Federal Court  Cour fédérale

Date: 20180419

Docket: IMM-1542-17

Citation: 2018 FC 422

Ottawa, Ontario, April 19, 2018

PRESENT: THE CHIEF JUSTICE

BETWEEN:

THOMAS WILLIAM MCALPIN

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Mr. McAlpin is inadmissible to Canada on grounds of serious criminality. In recommending that he be referred to an admissibility hearing, an officer employed with the Canada Border Services Agency [**CBSA**] placed significant weight on several findings. These included the following:

- the offences for which Mr. McAlpin was convicted have a very significant impact on society;
- the presence of several loaded firearms on his premises is indicative of the potential for harm to other persons in society;
- his most recent convictions were for offences that were committed while he was on bail, and involved very large amounts of drugs; and
- his potential for rehabilitation is low.

[2] In my view, it was not unreasonable for the officer to have reached and then placed significant weight on the foregoing findings. This is so despite the fact that the officer did not refer to information from certain sources which described Mr. McAlpin's potential for rehabilitation in more positive terms.

[3] Having made the foregoing findings, it was also not unreasonable for the officer to have made no mention, in the recommendation section of his assessment, of the various humanitarian and compassionate [**H&C**] considerations that Mr. McAlpin had drawn to the officer's attention. It is settled law that the officer was under no obligation to take those considerations into account in exercising his discretion to refer Mr. McAlpin for an admissibility hearing, particularly given that he is inadmissible to Canada on grounds of serious criminality.

[4] However, in the course of his assessment, the officer also relied on several withdrawn charges in reaching the conclusion that Mr. McAlpin "has a significant criminal history that

spans the past thirty five years with few gaps." The officer then appeared to place significant weight on that finding in recommending that Mr. McAlpin be referred for an admissibility hearing. That was unreasonable.

[5] In turn, it was unreasonable for a delegate of the Respondent Minister [**the Delegate**] to concur with the officer's assessment and recommendation, and to state that it was "well founded in fact and law."

[6] In the context of the exercise of the Minister's discretion to refer someone who is inadmissible to Canada to an admissibility hearing, it may be reasonably open to the Minister or his delegate to place significant weight on the number of interactions that an inadmissible person has had with the law. Given the priority Parliament has placed on public safety and security (*Medovarski v Canada (Citizenship and Immigration)*, 2005 SCC 51, at para 10 [***Medovarski***]; *Sharma v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 319, at para 23 [***Sharma***]), this may be entirely appropriate. Whether it is so in a particular case will depend on the circumstances, including the nature and frequency of those interactions, any crimes for which the person in question has been convicted, the extent to which the individual may have displayed wanton disregard of, or impunity in relation to, Canada's laws, and the nature of any H&C considerations that he or she may have raised.

[7] However, interactions with the law that do not result in convictions cannot be relied upon to support a finding of criminal history. It was therefore unreasonable for the Minister's delegate to have placed significant weight on Mr. McAlpin's past interactions with the law, in making

that finding and then partially relying on it to recommend Mr. McAlpin for an admissibility hearing.

[8] Accordingly, the decision of the Delegate to recommend Mr. McAlpin for an admissibility hearing will be set aside and remitted to the Minister for redetermination.

II. **Background**

[9] Mr. McAlpin is a citizen of the United Kingdom. He has been a permanent resident in Canada since shortly after his arrival in this country from Northern Ireland with his parents over 60 years ago. At that time, he was six years of age. He has not returned to the United Kingdom since then.

[10] He asserts that he has no connection to any country other than Canada, where his six siblings and their many children live and where his extended social network is located.

[11] He is not married and does not have any children or dependents.

[12] It is common ground between the parties that Mr. McAlpin has various health issues. According to the evidence in the certified tribunal record [**CTR**], in 1985 he was involved in an incident with a violent patient at the psychiatric hospital where he worked. As a result of that incident, he was left with severe neck and back injuries, as well as mental trauma. He maintains that these conditions continue to impact him today and have prevented him from working since they occurred. In the intervening period, he has remained involved with psychiatric treatment

and continues to suffer from Post-Traumatic Stress Disorder, anxiety, and depression. In addition, his medical history includes brain tumours, “heart issues,” and breathing problems.

[13] Mr. McAlpin further asserts that if he is deported to the United Kingdom, he will not be eligible for any health coverage for at least six months.

[14] In 2010, Mr. McAlpin was arrested and charged with twenty offences. In April 2014, while on bail awaiting his trial, he was charged with four new offences.

[15] In January 2016, he pleaded guilty to two offences pertaining to the 2010 charges – production of a substance and possession of a loaded firearm. In April of that same year, he pleaded guilty to two additional offences, in relation to the 2014 charges – production of a substance and possession for the purposes of trafficking. He was given concurrent sentences of two years, six months, six months and three months in connection with the four offences, respectively.

[16] In the sentencing decision, it was noted that Mr. McAlpin was apparently selling marijuana on a large scale, and that this is “a significant problem in our community and particularly affects the youth.”

[17] Mr. McAlpin’s criminal record also includes five other offences for which he was convicted, namely Failing to Remain at the Scene of an Accident (1975), Assault (1983), Driving

While Ability Impaired (1987), Mischief under $5000 (1996) and Failure to Stop at the Scene of an Accident (1997).

III. **The decision under review**

[18] The decision under review is the decision of the Delegate, dated August 25, 2016, to refer Mr. McAlpin for an admissibility hearing [**the Decision**].

[19] In the Decision, the Delegate made a few brief observations regarding Mr. McAlpin's immigration history, his lack of dependents in Canada, the fact that his siblings all live in this country, the fact that he completed a Bachelor's degree, and the fact that he has not worked since 1985. The Delegate then noted his recent convictions and the corresponding sentence that he received. After stating "see the notes of the officer on file," he observed that the officer's report was "well founded in fact and law." Having made that determination, he proceeded to express agreement with the officer's recommendation to refer Mr. McAlpin to an admissibility hearing.

[20] It is common ground between the parties that the officer's assessment forms part of the Decision that is subject to review in this proceeding. In that assessment, dated August 17, 2016, the officer briefly summarized Mr. McAlpin's family situation in Canada, described the circumstances of his four most recent convictions, briefly noted the H&C considerations that Mr. McAlpin had identified, assessed his potential for rehabilitation, referred to the fact that he had "many separate withdrawn charges" since 1975, and then provided the rationale for the recommendation that he be referred to an admissibility hearing. In the course of providing that

rationale, he observed that Mr. McAlpin "has a significant criminal history that spans the past thirty five years with few gaps."

