house, finds that she provided the vans she leased to the organization to facilitate its operations. The ID finds this a significant role indicating a significant level of mutual trust between the Applicant and other members of the organization.

[21] The ID considers the Applicant's submission that the Supreme Court of Canada's decision in *B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58 [*B010*], altered the interpretation of s 37(1)(a) of the Act. But the ID concludes that the Applicant is described in s 37(1)(a) by either party's reading of the Act. Adopting either the definition of "criminal organization" from the *Criminal Code*, s 467.1(1), or the definition of "organized criminal group" from the *United Nations Convention against Transnational Organized Crime*, 2225 UNTS 209, art 2(a) [*UNCTOC*], still results in membership in the Huang organization falling within s 37(1)(a).

[22] Though the ID states that it is not necessary to resolve the interpretative issue around s 37(1)(a), it proceeds to give a detailed analysis. The ID concludes that extending the Supreme Court of Canada's remarks about transnational organized crime to s 37(1)(a) overextends the Court's remarks and takes them out of the context of the *B010* decision. The ID points out that the Supreme Court did not analyze the term "membership" in *B010*, which the Applicant submits is the live issue in the current application. Regardless, the ID proceeds to provide an exhaustive application of its interpretation of s 37(1)(a) to the facts of this case and finds that the Applicant "was a member of the organization and engaged in activity that was part of the pattern of activity engaged in by the organization." The ID further finds that the Applicant "knowingly engaged in the activities of the organization in a fashion that advanced the purpose of the organization."

[23] The ID therefore concludes that the Applicant is inadmissible under both ss 36(1)(a) and 37 (1)(a) of the Act.

IV. ISSUES

[24] The Applicant submits that the following are at issue in this application:

1. Is the ID's consideration of the evidence unreasonable?
2. Is the ID's wilful blindness analysis and conclusion unreasonable?
3. Does the ID substitute the Applicant's guilty plea for an admission of membership in organized criminality?
4. Does the ID breach the duty of fairness by making a negative credibility finding about the Applicant without allowing her to respond?

5. Is the ID's analysis and application of s 37 of the Act unreasonable when considering the Supreme Court of Canada's decision in *B010*?

[25] The Respondent prefers to categorize the Applicant's first and second issues both as questions about the Decision's reasonableness, and the third and fourth issues both as questions of procedural fairness.

V. STANDARD OF REVIEW

[26] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*], held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[27] The standard of review generally applicable to the Board's inadmissibility findings is reasonableness. See *Suresh v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 28 at para 43 [*Suresh*]. The first, second, and fifth issues raised by the Applicant will therefore be reviewed under a reasonableness standard.

[28] Regarding the third issue, the Applicant submits that the ID breached the duty of fairness by putting undue emphasis on the Applicant's guilty plea. The Respondent also categorizes the third issue as a question of fairness. With respect, I cannot understand how the weight placed on the Applicant's guilty plea and its interpretation by the ID can be classified as an issue of procedural fairness. The Applicant's guilty plea was evidence before the ID. The weight placed on evidence is a matter within the ID's expertise that attracts a great deal of deference under the reasonableness standard of review. See *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at para 38 [*Mugesera*]. In reality, the third issue raised by the Applicant is an attempt to reframe the evidentiary value of the Applicant's guilty plea as a question of procedural fairness. To the extent that the question is separable from the first issue, it is reviewable on a reasonableness standard.

[29] The fourth issue raised by the Applicant is, however, a question of procedural fairness. The Supreme Court of Canada has stated that questions of procedural fairness are reviewed under a correctness standard. See *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43 [*Khosa*]; *Mission Institution v Khela*, 2014 SCC 24 at para 79 [*Khela*]. After *Khela*, however, the Federal Court of Appeal described the standard of review to be applied to questions of procedural fairness as "unsettled": *Bergeron v Canada (Attorney General)*, 2015 FCA 160 at paras 67-71. This Court has on occasion accepted that the Board is owed deference where its determination of procedural issues is largely factual or evidentiary. See *Suresh*, above, at para 38-42; *B095 v Canada (Minister of Citizenship and Immigration)*, 2016 FC 962 at paras 9-12. How to reconcile these lines of authority is a question best left for the future. Here, the question

of whether the Applicant was provided with a meaningful opportunity to respond to the Board's credibility concerns is a classic issue of fairness reviewable under the correctness standard.

[30] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at para 47, and *Khosa*, above, at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

VI. STATUTORY PROVISIONS

[31] The following provisions of the Act are relevant in this proceeding:

Rules of interpretation	**Interprétation**
33 The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.	33 Les faits — actes ou omissions — mentionnés aux articles 34 à 37 sont, sauf disposition contraire, appréciés sur la base de motifs raisonnables de croire qu'ils sont survenus, surviennent ou peuvent survenir.
…	…
Serious criminality	**Grande criminalité**
36 (1) A permanent resident or a foreign national is inadmissible on grounds of	36 (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :

serious criminality for

(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;

…

…

Organized criminality

Activités de criminalité organisée

37 (1) A permanent resident or a foreign national is inadmissible on grounds of organized criminality for

37 (1) Emportent interdiction de territoire pour criminalité organisée les faits suivants :

(a) being a member of an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment, or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence, or engaging in activity that is part of such a pattern; or

a) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle se livre ou s'est livrée à des activités faisant partie d'un plan d'activités criminelles organisées par plusieurs personnes agissant de concert en vue de la perpétration d'une infraction à une loi fédérale punissable par mise en accusation ou de la perpétration, hors du Canada, d'une infraction qui, commise au Canada, constituerait une telle infraction, ou se livrer à des activités faisant partie d'un tel plan;

(b) engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or laundering of

b) se livrer, dans le cadre de la criminalité transnationale, à des activités telles le passage de clandestins, le trafic de personnes ou le recyclage des

money or other proceeds of crime.	produits de la criminalité.

VII. ARGUMENT

A. *Applicant*

[32] As a preliminary matter, the Applicant emphasizes that she concedes the issue of serious criminality and does not challenge the ID's finding on that point in this application. The issue before the Board was whether she is inadmissible on grounds of organized criminality under s 37 of the Act. However, the Applicant has appealed the convictions that underlie the ID's serious criminality finding under s 36(1)(a) to the Ontario Court of Appeal. At the time of the hearing of this application, the results of that appeal were not known.

(1) Unreasonable Evidentiary Conclusions

[33] The Applicant submits that the ID makes numerous findings not supported by the evidence that render the Decision unreasonable. Specifically, the Applicant disputes the ID's conclusions: that the Applicant was a member or leader of the Huang criminal organization; that documents found in the Applicant's home related to the grow op ring belong to the Applicant personally; that the Applicant's house was purchased with the proceeds of crime or used for criminal purposes; that tenants at the Applicant's house were not arrested and charged in relation to the grow ops; that the Applicant leased two vehicles for use by the criminal organization; and that the Applicant admitted being a member of the Huang organization. The Applicant submits that these conclusions are repeated throughout the Decision and form the basis for the ID's finding that the Applicant was a trusted member of the organization.