IV. **Relevant Legislation**

[21] Mr. McAlpin is inadmissible to Canada pursuant to paragraph 36(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 **[IRPA]**. That provision states:

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

[22] The report that was made by the officer and relied upon by the Delegate was prepared pursuant to subs. 44(1) of the IRPA, which provides as follows:

Loss of Status and Removal	**Perte de statut et renvoi**
Report on Inadmissibility	**Constat de l'interdiction de territoire**
Preparation of report	**Rapport d'interdiction de territoire**
44 (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report	44 (1) S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport

setting out the relevant facts, which report shall be transmitted to the Minister.	circonstancié, qu'il transmet au ministre.

[23] The decision by the Delegate that is the subject of this judicial review was made pursuant to subs. 44(2) of the IRPA. That provision states:

Referral or removal order	**Suivi**
44 (2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.	44 (2) S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi.

[24] The objectives set forth in the IRPA with respect to immigration include the following:

Objectives — immigration	**Objet en matière d'immigration**
3 (1) The objectives of this Act with respect to immigration are	**3 (1)** En matière d'immigration, la présente loi a pour objet :
[…]	[…]
(h) to protect public health and safety and to maintain the security of Canadian society;	**h)** de protéger la santé et la sécurité publiques et de garantir la sécurité de la société canadienne;
(i) to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are	**i)** de promouvoir, à l'échelle internationale, la justice et la sécurité par le respect des droits de la personne et l'interdiction de territoire aux

criminals or security risks;	personnes qui sont des criminels ou constituent un danger pour la sécurité;
[…]	[…]

V. **Preliminary Issues**

[25] The Minister submits that this Application is moot. In the alternative, the Minister asserts that the doctrine of *res judicata* applies. In the further alternative, the Minister states that this Application amounts to an impermissible collateral attack on a subsequent decision of the Delegate, in respect of which a separate Application for Leave and for Judicial Review was denied by this Court.

[26] For the reasons set forth below, I do not accept these positions.

A. *Mootness*

[27] The Minister submits that this Application is moot because the Decision was superseded by a subsequent referral decision of the Delegate, dated April 3, 2017 [**the Reconsideration Decision**]. The latter decision was made after Mr. McAlpin made additional submissions in support of a request for reconsideration of the Decision.

[28] The Minister maintains that, in making the Reconsideration Decision, the Delegate relied on the exact same reasons that were set forth in the initial Decision, but provided additional reasons and came to a new decision to refer the case to an admissibility hearing. Given that Mr. McAlpin’s Application for Leave and for Judicial Review in respect of the Reconsideration

Decision was denied by this Court, the Respondent submits that an independent basis for a referral of Mr. McAlpin to an admissibility hearing now exists, regardless of what I may decide in this Application.

[29] The general test for mootness was stated in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342, at 353, as follows:

> The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

[30] With respect to the latter circumstances, three principal factors to be considered were identified. Those are: (i) whether an adversarial relationship continues to exist between the parties, (ii) the need to promote judicial economy, and (iii) whether proceeding to determine the merits of the matter might be viewed as intruding into the role of the legislative branch: *Borowski*, above, at 358-362.

[31] I agree with the Minister that the Delegate's Reconsideration Decision appears to have been intended to entirely supersede his initial Decision. I reach that conclusion based on the fact that the same officer who made the initial recommendation to refer Mr. McAlpin to an admissibility hearing simply added to his initial assessment, and then forwarded to the Delegate,

his expanded assessment that included the entire initial assessment. The Delegate then wrote in section 11 of the assessment form, under the heading "Decision of the Minister's Delegate," the words "I concur with the Officer's recommendation."

[32] My conclusion on this point is reinforced by the fact that the letter the Delegate then sent to Mr. McAlpin stated, among other things, that "the circumstances" had been "reconsidered," and it had been decided to refer Mr. McAlpin to an admissibility hearing "at this time." These words suggest that a new decision, which superseded the initial Decision, had been made.

[33] Nevertheless, there is no evidence to demonstrate that the Delegate actually made a new referral to the Immigration Division, pursuant to subs. 44(2) of the IRPA. The only referral in the CTR is that which was made following the initial Decision. That referral is dated August 25, 2016, which is before the Reconsideration Decision was made. This apparent oversight is relevant because the Respondent asserts that the setting aside of the initial Decision would lead to an absurd result. The Respondent asserts that this is so because the Reconsideration Decision would still stand as a basis for an admissibility hearing.

[34] Had a second formal referral been made, I would have agreed that this Application would be moot, because "the Reconsideration Decision which left the Original Decision intake would remain in effect": *Fairhurst v Unifor Local 114*, 2017 FCA 152, at para 16; *Moazeni v Canada (Citizenship and Immigration)*, 2008 FC 360, at para 10. However, if, as I must assume, only one formal referral to the Immigration Division was made, then this Application is not moot. This is because granting Mr. McAlpin's request to set aside that single formal referral would appear to

deprive the Immigration Division of the only jurisdiction it currently seems to have to conduct the admissibility hearing: *Immigration Division Rules*, SOR/2002-229, subs. 3(d). For Mr. McAlpin, a decision by this Court to grant that relief would therefore have a very real effect: *Borowski*, above, at 353.

[35] In any event, even if a second formal referral does exist or could be assumed to be a "mere formality" that would quickly be made in the event that I were to set aside the initial referral Decision dated August 25, 2016, I consider that it would be appropriate to exercise my discretion to hear this Application on its merits. This is because there is an ongoing adversarial relationship between the parties that would be nurtured by the collateral consequences of the outcome of this Application: *Borowski*, above, at 353.

[36] Moreover, the particular facts of this case are such that it would be in the interest of justice for this Application to be heard on its merits: *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62, at para 17. In this regard, it appears to be common ground between the parties that there were potentially significant documents before the Delegate that were not included in the CTR that was before this Court when Mr. McAlpin's Application for Leave and for Judicial Review of the Reconsideration Decision was denied. Mr. McAlpin maintains that because he was incarcerated at the time he was given the opportunity to make submissions to the CBSA, he was unaware of exactly what had been sent to the CBSA on his behalf, and what the CBSA had obtained independently, including his presentencing report and local police reports.

[37] In these circumstances, I agree with Mr. McAlpin that a decision by this Court not to hear the current Application on the ground of mootness would deprive him of the only practical opportunity that he has had to argue the merits of his case on the basis of the entire record that was before the Delegate.

[38] I will simply add in passing that by hearing this Application on its merits, the Court would neither depart from its traditional role as an adjudicator nor intrude upon the legislative or executive sphere: *Borowski*, above at 362.

B. *Res judicata*

[39] In the alternative, the Respondent maintains that the doctrine of *res judicata* applies to this proceeding and precludes the re-litigation of the same cause of action that was effectively adjudicated by this Court when Mr. McAlpin's Application for Leave to apply for Judicial Review of the Reconsideration Decision was denied. I disagree.

[40] The Respondent submits that Mr. McAlpin raised the exact same issues in the Applications that he filed before this Court in respect of both the initial Decision and the Reconsideration Decision.