[34] The Applicant submits that the ID's conclusions contradict the Member's assessments and statements during the hearing. The Applicant points to a portion of the hearing transcript to show that the ID questioned the Respondent's submission that the Applicant admitted being part of a criminal organization during an interview with immigration officials. Notes from the interview record the Applicant stating that she was "dragged into this case" by her husband. The Applicant suggests that the common sense interpretation of this phrase is that it refers to being dragged into her legal predicament, not membership in the criminal organization. Given the concerns the Member expressed, there was no need for the Applicant to respond.

[35] Further portions of the transcript which the Applicant says contradict the ID's conclusions include the Member questioning whether there was evidence beyond the Applicant's guilty plea that attributed the Huang organization's criminal activities to the Applicant and the Respondent's counsel agreeing that the Applicant bought her house with money from China. The Applicant says that the house was forfeited because it was bought with the proceeds of crime, not because it was used as a hub for criminal activity. The Applicant also says that an email in the record makes it clear that the Applicant's house was not used for criminal purposes.

[36] At the hearing, the Member questioned whether receipts and real estate documents found in the Applicant's home could be attributed to her. The Applicant says that particulars of the real estate documents found in the Applicant's closet were not described. There were, therefore, no documents to support the finding that the Applicant was the organization's financial organizer.

[37] The Applicant submits that the ID's conduct amounts to a breach of the duty of fairness and due process because these portions of the transcript show awareness of shortcomings in the evidence that the Decision does not acknowledge.

[38] The Applicant says that the Decision also ignores her testimony that she did not like her husband's friends but did not wish to cause problems in her relationship with her husband. The Decision ignores the cultural, personal, and historical context of the Applicant's relationship with her husband. Contrary to the ID's finding that members of the organization were convicted of crimes that took place over a long period, the Applicant points out that she had only been married to her husband for a matter of months. The Applicant says that she could not have become a trusted member of the organization in that short period of time.

(2) Wilful Blindness

[39] The Applicant submits that the ID did provide any analysis regarding its finding that the Applicant was at least wilfully blind to the activities taking place in her house. The Applicant says that there is no basis for this finding.

(3) Emphasis on the Applicant's Guilty Plea

[40] The Applicant submits that the ID interprets the Applicant's guilty plea as an admission of organized criminality. The Applicant notes that she did not plead guilty to a charge of membership in a criminal organization. In the Decision, the ID states that the Applicant agreed as part of her guilty plea that her home served as the organization's base of operations and that

through her plea she admitted that this was done with her knowledge. Though the Applicant recanted the admission of her knowledge, the ID did not find her credible. The Applicant says that the hearing before the ID was therefore "an exercise in futility" because the ID had already decided that her plea was determinative. The Applicant submits that this amounts to a breach of the duty of fairness.

(4) Opportunity to Respond to Credibility Concerns

[41] The Applicant submits that the ID breached the duty of fairness by not allowing her an opportunity at the hearing to respond to purported inconsistencies in her evidence. The Decision refers to the Applicant's evidence as not credible on multiple occasions. The Applicant says that the Member never put the purported inconsistencies to her at the hearing for her response. The Applicant says that if the ID did not believe the Applicant's testimony, it had a duty to identify the basis of its concerns and provide the Applicant with an opportunity to respond to those concerns at the hearing.

(5) *B010*

[42] The Applicant submits that the Supreme Court of Canada's decision in *B010* changed the law applicable to s 37(1)(a) of the Act. In *Sittampalam v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 326 at para 40 [*Sittampalam*], the Federal Court of Appeal rejected the value of international instruments and criminal jurisprudence when interpreting the meaning of "organization" in s 37(1)(a) of the Act. Considering the immigration context, the Court concluded that a broad and unrestricted approach to the definition better suited the Act's

purpose. The Applicant submits that *B010* held that s 37(1)(b) should be interpreted harmoniously with the *Criminal Code* and the *UNCTOC* because the purposes of the provisions are directed at transnational crime. The Applicant says that this is now the law for s 37(1)(a), and that proving membership in a criminal organization "should now follow criminal law standards." The Applicant maintains, however, that her membership in a criminal organization has not been proven under any standard.

[43] The Applicant therefore requests that the application for judicial review be allowed, that the Decision and deportation order be quashed, and that the matter be remitted back to the ID for redetermination.

B. *Respondent*

(1) Reasonableness

[44] The Respondent submits that the ID's finding that the Applicant was a member of the Huang criminal organization is reasonable. The Applicant pled guilty to the offences of conspiracy, possession for the purpose of trafficking, and theft on the basis of an agreed statement of facts. The Respondent says that the Applicant's guilt was therefore established beyond a reasonable doubt and that the ID had ample basis to find the Applicant inadmissible on the lower "reasonable grounds to believe" standard. The Respondent notes that the Applicant did not contest her convictions before the ID during her inadmissibility hearing under s 36 of the Act, nor did she file an application for judicial review of the s 36 inadmissibility finding. The Applicant's guilty plea provided a reasonable basis for the ID's conclusion that the Applicant

was inadmissible on the grounds of serious criminality. See e.g. *Burton v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 727 at para 43.

[45] The Respondent says that the Applicant's admission that she was involved in a criminal conspiracy with a criminal organization involving multiple co-accused is sufficient for a finding that the Applicant is inadmissible for organized criminality. The Respondent points to *United States of America v Dynar*, [1997] 2 SCR 462 at para 88, where the Supreme Court of Canada held that "[a] conspiracy must involve more than one person."

[46] In addition to the Applicant's conspiracy conviction, the Respondent points to further findings in the Decision that support the conclusion that the Applicant is inadmissible for organized criminality. Namely, the Applicant owned and lived in the house that was a centre of operations for the conspiracy. Police found materials related to the conspiracy throughout the house, including in two bedrooms where the Applicant's identification was found. These materials included dismantled grow op equipment, bags of marijuana leaves, lists of chemicals, receipts for grow op equipment, and real estate documents related to grow op sites. The real estate documents were located inside a locked bag in a locked closet that also contained the Applicant's identification. Members of the organization had other residences where they could have kept this material. The Applicant also leased two vans which organization members used to visit grow op sites and both vans were forfeited as offence-related property. And the Applicant was a director of a numbered company that purchased a rural property in the area of the organization's other grow op sites. Considering these facts cumulatively, the ID found that the Applicant "was a member of the organization and engaged in activity" on behalf of the

organization. The Respondent says that the Applicant admitted these relevant facts as part of her guilty plea.

[47] The ID found that the Huang criminal organization placed a significant degree of trust in the Applicant because her home was unique among the Toronto area properties searched. The materials located there were "more directly related to supporting the production of marijuana." The open display of this material contributed to the ID's conclusion that the organization trusted the Applicant. Also, the ID reasonably concluded that her role was to provide financial support, transportation, and an operational base for the organization. The Respondent submits that the Applicant's disagreement with these findings and the inferences that they support does not establish reviewable error. See *L'Écuyer v Canada*, 2010 FCA 117 at paras 4-5.

(2) Procedural Fairness

[48] The Respondent says that the ID's consideration of the facts relating to the Applicant's criminality is not unfair. In proceedings before the Ontario Court of Justice, the Applicant was provided with a court-appointed interpreter and represented by counsel. She voluntarily entered a guilty plea and was referred to the ID based on her convictions. In *Clare v Canada (Citizenship and Immigration)*, 2016 FC 545 at para 17, Justice O'Reilly held that an individual subject to an amended s 44 referral was treated fairly because he was put on notice of the substance of the allegation. Here, the Respondent says that the ID explained the process to the Applicant at the beginning of her hearing.