[41] I accept that the issues that have been raised in this Application were all raised in the Application that he made to this Court in respect of the Reconsideration Decision. However, that is not necessarily dispositive of the matter.

[42] The doctrine of *res judicata* was succinctly summarized as follows by Justice Fothergill in *Singh v Canada (Citizenship and Immigration)*, 2015 FC 1055, at paras 22-24:

> [22] *Res judicata* precludes the re-litigation of both the same cause of action (cause of action estoppel) and the same issues or material facts (issue estoppel) ... [citation omitted]
>
> [23] Issue estoppel involves the application of a two-part test. The decision-maker must first determine whether the three preconditions of issue estoppel are met, as described in *Angle v Canada (Minister of National Revenue - M.N.R.)*, [1975] 2 SCR 248 at para 3:
>
> a. the same question has been decided;
>
> b. the decision said to create the estoppel was final; and
>
> c. the parties to the previous decision or their privies are the same as the parties to the proceeding in which the estoppel is raised.
>
> [24] Second, the decision-maker must consider whether the application of issue estoppel or *res judicata* would lead to an injustice … [citations omitted.]

[43] In my view, the three preconditions to the application of the doctrine of *res judicata* in this case are satisfied: the Delegate essentially decided the same question, the Delegate's decision became final when this Court denied Mr. McAlpin's Application for Leave in respect of the Reconsideration Decision, and the parties to this proceeding are the same as the parties to the prior proceeding.

[44] However, for the reason discussed at paragraphs 36-37 of these reasons, I consider that the application of the doctrine of *res judicata* in this particular case would lead to an injustice. On the particular facts of this case, I also consider that it would not be appropriate to apply that

doctrine in circumstances where this Court did not provide any reasons in finally disposing of the parties' dispute in relation to the Reconsideration Decision. In the absence of such reasons, the basis for this Court's decision to deny Leave in respect of that decision is not entirely clear. In this context, it behooves the Court to be very cautious in consideration whether to apply the doctrine of *res judicata*: *Burton v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 727, at para 21. Conceptually, it is possible that the decision to deny Leave was made on the basis that no fairly arguable issue had been raised in respect of the Delegate's concurrence with the officer's assessment of the new information that had been provided by Mr. McAlpin, in support of his reconsideration request. Accordingly, it would not be appropriate to rely on that decision as the basis for invoking the *res judicata* doctrine: *Figueroa v Canada* (*Public Safety and Emergency Preparedness)*, 2016 FC 1396, at para 46.

C. *Collateral attack*

[45] In the further alternative, the Respondent asserts that Mr. McAlpin's attempt to have the initial Decision overturned after this Court denied his attempt to have the Reconsideration Decision set aside amounts to an impermissible collateral attack. Relying upon *Huang v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 28, at para 80 [***Huang***], the Respondent maintains that in cases where "several administrative decisions are related, one cannot challenge an initial decision in order to indirectly invalidate a subsequent decision." As with its mootness argument, the Respondent adds that it would create an absurdity to allow the initial Decision to be challenged, where the Reconsideration Decision would continue to stand.

[46] The latter position has already been addressed at paragraphs 33-34 of these reasons above.

[47] As to the Respondent's reliance on *Huang*, above, that case is distinguishable. In brief, the applicant there challenged a ministerial delegate's decision to refer her case to the Immigration Division for an admissibility hearing, but she did not challenge the subsequent decisions made by that division and then by the Immigration Appeal Division. Justice Diner ruled that her challenge of the delegate's decision amounted to an impermissible collateral attack on the latter two decisions: *Huang*, above, at paras 80-81.

[48] By contrast, Mr. McAlpin did in fact challenge the subsequent decision in question, namely, the Reconsideration Decision. He did so on April 6, 2017, two days after challenging the initial Decision. However, his Application in the present proceeding was not perfected until well after his Application in respect of the Reconsideration Decision was perfected. As a result, the latter Application proceeded on a more expeditious time path and was rejected approximately two months before Leave was granted in respect of this Application. In these circumstances, Mr. McAlpin's challenge of the initial Decision cannot be said to constitute an impermissible collateral attack on the Reconsideration Decision.

[49] On the contrary, Mr. McAlpin has every right to challenge both decisions, which are considered to be distinct: *Canada (Human Resources Development) v Hogervorst*, 2007 FCA 41, at para 20; *Vidéotron Télécom Ltée v Communications, Energy and Paperworkers Union of*

Canada, 2005 FCA 90, at paras 11-14; *Soimu v Canada (Secretary of State)*, [1994] FCJ No 1330, at para 10.

[50] Given the conclusions that I have reached in respect of the preliminary issues raised by the Respondent, I will turn now to the merits of this Application.

VI. **Issue and standard of review**

[51] As counsel to Mr. McAlpin acknowledged during the hearing of this Application, the issues that he has raised in respect of the initial Decision can be conveniently summarized into the single issue of whether that exercise of the Delegate's discretion to refer Mr. McAlpin to an admissibility hearing was reasonable. It is common ground between the parties that this exercise of discretion is reviewable on a standard of reasonableness: *Kidd v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 1044, at para 17 [***Kidd***]; *Melendez v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 1363, at para 11 [***Melendez***].

[52] In assessing whether a decision is reasonable, the focus of the Court is upon whether the decision is appropriately intelligible, transparent and justified. In this regard, the Court's task will be to assess whether it is able to understand why the decision was made and to ascertain whether the decision falls "within a range of acceptable outcomes which are defensible in respect of the facts and the law": *Dunsmuir v New Brunswick*, 2008 SCC 9, at para 47 [***Dunsmuir***]; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, at para 16 [***Newfoundland Nurses***].

[53] Given the highly fact-based nature of a decision by a ministerial delegate to refer or to not refer someone to an admissibility hearing, such decisions will ordinarily attract significant deference. Stated differently, such decisions will typically attract "a wide margin of appreciation": *Paradis Honey Ltd v Canada*, 2015 FCA 89, at paras 135-137, leave to appeal to SCC refused, 36471 (29 October 2015); *Canada (Attorney General) v Boogaard*, 2015 FCA 150**,** at paras 35-53, leave to appeal to SCC refused, 36621 (7 April 2016). Significant deference is also warranted in light of the fact that the exercise of a ministerial delegate's discretion not to refer someone for an admissibility hearing, after having determined that an officer's recommendation in favour of a referral is "well-founded," would be exceptional in nature. In my view, this follows from the analysis at paragraphs 58-69 below.

VII. **Analysis**

[54] Mr. McAlpin submits that the Decision to refer him to an admissibility hearing was unreasonable because of several errors in the officer's assessment, upon which the Delegate relied. In particular, Mr. McAlpin submits that the officer's assessment was unreasonable because the officer:

- simply listed some of the H&C factors present in his case, without undertaking any consideration or balancing of those factors, and without taking any account of other compelling H&C considerations that he had identified;

- failed to take into account important information in relation to his work history;

- conducted an assessment of his potential for rehabilitation that did not include important information that was before the officer; and

- relied on withdrawn charges in concluding that Mr. McAlpin has a long criminal history and is a serious criminal.