[49] Notwithstanding the Applicant's attempt to appeal her criminal convictions, at the Applicant's admissibility hearing the existence of her convictions was not contested. The Respondent says that there was nothing before the ID to indicate that the Applicant had raised concerns about her innocence with her criminal counsel. In the circumstances, there was no evidentiary basis for the ID to go behind the Applicant's plea and conviction, or unfairness in relying on uncontested facts. The Respondent says that the Applicant also failed to advance any evidentiary basis for an allegation of incompetence against her former counsel.

(3) Section 37(1)(a) of the Act

[50] The Respondent submits that the Supreme Court of Canada's comments on the meaning of "organization" in s 37(1)(b) of the Act in *B010* have no application because the issue before the ID was the Applicant's membership and role in the Huang organization. The existence and criminality of the organization was not contested before the Board. The Respondent also notes that the ID held that it was not necessary to resolve how *B010* affected the interpretation of s 37(1)(a) on these facts as the ID found that the Applicant was described by s 37(1)(a) under either party's reading of the Act.

[51] Regardless, the Respondent submits that the ID's analysis of the effect of *B010* on the application of s 37(1)(a) is reasonable. The decision in *B010* interprets a different paragraph of the Act from the one at issue in the present application. Further, the Respondent says that *B010* was about defining the meaning of "organized criminality" by reading in the existence of organization when the Supreme Court created the term "transnational organized crime" in s 37(1)(b).

[52] As noted, the Applicant has not disputed the Huang organization's existence or that it was a criminal organization. Rather, the Applicant disputes her relationship with the organization. The Respondent notes that the Applicant's position that she has no knowledge of the organization precludes her asserting that it had some other purpose. The Respondent also says that all the evidence supports the conclusion that the Huang organization was involved in criminality.

[53] The Respondent further submits that, even if the Applicant's interpretation of s 37(1)(a) is correct, it is irrelevant to her inadmissibility under the section. The Applicant provided vehicles and a base of operations for the organization. The ID found that she was either a member of the organization or someone "engaged in activity that was part of the pattern of activity engaged in by the organization."

[54] The Respondent says that should the Court wish to consider the Applicant's submissions regarding the application of *B010* to the interpretation of s 37(1)(a) of the Act, the narrow and technical interpretation offered by the Applicant should be rejected. In *Sittampalam*, above, at para 36, the Federal Court of Appeal held that the definition of organization in s 37(1)(a) of the Act should be given an "unrestricted and broad" interpretation, consistent with the Act's intention to "prioritize the security of Canadians." The Court noted Parliament had not adopted the *Criminal Code* definition of criminal organization in s 37(1)(a) of the Act: *Sittampalam*, above, at para 40. The Respondent points out that in s 121.1 of the Act, Parliament adopted the *Criminal Code* definition for other provisions of the Act. In these circumstances, the Respondent submits that had the Supreme Court of Canada intended to overturn *Sittampalam*, and change the

meaning of s 37(1)(a) in a decision about s 37(1)(b), it could have done so expressly. Therefore, *Sittampalam* remains good law and the Applicant's interpretation should be rejected.

[55] The Respondent therefore requests that the application for judicial review be dismissed.

VIII. ANALYSIS

[56] The ID's conclusion that the Applicant is inadmissible for organized criminality under s 37(1)(a) of the Act is based upon "the convictions registered against the conspirators and the evidence as a whole which describes the activities of the organization in significant depth" (at para 31).

A. *Unreasonableness*

[57] The Applicant summarizes why the ID's conclusions are unreasonable as follows:

> 7. The panel makes the following evidentiary conclusions that are not founded on the record before him:
>
> - The panel concludes the Applicant was a member or leader of the criminal organization for a number of reasons, noted further below are not founded on the record.
>
> - The panel relies on general statements and assertions to conclude that unidentified documents purportedly found in Applicant's home related to grow operations, belonged to the Applicant personally and established her role with the organization which is not supported by the record and by the results of the police investigation.
>
> - The panel concludes the Applicant either admitted her house was proceeds of crime or used for criminal purposes neither of which was founded on the evidence examined by the panel. The Minister conceded the issue and evidence also

revealed, the Applicant purchased her house with her own savings brought by her from China.

- The Panel relies on a receipt found on the Applicant's kitchen table for a storage in Belleville in which grow-op equipment [was] stored for its conclusion that the applicant played a leading role in the organization when it was already established the receipt did not belong to the Applicant. She had no knowledge of it and of storage and had never visited Belleville.

- The panel concludes the Applicant[']s] tenants were not charged and arrested in relation to the crimes, contrary to the evidence before it, thereby erroneously attributing any evidence of criminal activity found in the tenants' apartment to the Applicant.

- The panel misapprehends the evidence with respect to a SUV/Van the Applicant had leased in her name but on behalf of and at the expanse of a friend/relative of her spouse under pressure. The panel at times appears to erroneous[ly] suggest she had leased two such vans and ignores the applicant's testimony on her particular personal and cultural context in this regard.

- The panel concludes without a foundation that [the] Applicant admitted to having been a member of the criminal organization.

- The panel's purported evidential conclusions are repeated throughout its reasons in different forms, which the panel then relies on to conclude that the Applicant was a trusted person in the organization, responsible for the group's financial operations, again without any evidence directly attributable to the Applicant that would warrant occupying such a position for a newcomer such as the Applicant. However, acknowledging there is no evidence placing the Applicant with the criminal activities of the group the panel takes this as in fact supporting the role of a leader of the group. The panel attempts to draw a parallel between the Applicant and the real estate agent held by the police to be the main force behind the groups. It is submitted this is an absurd and perverse conclusion in light of the evidence on this record for the two individuals.

(1) General Statements and Unidentified Documents

[58] The Applicant elaborates on this point as follows:

> 14. The panel mischaracterized or appears to have embellished the documentary evidence found in the Applicant's house, on the [basis] of which the panel concludes the Applicant played a lead role with the criminal organization. As the below exchange also makes it clear there was no identifiable evidence presented by Minister that could point to a role played by the applicant with the criminal organization. The evidence presented by the Minister constituted general reference to documents and assertions. The receipt [referred] to below is [for] storage in Belleville where it was alleged grow-op equipment [was] kept. However, this receipt did not belong to the applicant. Its source was identified however the panel appeared to have erroneously attributed to the Applicant in his reasons:
>
> > MINISTER'S COUNSEL: And if anything, as I, as I'm saying to you right now, all the information points to the fact that this was the hub of the operation. Everything points out that the instructions were, were disseminated from that location.
> >
> > So when, when we take a look at the case law such as Thanaratnam and we're determining about the organization, and we start looking at a location as one of the elements, clearly 30 Amanda was the location that this group met up in and stored all their valuable information. And everything suggests that Ms. Fang was the person responsible *for* it all in regards to the finances.
> >
> > As you can see from the ---
> >
> > MEMBER: Okay. The — one of the things I asked about was the comment about real estate documents and financial documents which are alluded to in the charges and in the guilty plea and found in a locked suitcase in a bedroom closet.
> >
> > But I can't find anything that describes in more detail what properties those were in relation to,

> when they happened. Is there something in the material that describes that?
>
> MINISTER'S COUNSEL: I — not, not that I'm aware of. We're talk, what, what they, what the material clearly identifies is the receipts for the, for the purchases of the materials required for these grow ops.
>
> MEMBER: I think that was — connect me if I'm wrong — I think there was receipts in the living room? Or something to that effect.
>
> MINISTER'S COUNSEL: I think they were, they were in a few places.
>
> MEMBER: Yeah. The receipt from the storage locker was on the dining room table in her husband's name, giving a different address. It's page 256. MLS listings, (inaudible) bag inside the Nissan Quest (ph) vehicle which parked outside, it's page 257.