[55] I will consider each of the foregoing submissions in order below.

A. *The Officer's treatment of the H&C factors put forth by Mr. McAlpin*

(1) General principles

[56] As recognized by both of the parties to this Application, there is divergence in this Court's jurisprudence regarding the scope of the discretion that Ministerial delegates have in deciding whether to refer an individual for an admissibility hearing pursuant to subs. 44(2) of the IRPA.

[57] In *Melendez*, above, Justice Boswell provided a very helpful summary of that divergence. He then arrived at the following conclusions at para 34 of his decision:

> 1. There is conflicting case law as to whether an immigration officer has any discretion under subsection 44(1) of the *IRPA* beyond that of simply ascertaining and reporting the basic facts which underlie an opinion that a permanent resident in Canada is inadmissible.
>
> 2. Nevertheless, the jurisprudence and the Manual do suggest that a Minister's delegate has a limited discretion, when deciding whether to refer a report of inadmissibility to the Immigration Division pursuant to subsection 44(2) or to issue a warning letter, to consider H&C factors, including the best interests of a child, at

> least in cases where a permanent resident, as opposed to a foreign national, is concerned.
>
> 3. Although the Minister's delegate has discretion to consider such factors, there is no obligation or duty to do so.
>
> 4. However, where H&C factors are presented to a delegate of the Minister, the delegate's consideration of the H&C factors should be reasonable in the circumstances of the case, and in cases where a delegate rejects such factors, the reasons for rejection should be stated, even if only briefly.
>
> 5. The consideration of H&C factors by the Minister's delegate in respect of a permanent resident need not be, in my view, as extensive as or comparable to an analysis of such factors under subsection 25(1) of the *IRPA* in order to be reasonable; it need not be so because that would usurp the role and purpose of that subsection.

[58] Shortly after Justice Boswell's decision was issued, the Federal Court of Appeal [**FCA**] addressed the scope of the discretion conferred upon immigration officers and ministerial delegates under subss. 44(1) and (2) of the IRPA, respectively, in *Sharma*, above. There, the Court observed that such discretion is "very limited," and is "dependent on a number of factors, including the alleged grounds of inadmissibility and whether the person concerned is a permanent resident or a foreign national." In any event, the Court stated that "officers and the Minister or his delegate must always be mindful of Parliament's intention to make security a top priority (see paragraphs 3(1)(h) and (i) of the IRPA)": *Sharma*, above, at paras 23-24.

[59] However, with respect to inadmissibility on grounds set forth in s. 36 of the IRPA (namely, "serious criminality" and "criminality"), the FCA stated that the following rationale offered by that Court in *Cha v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126

[***Cha***], which concerned a foreign national, would appear to apply with equal force to permanent residents:

> [37] It cannot be, in my view, that Parliament would have in sections 36 and 44 of the Act spent so much effort defining objective circumstances in which persons who commit certain well defined offences in Canada are to be removed, to then grant the immigration officer or the Minister's delegate the option to keep these persons in Canada for reasons other than those contemplated by the Act and the Regulations. It is not the function of the immigration officer, when deciding whether or not to prepare a report on inadmissibility based on paragraph 36(2)(a) grounds, or the function of the Minister's delegate when he acts on a report, to deal with matters described in sections 25 (H&C considerations) and 112 (Pre-Removal Assessment Risk) of the Act […]

Sharma, above, at para 23, emphasis added.

[60] The reference in the passage quoted above to paragraph 36(2)(a) of the IRPA was made because the applicant in that case was inadmissible under that provision, namely, on grounds of "criminality."

[61] In my view, the last sentence in that passage applies with greater force to the grounds of inadmissibility contemplated by subs. 36(1), which was at play in *Sharma*, above. That is to say, if it can be inferred that Parliament could not have intended immigration officers and ministerial delegates to have the discretion to take H&C considerations into account in the context of alleged inadmissibility on grounds of "criminality," then the basis for drawing that inference would be even stronger in the context of alleged "serious criminality."

[62] The comments that I have reproduced at paragraphs 58-59 above from *Sharma* were *obiter dictum* because the FCA proceeded to observe that the applicant's submissions regarding

the scope of discretion contemplated by subs. 44(1) of the IRPA were academic. It reached that conclusion after determining that the officer in that case had in fact considered the various personal or mitigating factors that had been raised by the applicant: *Sharma*, above at paras 47-48. As a result, the FCA considered it to be preferable to leave for another day the determination of "the precise extent of an officer's discretion": *Sharma*, above, at para 48. I pause to note in passing that the FCA in *Cha*, above, at para 41, took the same position.

[63] Notwithstanding the foregoing, the nature and tenor of the observations made by the FCA in *Cha*, above, and *Sharma*, above is such that they ought to prevail over any inconsistent jurisprudence of this Court.

[64] It is also relevant to keep in mind that a person who is inadmissible under s. 36 is still eligible to make an application on H&C grounds under s. 25 of the IRPA: *Sharma*, above, at para 37; *Faci v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 693, at para 25. This has a bearing on whether H&C considerations should be read into other provisions of the IRPA: *Canada (Citizenship and Immigration) v Bermudez*, 2016 FCA 131, at para 38.

[65] Moreover, it is important to remain cognisant of the very different focuses of ss. 25 and 36 of the IRPA. Whereas the former is focused on the individuals who may advance H&C considerations as a basis for being relieved of the general requirement to apply for permanent residence from outside Canada, the latter is focused on public safety and security: *Medovarski*, above, at paras 9-10. As a result, it would ordinarily be reasonably open to an officer or a ministerial delegate to prioritize public safety and security, even to the point of entirely

refraining from taking H&C factors into account in stating the rationale for a decision to refer someone for an admissibility hearing. This is particularly so in the case of someone who is or appears to be inadmissible on grounds of "serious criminality." Indeed, this follows from the fact that there is no obligation on an officer or a ministerial delegate to consider H&C factors in exercising the discretion that is contemplated by subss. 44(1) and (2) of the IRPA: *Melendez*, above, at para 34.

[66] The very restrictive approach that the FCA in *Sharma*, above, took in commenting upon the scope of the discretion contemplated by subss. 44(1) and (2) of the IRPA in a case involving serious criminality is consistent with the approach taken by Citizenship and Immigration Canada in its manual entitled *ENF 5 Writing 44(1) Reports* [**ENF 5**]. Although that manual is not binding on the Court, it can be helpful in determining the reasonableness of the approach taken by an officer or a ministerial delegate to the exercise of the discretion contemplated by subss. 44(1) and (2), respectively.

[67] In s. 8.1 of ENF 5, it is noted that "the scope of discretion varies depending on the inadmissibility grounds alleged, whether the person concerned is a permanent resident or a foreign national, and whether the report is to be referred to the Immigration Division." With respect to "criminal" inadmissibility, the document states that the scope of an officer's discretion "will be narrower" than may otherwise be the case (s. 8.3). In exercising that discretion, officers are instructed to consider six factors, none of which include H&C considerations. Instead, those factors relate to the person's criminal history, the sentence that was imposed, the maximum sentence that was available, the circumstances of the particular incident and whether the

conviction involved crime of violence or drugs. In addition, "in minor criminality cases," officers are instructed to consider whether a decision on rehabilitation is imminent and likely to be favourable (emphasis added).

[68] With respect to alleged inadmissibility on grounds involving security (s. 34 of the IRPA), violation of human or international rights (s. 35), serious criminality (subs. 36(1)) or organized criminality (s. 37), ENF 5 states that officers may choose not to prepare a report only "in rare instances" (s. 8.3). As a result, Mr. McAlpin's suggestion that he had a legitimate expectation that his H&C considerations would be considered by the officer cannot be maintained.

[69] The approach taken in ENF 5 is broadly consistent with the approach taken in the manual entitled *ENF 6 Review of reports under subsection A44(1)* [**ENF 6**]. After identifying a range of considerations, including H&C factors that may be taken into account by ministerial delegates exercising their discretion under subs. 44(2), the document addresses the factors that should be considered in criminal cases. Those factors do not include H&C considerations. Rather, they closely track the factors in ENF 5 that are discussed in the penultimate sentence of paragraph 67 above.

[70] Having regard to all of the foregoing, and in particular the guidance that the FCA has provided in *Sharma*, above, I consider it necessary and appropriate to update and elaborate upon the conclusions reached by Justice Boswell in respect of the current state of the jurisprudence concerning the scope of the discretion contemplated by subss. 44(1) and (2) in cases involving allegations of "criminality" and "serious criminality" on the part of permanent residents.

Maintaining the framework adopted by Justice Boswell, I would summarize that jurisprudence as follows:

> 1. In cases involving allegations of criminality or serious criminality on the part of permanent residents, there is conflicting case law as to whether immigration officers and ministerial delegates have any discretion under subss. 44(1) and (2) of the IRPA, respectively, beyond that of simply ascertaining and reporting the basic facts which underlie an opinion that a permanent resident in Canada is inadmissible, or that an officer's report is well founded.
>
> 2. In any event, any discretion to consider H&C factors under subss. 44(1) and (2) in such cases is very limited, if it exists at all.
>
> 3. Although an officer or a ministerial delegate may have very limited discretion to consider H&C factors in such cases, there is no general obligation or duty to do so.
>
> 4. However, where H&C factors are considered by an officer or by a ministerial delegate in explaining the rationale for a decision that is made under subs. 44(1) or (2), the assessment of those factors should be reasonable, having regard to the circumstances of the case. Where those factors are rejected, an explanation should be provided, even if only very brief in nature.
>
> 5. In this particular context, a reasonable assessment is one that at least takes account of the most important H&C factors that have been identified by the person who is alleged to be inadmissible, even only by listing those factors, to demonstrate that they were considered. A failure to mention any important H&C factors that have been identified, when purporting to take account of the H&C factors that have been raised, may well be unreasonable.

[71] Principles 3-5 immediately above warrant elaboration.

[72] With respect to principle 3, the absence of any obligation on an officer or a ministerial delegate to consider H&C factors in exercising their discretion under subss. 44(1) and (2) has been recognized in a variety of different types of cases. These include serious criminality (e.g., *Faci*, above, at para 63; *Kidd*, above, at paras 33-34; *Spencer v Canada (Citizenship and*

Immigration), 2006 FC 990, at para 15); organized criminality (e.g., *Nagalingam v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 1411, at para 35); and the failure to leave Canada at the end of the period authorized for the applicant's stay in this country (e.g. *Rosenberry v Canada (Citizenship and Immigration)*, 2010 FC 882, at para 36). In at least two of those cases, the individuals in question came to Canada as a child: *Faci*, above, and *Kidd*, above.

[73] However, I am not aware of any cases in which the Court has affirmed the absence of such an obligation in connection with a person who became a permanent resident as a young child and is alleged to be inadmissible based on one or two convictions that fall at the lower end of the spectrum of offences contemplated by subs. 36(2) of the IRPA.

[74] In my view, the H&C considerations raised by such individuals may be *prima facie* so compelling as to give rise to an obligation to consider them, when the actual or apparent basis for inadmissibility is one or two convictions of the type described immediately above. Stated differently, the *prima facie* compelling nature of H&C considerations, relative to the less serious nature of the offence(s) that I have described, may be such as to render unreasonable any failure to consider them in exercising discretion under s. 44. Whether this would be so would depend on the nature of those considerations, as well as on the nature of countervailing considerations, such as those identified in ENF 5 and discussed at paragraph 67 above, and whether the person has a long history of interactions with the law.

[75] In this context, I consider *prima facie* compelling H&C considerations to include an inability to speak the language of one's country of origin, the absence of any family in that

jurisdiction, the personal exposure to severe trauma as a child in that jurisdiction, a terminal illness, and the demonstrated unavailability of medical assistance to address a very serious health issue.

[76] I will pause to note that in the absence of any evidence that Mr. McAlpin is terminally ill, I do not consider the H&C considerations he has advanced to be "compelling." In any event, given that he is inadmissible on grounds of "serious criminality," as opposed to the lower end of the "criminality" contemplated by subsection 36(2), the officer and the Delegate were under no obligation to consider those considerations.

[77] Turning to principles 4 and 5 set forth at paragraph 70 above, it bears underscoring that these apply to the stated rationale for a decision made under subss. 44(1) or (2). In my view, if an officer or a ministerial delegate does not refer to any H&C considerations in that part of their report or assessment, it cannot reasonably be claimed that such considerations were taken into account in reaching the opinion contemplated in those provisions. This is so even if such considerations are listed in the earlier part of the officer's assessment form that requires H&C factors to be identified, as happened in this case.

[78] With respect to the nature of the brief explanation that should be provided where H&C considerations are in fact taken into account in the stated rationale for the opinion reached by an officer or a ministerial delegate, a good example is what was provided by the officer upon reconsidering Mr. McAlpin's situation. In his expanded decision, the officer briefly mentioned the principal H&C factors that had been identified by Mr. McAlpin, including the length of time

that he has been in Canada, his medical conditions and the fact that he is elderly. However, the officer stated that these considerations and certain others that he explicitly mentioned "do not overcome the seriousness of the crimes that Mr. McAlpin was convicted" of committing. In the context of the "very limited" discretion that an officer may have to take H&C considerations into account, I do not consider this type of treatment of such considerations by an officer to be unreasonable.