15. The applicant explained in her testimony, which no issues [were] taken with, that the only real estate documents she had were the documents in relation to her pre-built condominium and her house on 30 Amanda Dr. in Toronto. While the [latter] was noted in the evidence there was no reference to the former, the condominium in the Minister's evidence. Therefore it is clear the evidence of real estate documents in the Applicant's possession relates to those two documents only. Further, as the Minister conceded on other particulars of any documents were given in the evidence before the panel. Reference to unidentified documents cannot and ought not be relied [upon] to conclude the applicant was a real estate or financial organizer for the group as the panel has done in this case. There were no identifiable documents in record to rely on for a finding that the Applicant was the financial organizer. The Minister did not meet its burden in establishing that the Applicant was a member of organized criminality.

[Emphasis in original; citation omitted.]

[59] Further elaboration is provided in the Applicant's Reply:

> 7. The Minister's evidence constituted the following reference to evidence: "documents" with respect to "financial and real estate transactions" which the Minister argued were found in Ms. Chen's house and in her bedroom (which she shared with her husband, a fact ignored by the panel). The Minister attributed such "documents" to the Applicant when [in] fact the actual documents referred to by the Minister, with respect to "financial and real estate transactions" were not produced by the Minister [and] were not in themselves before the panel. Further, when questioned by the panel the Minister conceded he did not have any particulars with respect to such documents and was therefore not able to identify what they were, what properties or financial transactions they referred to or why and how they could be attributed to the Applicant. As the record before the panel further shows, the Applicant testified that the only financial documents or real estate documents she personally possessed were in relation to her personal matters, including a prebuilt condominium and her ownership of her house which she had purchased in December 2008, some six months earlier, prior to being arrested and charged, in June of 2009. She further provided proof that she purchased her house with her own funds which she transferred from China with help from her family, after immigrating here, a fact the Minister also accepted at the hearing.
>
> 8. It is submitted reference to evidence without the actual evidence to back up such references or statements and without any identifying particulars ought not to be relied on as evidence in a tribunal and proceedings of this nature where the consequences are extremely serious for the Applicant. Such general statements do not constitute evidence. They are highly prejudicial to the Applicant and cannot be tested and verified for their reliability and veracity. In the Applicant's respectful submission, the decision of the panel ought to be quashed on this issue alone as it played a prominent and crucial basis for the panel's conclusions with respect to all elements of the provision. This is readily apparent from the panel's reasons and from the Minister's Memorandum here.
>
> 9. Further, in her Memorandum, including at paragraph 17, dealing the Applicant's ties to the group and the issue of membership, the Minister asserts the Member did not find the Applicant to be "a leader of the group or the person in charge of the group's financial operations.["] The Minister goes on to submit that the panel's decision is reasonable apparently because the panel compared her situation with those of Mr. Huang's and Mr. Zeng's

> (alleged leaders of the group) whose "properties also contained real estate and mortgage documents". As noted above there was no documentation before the panel to be attributed to the Applicant as conceded by the Minister before the panel. While the Respondent appears to dismiss the Minister's concessions before the panel, they are consistent with this record. It was unreasonable for the panel to draw such a comparison, in the absence of any documents. Without documents showing requisite information, it is not [possible] to attribute such roles or ties to the Applicant, alleging she was in [a] position of "trust", as the panel finds. The panel['s] reasons are based on pure speculation and conjuncture.

[60] The ID's findings on this issue are as follows:

> [33] The panel finds it reasonable to conclude that Ms. Chen's role was to provide financial support, transportation and an operational base for the organization. Her role included knowingly providing her home as one of the bases of operations for the organization. Her home was used to plan and execute the establishment and maintenance of the marijuana production operations and to store materials. Her home is unique among the GTA properties searched in this respect. Mr. Huang's and Mr. Zeng's properties also contained real estate and mortgage documents but not hardware receipts, chemical lists or a dismantled grow operation. The material found in her home was more directly related to supporting the production of marijuana and was not found anywhere else in the GTA. This strongly supports the finding that her home was the operational base of the organization.
>
> [34] Several persons were present in Ms. Chen's home at the time of her arrest who were directly involved in carrying out the production operations. Mr. Chen, Mr. Wang and Ms. Huang were all present. Ms. Chen claims that Mr. Wang and Ms. Huang had just spent the night. The panel finds this explanation implausible. It is more reasonable to conclude that they were present because they attended her property in relation to planning the operations of the organization. Mr. Zeng who was extensively involved in the operations also had personal property amongst the operational material recovered from Ms. Chen's residence. The material[s] located openly on her kitchen table and throughout her residence were displayed in a manner consistent with the open planning of the conspiracy at her residence. The panel finds it reasonable to believe that the members of the organization used this location for planning and were comfortable doing so openly in Ms. Chen's

> presence. The panel finds it reasonable to believe, based on all of the evidence, that Ms. Chen knowingly provided her property to facilitate the financial transactions, planning, storage of materials and execution of the marijuana production operation. The panel finds it reasonable to believe, based on the evidence as a whole, that Ms. Chen was a trusted member of the organization. Whether she initially bought her property with her own savings for the primary purpose of residing there or not, Ms. Chen admitted in her guilty plea that she knowingly permitted her property to be used as a base of operations for the group, which the panel finds to be a criminal organization. The Court ordered that her property be seized as it had likely been used in the commission of the offences.

[61] There is nothing in these reasons to suggest that the Member "adopted the Minister's portrayal" of what the Minister said was "one statement" she made previously about being "dragged into the case" which she then recanted. The Member is focused upon materials that were found in the Applicant's home and the people who were there at the time of the arrest.

[62] The Applicant pleaded guilty to, *inter alia*, possession for the purposes of trafficking, conspiracy to produce a substance (marijuana), and theft of electricity and water. As the Respondent points out, at the guilty plea in criminal court, the Applicant did not dispute that she owned 30 Amanda Drive (and she does not dispute that in this application) or that the house "is considered to be the base of operations for this bunch" (see the proceeding before Justice Hunter of the Ontario Court of Justice on January 15, 2010 at Belleville at p 351 of the Certified Tribunal Record).

[63] It seems to me that, in this application, the Applicant is attempting to question the evidence that was used and referred to in the criminal proceeding in order to demonstrate that, if the Applicant had not pleaded guilty, arguments could have been that there was reasonable

doubt. But that is not a matter that was before the ID. It was the ID's duty to determine, given the Applicant's guilty plea and the other evidence on the record, whether, in accordance with s 33 of the Act, there are "reasonable grounds to believe" there are facts that support inadmissibility. In *Canada (Citizenship and Immigration) v Tran*, 2016 FC 760 at para 22 [*Tran*], Justice LeBlanc quotes the *Mugesera* definition of reasonable grounds in a s 37(1)(a) context. Regarding whether the reasonable grounds to believe standard applies to membership, Justice LeBlanc states the following at para 21 of *Tran*:

> As is well-established, it is not necessary under sections 33 and 37 of the Act to show that the person concerned is a member of a criminal organization but rather that there are reasonable grounds to believe that he or she is a member of such an organization or has engaged in activity that is a part of such a pattern of criminal activity (*Castelly*, at para 26; *He v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 391, at paras 28-29, 367 FTR 28; *Toussaint*, at para 38).