(2) Application of the general principles to this case

[79] Applying the foregoing principles to this case, I find that the Delegate did not err in the manner that Mr. McAlpin has alleged. That is to say, the Delegate's decision was not unreasonable based on the fact that he refrained from considering and balancing all of the H&C factors that Mr. McAlpin had identified, including the most compelling ones, which Mr. McAlpin submits were completely ignored. In this latter regard, Mr. McAlpin states that the officer failed to take into account compelling evidence that his removal to Northern Ireland would have a devastating effect on his mental and physical health.

[80] The Delegate and the officer were under no obligation to consider and balance any of the H&C considerations that Mr. McAlpin had identified: *Melendez,* above, at para 34. In my view, this is particularly so because Mr. McAlpin is inadmissible on grounds of serious criminality.

[81] In the narrative report which forms part of the Delegate's decision, the officer listed, in a very general way, a number of H&C considerations and other personal information pertaining to Mr. McAlpin. That was done in section 7 of the assessment form, under the heading

"Humanitarian and Compassionate Factors and Other Information." The factors listed included the financial hardship that Mr. McAlpin claimed would be associated with his removal to Northern Ireland, as well as his "very lengthy list of health problems" and his family's concern regarding the continuity of his health care in Great Britain.

[82] However, in section 9 of the assessment form, under the heading "Recommendation and rationale," the officer made no mention whatsoever of those or other H&C considerations in articulating the rationale for his recommendation that Mr. McAlpin be referred to an admissibility hearing. It can reasonably be inferred from the absence of any discussion of H&C considerations in the latter section of the officer's initial Recommendation, that the officer exercised his discretion to not take such considerations into account in making that recommendation.

[83] Given that the officer was under no obligation to consider those H&C factors, and given that he did not in fact take those factors into account in explaining the rationale for his decision to recommend that Mr. McAlpin be referred to an admissibility hearing, Mr. McAlpin's allegation cannot be sustained. In brief, contrary to his allegation, the officer did not engage in a partial assessment of some of the H&C factors that he had identified, without assessing what Mr. McAlpin asserts are the more compelling H&C considerations in his case, and without explaining how H&C considerations had been weighed against other relevant considerations. Instead, the officer simply decided not to take any of those H&C factors into account. In the absence of any obligation on the officer or the Delegate to take such factors into account, that was not unreasonable.

B. *The Officer's treatment of Mr. McAlpin's work history*

[84] Mr. McAlpin submits that the officer's treatment of his work history was unreasonable because the officer appeared to place negative weight on the fact that he had not worked since 1985. In so doing, the officer failed to take into account that Mr. McAlpin's inability to work is allegedly due to a workplace injury and that he had unsuccessfully attempted to return to work.

[85] I agree that the officer appeared to place negative weight on the fact that Mr. McAlpin had not worked since 1985, and that he appeared to disregard Mr. McAlpin's explanation of why that was so. The officer took note of that explanation earlier in his report, yet failed to make any mention of it in providing the rationale for his recommendation to refer Mr. McAlpin to an admissibility hearing. He simply referred to the fact that Mr. McAlpin had not worked since 1985.

[86] In my view, the officer's apparent disregard of Mr. McAlpin's explanation for not having worked since 1985 did not render either his decision, or the Delegate's subsequent Decision, unreasonable.

[87] It is readily apparent from a reading of the "Recommendation and Rationale" section of the officer's report that Mr. McAlpin's work history was a relatively minor factor in the officer's overall assessment. The principal factors relied upon by the officer were the following:

- Mr. McAlpin's significant criminal history;
- The escalation in the seriousness of his offences;

- His most recent offences involved “very large amounts of drugs and a prohibited loaded firearm”;

- The latter offences occurred while he was on bail awaiting the outcome of other serious charges;

- The offences for which he was convicted have a very significant impact on Canadian society, particularly considering the “large scale” of his sales of marijuana;

- The fact that a loaded prohibited handgun and several other loaded unlicensed firearms were found inside a drug operation of “immense scale is indicative of the potential for harm”;

- He has an assault conviction on his record and several withdrawn violent offences involving pointing a firearm and violence against exotic dancers; and

- His potential for rehabilitation is low.

[88] Given all of the foregoing, I consider that the manner in which the officer, and by implication the Delegate, dealt with Mr. McAlpin’s work history did not render the Decision unreasonable. In the overall context of their respective decisions, that treatment of his work history did not render unreasonable either the process by which the officer and the Delegate reached their decisions, or the outcome of those decisions. In my view, both the process and the outcome of those decisions fell “within a range of acceptable outcomes which are defensible in respect of the facts and the law” (*Dunsmuir*, above, at para 47). In brief, they allow the Court to

understand why they were made and to determine that they fell within the range of acceptable outcomes (*Newfoundland Nurses*, above, at para 14). The fact that they did not refer to all of the arguments or explanations that Mr. McAlpin had submitted in support of his request not to be referred to an admissibility hearing did not render the decisions unreasonable (*Newfoundland Nurses*, above, at para 16; *Construction Labour Relations v Driver Iron Inc.*, 2012 SCC 65, at para 3).

[89] I will simply observe in passing that although Mr. McAlpin maintained that he was not able to work due to his workplace injury in 1985, this did not prevent him from operating what the sentencing judge characterized as being a "large scale" marijuana operation. In this context, the failure of the officer and the Delegate to explicitly recognize Mr. McAlpin's alleged inability to work was understandable.

C. *The officer's assessment of Mr. McAlpin's potential for rehabilitation*

[90] Mr. McAlpin submits that the officer's assessment of his potential for rehabilitation was unreasonable because it did not take account of important evidence on the record that contradicted the conclusion reached by the officer.

[91] The information upon which Mr. McAlpin relies in this regard is contained in a Pre-Sentence Report, the Reasons for Sentence given by Arrell J, and Mr. McAlpin's Correctional Plan.

[92] The relevant passage of the Pre-Sentence Report noted that Mr. McAlpin "seemed open about providing details regarding the circumstances on [*sic*] what occurred and appeared to accept responsibility for his actions." Similarly, the Reasons for Sentence provided by Arrell J state that Mr. McAlpin "has accepted responsibility for his actions and I accept that he has shown real remorse." In addition, Mr. McAlpin notes that his Correctional Plan states that he "accepts responsibility for his involvement in the index offence as evidenced by his guilty plea and disclosure to [the] writer" of the report.

[93] However, the Correctional Plan also contains several passages that reflect that Mr. McAlpin has not in fact fully accepted responsibility for his offences and may continue to present a potential for reoffending. In this regard, the Correctional Plan states that he "expressed very little remorse for his actions," provided a version of events that was "not accurate," maintained that the substantial number of marijuana plants and dried marijuana (25 pounds) that were found in his position were for medicinal purposes, and that he continues to harbour "pro-criminal sentiments, including a cavalier attitude towards the law and little regard towards the negative impact the illicit drug trade has on society as a whole."

[94] More importantly, subsequent to the dates of the Pre-Sentence Report and Arnell J's Reasons for Sentence, the officer interviewed Mr. McAlpin. Based on that interview, the officer concluded that "his accountability is very low for the Criminal behaviour that he committed and that he rationalizes his behaviour as having had a license and it all being for medicinal purposes and not for profit." In addition to relying on his personal conclusion in this regard, the officer based his conclusion regarding Mr. McAlpin's low potential for rehabilitation on the fact that his

most recent convictions were for offences that he committed while he was "already on bail for selling and producing marijuana."

[95] Considering the foregoing, and having regard to the "very limited" discretion that was available to the officer (*Sharma*, above, at para 24), I am satisfied that the officer's assessment of Mr. McAlpin's potential for rehabilitation was not unreasonable. In this context, the officer simply needed to provide a very brief explanation for his finding on this point. I consider that the explanation provided was not only reasonable, but was supported by the passages from Mr. McAlpin's Correctional Plan that I have discussed at paragraph 93 above (*Newfoundland Nurses*, above, at para 15).

D. *The officer's treatment of Mr. McAlpin's withdrawn charges*

[96] Mr. McAlpin submits that the officer erred in relying on withdrawn criminal charges to reach findings upon which he placed significant weight in reaching his decision to recommend Mr. McAlpin for an admissibility hearing. I agree.

[97] As noted at paragraph 87 above, the principal factors upon which the officer appears to have relied in recommending that Mr. McAlpin be referred to an admissibility hearing included his "significant criminal history," and "several withdrawn violent offences involving pointing a firearm and violence against exotic dancers." The officer characterized that criminal history as having spanned "the past thirty five years with few gaps." It appears from the face of the officer's decision that these factors were given significant weight in that decision.

[98] The officer's characterization of Mr. McAlpin's "criminal history" as having spanned "the past thirty five years with few gaps" is only intelligible if that history is viewed as including the "many separate withdrawn charges during that time period" that were noted earlier in the officer's report. However, those charges were never proved, and therefore are not evidence of any "criminal history": *Sittampalam v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 326, at para 50 [***Sittampalam***]; *Balan v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 691, at para 21; *Kharrat v Canada (Citizenship and Immigration)*, 2007 FC 842, at para 21 [***Kharrat***].

[99] Once those charges are excluded from consideration, Mr. McAlpin's "criminal history" consists of five non-reported convictions plus the four offences to which he pled guilty in 2014. The latter are described at paragraph 15 above. The former were for Failing to Remain at the Scene of an Accident (1975), Assault (1983), Driving While Ability Impaired (1987), Mischief under $5,000 (1996), and Failure to Stop at the Scene of an Accident (1997).

[100] It is readily apparent from the foregoing brief summary of Mr. McAlpin's convictions that there are indeed significant gaps in his criminal history, namely, the eight-year gap between his first two convictions, the nine-year gap between his third and fourth convictions, and the seventeen-year gap between his fifth conviction in 1997 and his four convictions in 2016. Indeed, as a result of the latter gap, Arrell J characterized Mr. McAlpin's criminal record as being "dated."

[101] Given the foregoing, it is reasonable to infer that the officer impermissibly relied on Mr. McAlpin's withdrawn charges in finding that he "has a significant criminal history that spans the past thirty five years with few gaps." To the extent that the officer and the Delegate then placed significant weight on that finding in reaching their decisions, those decisions were unreasonable.

[102] This conclusion 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 IRPA. Provided that such evidence is found to be credible and trustworthy, it may be considered in this and certain other contexts that arise under the IRPA: *Sittampalam*, above, at para 49; *Kharrat*, above, at para 21; *Thuraisingam v Canada (Citizenship and Immigration)*, 2004 FC 607, at paras 35-39 and 44.

[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. Indeed, some of that evidence was the same evidence upon which Mr. McAlpin himself relied to challenge the finding reached by the officer regarding his potential for rehabilitation. Specifically, his Correctional Plan, discussed above, details those withdrawn charges (CTR, at 31). In addition, one police report that was included in the CTR was written by the reporting officer within a few hours of the alleged assault incident, and summarizes evidence provided by eye witnesses (CTR, at 97-99). Another police report was prepared two days after an alleged assault and contains considerable details and particulars of the incident (CTR, at 100-101 and 109).

[106] In summary, in exercising the very limited discretion afforded to them under subss. 44(1) and (2) of the IRPA, it would have been reasonably open to the officer and the Delegate to consider the evidence described above with respect to Mr. McAlpin's withdrawn charges and associated police reports, solely for the purpose of considering his history of interactions with the law. However, it was not reasonably open to the officer and the Delegate to treat Mr. McAlpin's withdrawn charges as evidence of his history of criminality.

[107] Accordingly, the Decision will be set aside and remitted to a different ministerial delegate for reconsideration in accordance with these reasons.

VIII. **Conclusion**

[108] For the reasons set forth in parts VII.A – C above, the treatment by the officer and the Delegate of the H&C considerations advanced by Mr. McAlpin, his work history and his potential for rehabilitation was not unreasonable.

[109] However, for the reasons set forth in Part VII.D above, it was unreasonable for the officer and the Delegate to have relied upon Mr. McAlpin's withdrawn charges as evidence of his criminal history.

[110] Accordingly, this application will be granted.

[111] At the end of the oral hearing of this Application, counsel to the Respondent stated that the Application does not raise any serious question of general importance, as contemplated by

subs. 74(d) of the IRPA. Counsel to Mr. McAlpin agreed, assuming that this Application would be determined on the basis of whether the Delegate's decision was reasonable.

[112] In my view, the issue of the scope of the discretion contemplated by subss. 44(1) and (2) is a serious question of general importance. Indeed, the FCA has intimated as much: *Sharma*, above, at para 48; *Cha*, above, at para 41. The divergence in the jurisprudence of this Court with respect to this issue is also reflective of the seriousness of the question.

[113] However, given that I have decided this Application on an entirely different basis, namely, that the Delegate erred in relying on Mr. McAlpin's withdrawn charges as evidence of his criminal history, the issue of the scope of the discretion contemplated by subss. 44(1) and (2) would not be "dispositive" of this matter: *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22, at paras 3 and 46; *Varela v Canada (Citizenship and Immigration)*, 2009 FCA 145, at para 28.

[114] Accordingly, no question will be certified.

JUDGMENT in IMM-1542-17

THIS COURT'S JUDGMENT is that:

1. This application is granted. This matter shall be remitted to the Minister for reconsideration in accordance with these reasons.