And Justice Elliott is emphatic that the reasonable grounds to believe standard applies to the membership determination in *Odosashvili v Canada (Citizenship and Immigration)*, 2017 FC 958 at para 34.

[64] In the present case, there was credible and compelling evidence to support reasonable grounds:

(a) The Applicant's guilty plea to charges that included conspiracy, possession, and theft of water and electricity;

(b) The Applicant's ownership of the house at 30 Amanda Drive where she was arrested and where there were other persons present who were directly involved in carrying out the production operations;

(c) The house contained materials – some of which were on open display - that, reasonably speaking, suggested a grow op operation; and

(d) The other persons present at the time of the arrest were, reasonably speaking, members of a criminal organization.

[65] If this does not provide proof beyond a reasonable doubt, it certainly provides reasonable grounds to believe in my view.

[66] By entering a guilty plea before Justice Hunter, the Applicant did not dispute the characterization of her house as "the base of operations for this bunch."

[67] The Applicant also now argues that there was "no evidence to suggest the forfeiture of her house in the guilty plea implied an admission that she participated in the criminal organization[']s] activities or that she was a member of the organization." But the ID does not look at the forfeiture of the house in isolation and the Member did not base his "reasonable grounds to believe" finding upon this fact alone. Nor does he say that this amounts to an "admission" by the Applicant. It is simply one of the facts that, considered cumulatively, lead him to a reasonable grounds finding. The Member acknowledges the Applicant's claim that she bought the house with her own money as a residence, but this does not assist her when the other evidence is considered. The Member did not leave this factor out of account.

[68] The Member does not "speculate [that] the Applicant's plea amounted to her admitting that the house was used as a hub for criminal activities." The Applicant pleaded guilty, *inter alia*, to conspiracy and trafficking. This is an admission that the Applicant was involved with others in committing a criminal offence. And the Member provides a full explanation of the way other

houses were purchased and used by organization members and why there were reasonable grounds to believe that the Applicant's house was a hub.

[69] Based on the ID's reading of the facts before Justice Hunter, the Member also points to what went along with the guilty plea:

> [28] In doing so she acknowledged that she was a knowing party to these offences and that the facts as described by the Crown were substantially correct. She acknowledged through this agreement that her home served as a base of operations for the conspiracy to produce marijuana. She acknowledged that receipts for building materials associated with the operation were located in her bedroom closet. She acknowledged knowing that her van was used in the operation. She acknowledged knowing that properties in Belleville, Kingston and Brighton were used by the organization. She acknowledged her responsibility for theft or hydro and water related to the properties. She did not seek to appeal her conviction or sentence or make any allegation about the conduct of Mr. Barrs at that time. She was released and continued her relationship with Mr. Chen.

[70] The Applicant now also says that the ID "mischaracterized or appears to have embellished the documentary evidence found in the Applicant's house, on the [basis] of which the [Member] concludes [that] the Applicant played a lead role with the criminal organization." The ID did not need to find that the Applicant played a "lead role" in order to find her inadmissible. He simply had to find under s 37(1)(a) of the Act that she was "a member of an organization that is believed on reasonable grounds…" (emphasis added).

[71] The ID, in fact, finds that "it is reasonable to conclude that her role was significant and that a significant degree of mutual trust existed between her and the other members of the organization."

[72] Once again, the Member does not need to find that the Applicant's role was "significant" in the sense of being "prominent." The context makes it clear that what is "significant" is that the Applicant "knowingly permitted her property to be used as a base of operations for the group" and the "two vans [the Applicant] leased were not for personal use, they were used extensively to support the operation."

[73] At the very least, there was evidence to support that the Applicant actively facilitated the business of the organization by providing her home as an operational base and transportation for operations.

[74] The Applicant makes much of her allegation that unidentified documentation was relied upon to conclude that the Applicant was a real estate or financial organizer for the group. However, what the ID relied upon is set out in the Decision:

> [13] Little direct evidence has been provided about Ms. Chen's activities after her arrival. Ms. Chen advised police that she spent six months each year after arriving in Canada living in China, but has provided no confirmation. At the time of her arrest, she stated that she was attempting to start an import/export business, but had earned no income from it. She stated when arrested that she was a student. On December 2, 2008, Ms. Chen received a money transfer of 500,000 Yuan ($91,450 Canadian) from China. She claims this was from her own accumulated savings and has no relation to the offences. She advised police on her arrest that she worked for International Trade partnership in China prior to coming to Canada. Shortly after receiving these funds Ms. Chen purchased a property located at 30 Amanda Dr, Toronto. She states she paid $42,000 as a down payment, using the funds she had transferred from China. She assumed a mortgage requiring payments of $2300/month. She claims her [fiancé] Liang Chen resided with her at her residence, and that he worked as a chef making $2,000 per month. She claims that he contributed to her expenses. She has variously claimed that she had 2 or 3 tenants who paid her about $1,000 per month. This property was later

found to contain equipment from a dismantled grow operation, receipts and real estate papers related to the operations. Ms. Chen leased two vans used in the operations and another was parked at her home. Four other members of the organization had property at her home. It was agreed as fact in her guilty plea that 30 Amanda Drive was a base of operations for the conspiracy and the property was ordered forfeited as offence related property.

[14] Ms. Chen now denies the facts underlying her plea and claims that she was not aware that her property was being used as a base of operations for the organization. She claims that her fiancé Liang Chen, his friend Ben Hong Song who was her tenant were involved in the criminal organization. She claims that two other tenants who resided at her property, but whose names were never known to her, were also involved. She claims that Mr. Chen, Mr. Song and others carried out the criminal activities at her home without her knowledge and that any materials related to the conspiracy located in her house was their property. Materials related to the conspiracy [were] found in almost every room of her home including the two bedrooms where her identification was found and openly displayed in the kitchen. The panel finds her claim that she did not observe anything or hear conversations related to the organization to be implausible. The materials found when her home was searched [were] so widely distributed, that the panel finds it reasonable to believe that Ms. Chen, who was the owner and primary resident, knew or was willfully blind to the nature of the criminal activity based on this material alone. If she were not trusted then this material would not have been in the open. When questioned by a CBSA officer she claimed to have been dragged into the conspiracy by Mr. Chen, and that she had no knowledge of it.