2. There is no question for certification.

"Paul S. Crampton"
Chief Justice

APPENDIX 1 — Relevant Legislation

Immigration and Refugee Protection Act (SC 2001, c 27)

Objectives — immigration

3 (1) The objectives of this Act with respect to immigration are

[…]

(h) to protect public health and safety and to maintain the security of Canadian society;

(i) to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks;

[…]

Objet en matière d'immigration

3 (1) En matière d'immigration, la présente loi a pour objet :

[…]

h) de protéger la santé et la sécurité publiques et de garantir la sécurité de la société canadienne;

i) de promouvoir, à l'échelle internationale, la justice et la sécurité par le respect des droits de la personne et l'interdiction de territoire aux personnes qui sont des criminels ou constituent un danger pour la sécurité;

[…]

Serious criminality

36 (1) A permanent resident or a foreign national is inadmissible on grounds of 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;

(b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or

(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of

Grande criminalité

36 (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :

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

b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;

c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.

imprisonment of at least 10 years.

Criminality

(2) A foreign national is inadmissible on grounds of criminality for

(a) having been convicted in Canada of an offence under an Act of Parliament punishable by way of indictment, or of two offences under any Act of Parliament not arising out of a single occurrence;

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

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

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

DIVISION 5

Loss of Status and Removal

Report on Inadmissibility

Preparation of report

44 (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.

Criminalité

(2) Emportent, sauf pour le résident permanent, interdiction de territoire pour criminalité les faits suivants :

a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions à toute loi fédérale qui ne découlent pas des mêmes faits;

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

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

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

SECTION 5

Perte de statut et renvoi

Constat de l'interdiction de territoire

Rapport d'interdiction de territoire

44 (1) S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.

Referral or removal order

(2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.

Suivi

(2) S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi.

Conditions

(3) An officer or the Immigration Division may impose any conditions, including the payment of a deposit or the posting of a guarantee for compliance with the conditions, that the officer or the Division considers necessary on a permanent resident or a foreign national who is the subject of a report, an admissibility hearing or, being in Canada, a removal order.

Conditions

(3) L'agent ou la Section de l'immigration peut imposer les conditions qu'il estime nécessaires, notamment la remise d'une garantie d'exécution, au résident permanent ou à l'étranger qui fait l'objet d'un rapport ou d'une enquête ou, étant au Canada, d'une mesure de renvoi.

Conditions — inadmissibility on grounds of security

(4) If a report on inadmissibility on grounds of security is referred to the Immigration Division and the permanent resident or the foreign national who is the subject of the report is not detained, an officer shall also impose the prescribed conditions on the person.

Conditions — interdiction de territoire pour raison de sécurité

(4) Si l'affaire relative à un rapport d'interdiction de territoire pour raison de sécurité est déférée à la Section de l'immigration et que le résident permanent ou l'étranger qui fait l'objet du rapport n'est pas détenu, l'agent impose également à celui-ci les conditions réglementaires.

Duration of conditions

(5) The prescribed conditions imposed under subsection (4) cease to apply only when

Durée des conditions

(5) Les conditions réglementaires imposées en vertu du paragraphe (4) ne cessent de s'appliquer que lorsque survient l'un ou l'autre des événements suivants :

(a) the person is detained;

a) la détention de l'intéressé;

(b) the report on inadmissibility on grounds of security is withdrawn;

b) le retrait du rapport d'interdiction de territoire pour raison de sécurité;

(c) a final determination is made not to make a removal order against the person for inadmissibility on grounds of security;

c) la décision, en dernier ressort, selon laquelle n'est prise contre l'intéressé aucune mesure de renvoi pour interdiction de territoire pour raison de sécurité;

(d) the Minister makes a declaration under subsection 42.1(1) or (2) in relation to the person; or

d) la déclaration du ministre faite à l'égard de l'intéressé en vertu des paragraphes 42.1(1) ou (2);

(e) a removal order is enforced against the person in accordance with the regulations.

e) l'exécution de la mesure de renvoi visant l'intéressé conformément aux règlements.

Admissibility Hearing by the Immigration Division

Enquête par la Section de l'immigration

Decision

Décision

45 The Immigration Division, at the conclusion of an admissibility hearing, shall make one of the following decisions:

45 Après avoir procédé à une enquête, la Section de l'immigration rend telle des décisions suivantes :

(a) recognize the right to enter Canada of a Canadian citizen within the meaning of the Citizenship Act, a person registered as an Indian under the Indian Act or a permanent resident;

a) reconnaître le droit d'entrer au Canada au citoyen canadien au sens de la Loi sur la citoyenneté, à la personne inscrite comme Indien au sens de la Loi sur les Indiens et au résident permanent;

(b) grant permanent resident status or temporary resident status to a foreign national if it is satisfied that the foreign national meets the requirements of this Act;

b) octroyer à l'étranger le statut de résident permanent ou temporaire sur preuve qu'il se conforme à la présente loi;

(c) authorize a permanent resident or a foreign national, with or without conditions, to enter Canada for further examination; or

c) autoriser le résident permanent ou l'étranger à entrer, avec ou sans conditions, au Canada pour contrôle complémentaire;

(d) make the applicable removal order against a foreign national who has not been authorized to enter Canada, if it is not satisfied that the foreign national is not inadmissible, or against a foreign national who has been authorized to enter Canada or a permanent resident, if it is satisfied that the foreign national or the permanent resident is inadmissible.

d) prendre la mesure de renvoi applicable contre l'étranger non autorisé à entrer au Canada et dont il n'est pas prouvé qu'il n'est pas interdit de territoire, ou contre l'étranger autorisé à y entrer ou le résident permanent sur preuve qu'il est interdit de territoire.

No appeal for inadmissibility

Restriction du droit d'appel

64 (1) No appeal may be made to the

64 (1) L'appel ne peut être interjeté par le

Immigration Appeal Division by a foreign national or their sponsor or by a permanent resident if the foreign national or permanent resident has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality.

résident permanent ou l'étranger qui est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux, grande criminalité ou criminalité organisée, ni par dans le cas de l'étranger, son répondant.

Serious criminality

(2) For the purpose of subsection (1), serious criminality must be with respect to a crime that was punished in Canada by a term of imprisonment of at least six months or that is described in paragraph 36(1)(b) or (c).

Grande criminalité

(2) L'interdiction de territoire pour grande criminalité vise, d'une part, l'infraction punie au Canada par un emprisonnement d'au moins six mois et, d'autre part, les faits visés aux alinéas 36(1)b) et c).

Misrepresentation

(3) No appeal may be made under subsection 63(1) in respect of a decision that was based on a finding of inadmissibility on the ground of misrepresentation, unless the foreign national in question is the sponsor's spouse, common-law partner or child.

Fausses déclarations

(3) N'est pas susceptible d'appel au titre du paragraphe 63(1) le refus fondé sur l'interdiction de territoire pour fausses déclarations, sauf si l'étranger en cause est l'époux ou le conjoint de fait du répondant ou son enfant.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1542-17
STYLE OF CAUSE:	THOMAS WILLIAM MCALPIN v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	TORONTO, ONTARIO
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APPEARANCES:

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