[15] The binding effect of the facts admitted in her guilty plea and conviction contradicts her testimony. Her testimony is also inconsistent with her prior statements and the evidence as a whole, these claims significantly lessen her credibility. When she was first questioned by the police she did not claim that her tenants were involved in the offences and did not name Ben Hong Song as being a tenant, she provided two other names. Now she claims she never knew the names of the other tenants. No other person who was listed as resident at 30 Amanda Drive was arrested in relation to the criminal activity. Identification and property belonging to four other members of the organization was located, but nothing belonging to a Ben Hong Song. Ben Hong Song was never alleged to be involved, arrested or convicted of an offence in relation to this organization. There is no indication that this is an alias of any of the conspirators. Mr. Chen was listed as being resident at a

> different address owned by another member of the organization. The persons present in Ms. Chen's residence when she was detained in September 2009 were not charged as they were simply tenants. The persons who were present operated grow operations in Belleville, Kingston and Brighton. The vans present were used by those persons to operate grow operations. The paperwork and other materials found were related to the grow operations carried out hundreds of kilometers from her home. All of these parties had other residences where they could have kept this material. The evidence as a whole shows that the other persons found in her home when she was arrested were present because she provided it on a regular basis as a base of operations for the organization.

[75] In my view, the Applicant has not, in any material way, established that the ID relies on facts that render the Decision unreasonable. The Decision also describes the following details of the police investigation into the Huang organization:

> [18] In May 2009, in response to public complaints about a number of properties in Belleville police commenced an investigation into indoor grow operations in Belleville and the surrounding area. Police conducted FLIR assessments of the properties and found three omitting high heat levels. Observations were conducted, the hum of ventilation equipment, bright lights in the basements and a strong odor of marijuana was found at two of the properties. Police began conducting surveillance on the properties and observed vehicles leaving the garages of the properties to purchase supplies for ventilation and plumbing equipment. It was learned that the same real estate agent had brokered the purchase of all of the purchases. During the inspections the agent and buyers had focused on the basement and ventilation system. They chose homes that were of high value for purpose of stealth. At one property a neighbour was asked if any police officers resided on the street [and] was told that a number did. The property was listed for sale shortly after this conversation took place.
>
> [19] Mr. Chen was observed in a silver Dodge Caravan registered to him attending at one of the properties in Belleville. He was observed attending a property in Kingston which was later determined to be a marijuana grow operation. Ms. Chen's gold Dodge Caravan was observed attending at two of the properties in Belleville which were being used to grow marijuana. The silver Dodge Caravan registered to Mr. Chen was observed at two of the

Belleville properties and the property in Kingston. Observations of other persons involved in the organization continued and they were observed using a Nissan Quest and a cube van to visit properties in Kingston and Belleville. Title searches [led] to the registered owners of the properties and vehicles involved being identified.

[20] Warrants were issued for the search of five properties in the Belleville/Kingston area based on the evidence gathered. In executing the warrants on June 16, 2009, the police found active grow operations or dismantled grow operations at each of the five properties. In total more than 9,700 marijuana plants were discovered. Extensive modifications had been made to the ventilation, electrical and plumbing systems of the houses in order to grow marijuana. Alterations had been made to steal electricity and water in order to support the operations[.] More than $53,000 in hydro and $14,000 in water was stolen in relation to these properties.

[21] Warrants were also issued for the search of five properties in the Greater Toronto area which had been linked to the criminal organization by observations of persons attending at the grow operations and ownership records for the properties and vehicles. On June 17, 2009, the warrants were executed and another active grow operation containing more than 2700 plants was located at a residence in Brighton, Ontario. The home of the real estate agent in Markham, contained $15,000 in cash and listings for all of the properties involved in the operation, except the one located in Brighton. The investigation had revealed that the homes were carefully chosen. The material located confirmed the investigation. The listings of the known grow operations were marked with notations about the properties[’] suitability for marijuana production, such as light and ventilation. The total assessed values of all the properties purchased was more than $ 3,000,000 with equity of more than $1,000,000. Listings for five rural properties in the Bancroft/Napanee area were located which contained similar notations including the locations of streams. Police initiated an investigation of rural properties purchased by members of the organization.

[22] Police attend[ed] Ms. Chen’s residence at 30 Amanda Drive, Toronto and executed a search warrant. Ms. Chen and Mr. Chen were arrested. A search of the residence revealed equipment from a dismantled grow operation and bags containing marijuana leaves. Computer printouts showing chemical amounts common to the grow operations, receipts for refrigeration and construction equipment items that were identical to items found in the properties used for the grow operations were on the kitchen table.

> Receipts for purchases of equipment used in the operations were located in several locations in the house. Real estate listings and financial documents related to the purchase and sale of properties used as grow operations were located at the residence. The notes of the officers conducting the search specifically mention real estate documents being located in a locked bag in Ms. Chen's locked closet along with her identification, although they do specify which property. She claims that she had only placed documents relating to her purchase of 30 Amanda Place and a condominium in this bag. She acknowledged that other real estate documents were located and claimed that others put them in the bag without her knowledge. She denies that [she had] any knowledge of the material found in her home which related to the grow operations. She was arrested in possession of two cell phones, four more were located in her bedroom. She denies they were hers. Another wallet located in her bedroom contained over $2,300 in cash. A third wallet containing her identification was found in bedroom 2, which contain[ed] material related to the grow operations.
>
> [Footnotes omitted.]

[76] The Decision reveals a full awareness that the Applicant's spouse resided in the same house and that he was a member of the criminal organization and participated in its activities. The Applicant's allegations of reluctance on her part may or may not be true, but any reluctance did not prevent her from participating in the operations of the organization in the ways found by the Member.

[77] The same goes for the cultural factors. Such matters may have a mitigating effect in sentencing, but they do not establish that the Applicant did not, however reluctantly, participate as a member in a criminal organization in the ways found by the Member.

[78] Nor does the short period of time since her arrival in Canada mean that she "could not have been a part of such an organization, let alone being [the] financial organizer and so trusted

as the panel concludes." As the spouse of a member, it is easy to see how the Applicant could be inducted into the organization quickly and play a "significant" role. The Member points out how new recruits are found to replace members who are arrested. See the Decision at para 32.

[79] The basis for the wilful blindness finding is fully explained in the Decision (see para 24) and stands up to scrutiny.

[80] The Applicant alleges not only that the Decision is unreasonable, but that a "careful examination of the testimony and evidence in this case provides no basis for the Board's conclusion" on wilful blindness (emphasis added). This is not convincing.

B. *Fairness Issues*

[81] The Applicant says that the ID "interprets the Applicant's guilty plea as an admission of membership in organized criminality" and that "[t]he fact of convictions itself does not mean the Applicant was a member of a criminal organization," because "[a] charge of criminal organization was not one she pled guilty to." The unfairness alleged is that the "member had determined that the Applicant['s] guilty plea was determinative on the issue."

[82] As the Decision makes clear, the Member specifically states that his findings are "based on the convictions registered against the conspirators and the evidence as a whole which describes the activities of the organization in significant depth," (at para 31) and the Decision as a whole makes it abundantly clear that the Member went far beyond the guilty plea. The Applicant pled guilty to "conspiracy" and there is no evidence to suggest that she could have

been conspiring with anyone else other than members of the Huang criminal organization to which her husband also belonged.

[83] The Applicant also says that the ID found her not credible based upon evidentiary inconsistencies that the Member failed to put to the Applicant so that she would have an opportunity to explain.

[84] By and large, the Decision as a whole relies upon uncontested facts. The Applicant alleges that these facts are insufficient for a finding of membership in a criminal organization. It is an uncontested fact that the Applicant pled guilty to the offences set out above. She cannot contest this and she does not contest the important facts in the evidence upon which the Member relies. She argues that these facts do not support the Member's conclusions and there are other facts that the Member leaves out of his account. The only important material discrepancy is between her guilty plea and her new allegations that she was really not involved in a criminal organization. The disagreement between the parties is over what the evidence, including the guilty plea, establishes. The Applicant was given a full opportunity to make her case on this issue.

C. *The B010 Issues – Section 37 Analysis*

[85] I agree with the Respondent that the Applicant's submissions regarding the application of the Supreme Court of Canada's decision in *B010,* above, do not apply to the facts of this case.

[86] The Supreme Court of Canada's analysis in *B010* involves s 37(1)(b) of the Act and the Court's reading in of the phrase "transnational organized crime."

[87] In dealing with s 37(1)(a) – the provision relied upon by the ID in this case – the Federal Court of Appeal in *Sittampalam*, above, came to the following conclusion:

> [55] I am satisfied that the Judge correctly interpreted paragraph 37(1)(a) of the IRPA when reviewing the Board's findings. I would answer the certified questions as follows:
>
> …
>
> b) The word "organization", as it is used in paragraph 37(1)(a) of the IRPA, is to be given a broad and unrestricted interpretation. While no precise definition can be established here, the factors listed by O'Reilly J. in *Thanaratnam*, *supra*, by the Board member, and possibly others, are helpful when making a determination, but no one of them is an essential element. The structure of criminal organizations is varied, and the Board must be given flexibility to evaluate all of the evidence in the light of the legislative purpose of IRPA to prioritize security in deciding whether a group is an organization for the purpose of paragraph 37(1)(a). The A.K. Kannan gang, as found by the Board and the Judge, fits within this meaning.

[88] The Applicant now alleges as follows:

> 35. It is submitted this is no longer the law. The Supreme Court has now recognized that purposes of the provisions are similar. Both the Criminal Code and the UNCTOC have a direct impact on the interpretation of s. 37(1)(a); they must be read harmoniously, like s. 37(1)(b), with domestic and international criminal law principles. For example, organized criminal group in the UNCTOC means as follows:
>
> > "Organized criminal group" shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or

> other material benefit; (b) "Serious crime" shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty; (c) "Structured group" shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure;
>
> 36. These elements were arguably not present in Mr. Sittampalam's case, or many of the immigration cases brought under [s]. 37 of IRPA. Consequently, if decided again under the new Supreme Court understanding of the section, he may not have been found described. Proving membership in an organized criminal gang should now follow criminal law standards.

[89] This dispute does not arise in the present application. The Applicant has never disputed – whether in her criminal conviction, in the admissibility hearing at the ID, or in this application – that the Huang organization existed or that it was a criminal organization. The only dispute has been with the characterization of her relationship to that organization. And the ID found in the Decision that she would be inadmissible under either reading of s 37(1)(a):

> [39] In the panel's view, it is not necessary to resolve these questions in the present case. The panel would find that Ms. Chen is described in s. 37(1)(a) using either parties reading of *IRPA* as applied to these facts. All of the factual elements contained in the *Criminal code* definition and the *UNCTOC* definition have been established in this case. The Huang criminal organization consisted of three or more persons. The organization existed for a period of twenty months. The organization acted in concert with the aim of committing more than one serious crime. Conspiring to produce marijuana and possession for the purpose are both punishable by more than 4 years imprisonment as required under the *UNCTOC* definition.
>
> [40] The members of the organization sought directly or indirectly to obtain a financial benefit, the organization produced more than three million dollars worth of marijuana plants. The organization was a structured group, it did not form randomly for the immediate commission of an offence. The organization

> carefully planned and carried out numerous offences over a 20 month period, different roles were performed by members who knowingly acted together to produce marijuana on a large scale. The organization had a flexible structure which permitted it to accomplish its purpose. Most of the members had some involvement in maintaining the marijuana production operations, which was the main purpose. Others were only involved in real estate transactions or providing a base of support and vehicles to those persons maintaining the operation, however their roles were significant in facilitating the criminal aim of the organization.
>
> [41] The same reasoning applies to the *Criminal code* definition of criminal organization. The Huang criminal organization was composed of three or more persons in Canada. One of its main purposes and activities was the commission of more than one serious criminal offence. Conspiracy to produce marijuana and possession for the purpose of trafficking both attract a maximum term of imprisonment of more than 5 years and are therefore serious crimes as required by the *Criminal code*. These offences were actually committed by members of the organization and were likely to result in the indirect or direct receipt of a financial benefit by the group and by one or more of the persons who composed the group. The group invested more than one million dollars in purchasing real estate, vehicles and equipment in order to produce more than three million dollars worth of marijuana. The panel finds it reasonable to conclude that the members of the group did so to obtain a financial benefit by trafficking in the marijuana produced. Seven members of the group including Ms. Chen were convicted of both conspiracy to produce marijuana and possession for the purpose of trafficking.

[90] The Applicant has offered no explanation as to how adopting the *Criminal Code* definition of "criminal organization" would change the determination that the Huang organization is a criminal organization. The Member makes specific findings on each of the *Criminal Code* elements. Those findings are reasonable, and the Applicant has not pointed to any that are unreasonable.

D. *Section 36(1)(a)*

[91] Even if I were to find a reviewable error with regard to the ID's s 37(1)(a) findings – which I do not – the Applicant remains inadmissible under s 36(1)(a). She may have avenues open to her to seek permanent residence and a possible avenue of appeal to the Immigration Appeal Division under s 36(1)(a), but these are not matters that affect my decision in this application where I see no grounds for judicial review with regard to the ID's handling of either s 36(1)(a) or s 37(1)(a) of the Act. Also, the Applicant's appeal to the Ontario Court of Appeal, which was pending at the time of the Decision, does not affect the ID's admissibility Decision. The Applicant's convictions were in force when the ID made its Decision and the subsequent setting aside of those convictions would not affect the validity of the ID's Decision. See *Johnson v Canada (Citizenship and Immigration)*, 2008 FC 2 at paras 19-29; *Pascale v Canada (Citizenship and Immigration)*, 2011 FC 881 at paras 45-46. At the time of issuing this Decision, it has also come to my attention that the Ontario Court of Appeal has dismissed the Applicant's appeal from her criminal conviction. See *R v Chen*, 2017 ONCA 946. Although it is not necessary for purposes of the application before me, I think it is worth pointing out that the Ontario Court of Appeal makes findings that are totally supportive of the Decision under review:

> **Were the appellant's guilty pleas informed?**
>
> 44 To be valid, a guilty plea must be voluntary, unequivocal, and informed: *R. v. T. (R.)* (1992), 10 O.R. (3d) 514 (Ont. C.A.), at para. 14. The appellant does not take issue with the first two prongs of this test.
>
> 45 To be informed, the accused must be aware of the nature of the allegations and the effect and consequences of the plea: *T. (R.)*, at para. 14; see also *R. v. Quick*, 2016 ONCA 95, 129 O.R. (3d) 334 (Ont. C.A.).

46 During oral argument, appellant's counsel acknowledged that if we accept Mr. Barrs' evidence that he advised the appellant of potential immigration consequences in that she could be deported if she pleaded guilty, then we could conclude that her guilty pleas were informed.

47 The appellant deposed that Mr. Barrs told her there would be no impact on deportation based on her guilty pleas or sentence.

48 For several reasons, we accept Mr. Barrs' evidence and reject the appellant's evidence on this point.

49 First, certain key aspects of Mr. Barrs' evidence are confirmed by the record or not disputed. For example, he deposed that he obtained a handwritten direction that the appellant signed with the benefit of an interpreter. Although the content is not confirmed, the existence of a direction was placed on the record and is acknowledged by the appellant. Further, although they do not agree with Mr. Barrs about the content of the discussions, both the appellant and her husband acknowledge that the immigration consequences of their pleas were discussed. In addition, Mr. Chen confirms that the direction he signed stated that he would be pleading guilty to certain offences and that by pleading guilty he was admitting his guilt. We find it inconceivable that Mr. Chen's direction contained such an acknowledgment but the appellant's did not.

50 Second, we find Mr. Barrs' assertions that he would not have allowed the appellant to plead guilty had she professed her innocence to be entirely credible and consistent with his standing as a criminal lawyer with 40 years of experience.

51 Third, the appellant deposed that she told Mr. Barrs she was innocent and asked why she had to plead guilty. He allegedly told her that because her husband was involved, and she did not try to stop him, she was guilty. We find this evidence not only self-serving but preposterous. Moreover, we reject the submission that we should view this as a mere misunderstanding based on interpretation issues. There is no evidence to that effect.

52 Fourth, several aspects of the appellant's affidavit and cross-examination are implausible. As but one example, her claim that she purchased the van that was spotted travelling between grow-operations for her tenant because he was her husband's friend's relative and a refugee claimant who could not purchase a vehicle — and her further claims that she loaned the van to other individuals for cash to help pay the monthly payments, not

knowing what they used it for — while acknowledging she drove another vehicle — simply make no sense.

53 Fifth, given that it is acknowledged that immigration consequences of the pleas were discussed, we find the claims by the appellant and her husband that Mr. Barrs told them there would be no impact on deportation or that they would not be deported if the sentence was less than two years implausible.

54 In 2010, at the time of the guilty pleas, the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "IRPA"), provided that a permanent resident would be inadmissible to Canada on grounds of "serious criminality" under s. 36 or "organized criminality" under s. 37. At the time, a permanent resident could appeal one's inadmissibility for a finding of serious criminality under s. 36, if sentenced to a term of imprisonment of less than two years8, but had no right of appeal with respect to a finding of organized criminality.

55 Even assuming Mr. Barrs was unaware of the provisions of s. 37, it is implausible that he would advise a client there would be no immigration consequences if sentenced to a term of imprisonment of less than two years. The only significance of a sentence of imprisonment of less than two years was that a person found inadmissible had a right of appeal. What is more plausible is Mr. Barrs' evidence of what he told the appellant and her husband, that is, the guilty pleas could result in deportation. Mr. Chen is a case in point. Even though he was convicted of conspiracy, immigration authorities apparently proceeded against him under s. 36 only — and, although inadmissible, he succeeded in his appeal on compassionate and humanitarian grounds.

56 Based on the foregoing reasons, where the appellant and her husband's evidence conflict with the evidence of Mr. Barrs, we accept the evidence of Mr. Barrs. We are satisfied that Mr. Barrs informed the appellant that, if she pleaded guilty, there could be immigration consequences in that she could deported. Accordingly, we would not give effect to this ground of appeal.

Was Mr. Barrs in a conflict of interest?

57 We do not accept the appellant's submission that she was deprived of effective assistance of counsel because Mr. Barrs was in a conflict of interest.

58 This issue calls for a fact-specific inquiry. Based on the evidence that we accept, Mr. Barrs met the appellant for the first

time on January 15, 2010. On that day, the trial Crown offered favourable terms for guilty pleas for both the appellant and her husband. The offer was time-limited, and the trial Crown was firm in her position concerning to which offences the parties should plead, the sentences she would seek, and the forfeiture orders that should be made.

59 Mr. Barrs was obliged to convey the Crown's offer to both the appellant and her husband. On Mr. Barrs' evidence, which we accept, both the appellant and her husband acknowledged their guilt, and both wanted to accept the Crown's offer.

60 Given these facts, we are not persuaded that the interests of the appellant and her husband were immediately and directly adverse. Nor are we satisfied that there were factors present that could "reasonably be perceived as affecting judgment": *Wallace v. Canadian Pacific Railway*, 2013 SCC 39, [2013] 2 S.C.R. 649 (S.C.C.), at para. 38, citing D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Carswell, 2012), at p. 968; see also *R. v. Baharloo*, 2017 ONCA 362, 348 C.C.C. (3d) 64 (Ont. C.A.), at para. 36. When Mr. Barrs went to Belleville on January 15, 2010, he did not anticipate representing the appellant or her husband on guilty pleas that day. Having regard to the firm position taken by the trial Crown in her offers and the fact that both accused acknowledged their guilt, we are not persuaded Mr. Barrs was faced with any conflict in his duty of loyalty by representing both the appellant and her husband on their guilty pleas.

Was the appellant deprived of effective assistance of counsel?

61 We also reject the appellant's submission that she was deprived of effective assistance of counsel because Mr. Barrs failed to review with her the Crown's disclosure, failed to obtain her version of events, and failed to advise her of available defences.

62 On Mr. Barrs' evidence, the appellant was conversant with the case against her, and he advised her that the Crown had "a strong case" such that it was his opinion she would be committed for trial following a preliminary inquiry. Based on our review of the fresh evidence record, this was a reasonable assessment. Moreover, in agreeing to plead guilty, the appellant acknowledged that she was guilty of the offences forming the subject matter of the Crown's offer. For the reasons outlined above, where the appellant's evidence differs from that of Mr. Barrs, we prefer Mr. Barrs' evidence. In our view, the appellant has failed to

> establish that any shortcomings in Mr. Barrs' representation give rise to a miscarriage of justice. See *R. v. B. (G.D.)*, 2000 SCC 22, [2000] 1 S.C.R. 520 (S.C.C.), at paras. 26-29.
>
> **Did the facts read in by the Crown on the guilty pleas support findings of guilt?**
>
> 63 Although the facts read in on the guilty pleas were sparse in terms of connecting the appellant to the conspiracy to produce marijuana, and, in turn, the other offences relating to the grow-ops, we are satisfied they were sufficient, in combination with the appellant's guilty pleas, to support findings of guilt. In particular, the following assertions together with the appellant's guilty pleas established the appellant was involved in the conspiracy and was guilty of the other offences arising from the grow schemes:
>
> - the appellant owned 30 Amanda Drive;
> - 30 Amanda Drive was the base of operations for the conspirators, some of whom owned and actively operated several sophisticated marijuana grow houses, involving significant thefts of water and electricity and about 24,000 plants;
> - 30 Amanda Drive housed vehicles seen during the course of police surveillance, including a vehicle owned by the appellant; and
> - receipts for building materials associated with grow schemes were found in the bedroom closet of the appellant and her husband at 30 Amanda Drive.
>
> 64 Viewed in combination with the appellant's guilty pleas, the facts read in established that, even though she was never seen at any of the grow-operations, the appellant knew of the grow-operations and what they entailed and provided assistance to those who actively operated them.

E. *Certification*

[92] The parties have raised no question for certification and the Court agrees.

JUDGMENT IN IMM-1710-17

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Hadayt Nazami	FOR THE APPLICANT
Christopher Ezrin	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Jackman, Nazami & Associates Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT