Federal Court Cour fédérale

**Date: 20190312**

**Docket: IMM-1553-18**

**Citation: 2019 FC 297**

**Ottawa, Ontario, March 12, 2019**

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

**BETWEEN:**

**R. G.**

**Applicant**

**and**

**THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

**Respondent**

# JUDGMENT AND REASONS

## I. INTRODUCTION

[1] This is an application for judicial review of the decision of the Minister's Delegate dated March 27, 2018 [Decision] to refer the Applicant to an admissibility hearing pursuant to s 44(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act], for organized criminality under s 37(1)(a) of the Act.

## I. BACKGROUND

[2] The Applicant, R. G., is a Chinese citizen.

[3] Between 2003 and 2014, the Applicant worked for a bank in China. At the end of 2013, he travelled to Canada to explore business and real estate opportunities for himself and his father. His boss also requested that he investigate business prospects for her. In 2014, the Applicant successfully applied for a temporary resident visa on fraudulent grounds.

[4] The Canada Border Services Agency [CBSA] learned that the Applicant is wanted for arrest in China. On May 5, 2015, the CBSA submitted an inquiry to Interpol and the Royal Canadian Mounted Police [RCMP] in order to obtain evidence about the Applicant's status as a fugitive. The RCMP received an Interpol Red Notice and a copy of the Chinese arrest warrant for the Applicant in August 2015.

[5] The Chinese authorities allege that the Applicant engaged in a complex fraud scheme which involved numerous friends and relatives. In his role at the bank, the Applicant is said to have fraudulently approved loans for shell companies which he owned and operated. The Chinese authorities claim to have become aware of the scheme only after the Applicant left for Canada.

[6] On December 15, 2015, the CBSA informed the Applicant through a s 44(1) report that he was inadmissible to Canada for serious criminality pursuant to s 36(1)(c) of the Act. An

admissibility hearing was commenced on March 14, 2016 at the Immigration Division [ID] to determine whether the Applicant was inadmissible for serious criminality. The ID determined that there was insufficient evidence to find the Applicant inadmissible for serious criminality on December 22, 2016. The Minister appealed this decision to the Immigration Appeal Division [IAD] where proceedings are ongoing.

[7] The Applicant filed a refugee claim on November 20, 2015. His claim was based on a fear of persecution based on what the Public Security Bureau [PSB], Chinese authorities, and his former boss would do to him if he returned to China. He fears that he would face arrest on false charges, wrongful imprisonment, torture and mistreatment, and possibly death.

[8] On March 18, 2016, criminal charges were laid against the Applicant in Canada for uttering a forged document and fraudulent concealment for having obtained his Ontario documents. The Applicant admitted to having engaged in fraud on July 10, 2017. He received a conditional discharge and probation in relation to the fraud charges.

[9] The CBSA corresponded with Chinese officials in 2017 in order to elicit further information and evidence about the Applicant’s criminal activities in China. Officials from the Chinese Embassy informed the CBSA that additional evidence would be sent. The Minister received the new evidence in October 2017 and disclosed it to the Applicant in November of the same year. The Minister also submitted this additional evidence to the IAD in support of the appeal of the s 36(1)(c) decision of the ID.

[10] A second s 44(1) report was written on March 19, 2018 which alleged that the Applicant is inadmissible to Canada for organized criminality pursuant to s 37(1)(a) of the Act.

[11] The Minister's Delegate reviewed the s 44(1) report and referred it to the ID for an admissibility hearing. It is this decision, dated March 27, 2018 which is the subject of this application for judicial review. On March 29, 2018, the CBSA notified the Applicant that the report had been referred to the ID.

## II. DECISION UNDER REVIEW

[12] The Minister's Delegate reviewed the s 44(1) report and decided to refer it to the ID for an admissibility hearing. The s 44(1) report alleged that the Applicant is inadmissible because he,

> is a permanent resident or a foreign national who is inadmissible on grounds of organized criminality for 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 outside Canada that, if committed in Canada, would constitute such an offence, or engaging in activity that is part of such a pattern (Certified Record at 14).

[13] Specifically, the report was based on information which showed that there are reasonable grounds to believe that the Applicant engaged in fraud which was planned and organized by a number of people acting together.

## IV. ISSUES

[14] The issues to be determined in the present matter are the following:

1. What is the standard of review?
2. Was the Decision reasonable?
3. Was the Decision an abuse of process?
4. Is the Minister barred from proceeding with the second admissibility hearing on the basis of issue estoppel?

## V. STANDARD OF REVIEW

[15] 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.

[16] The Applicant submits that the appropriate standard of review for issues of abuse of process and issue estoppel is correctness. The Applicant submits that the standard of reasonableness applies to the analysis of the Decision to refer the Applicant to an admissibility hearing under s 44(2).

[17] The Respondent submits that the standard of review for issues of procedural fairness and natural justice is correctness, while reasonableness applies to the Minister's Delegate's findings of fact and mixed fact (*Dunsmuir*, above, at para 47; *Canada (Citizenship and Immigration) v Khosa,* 2009 SCC 12 at paras 52-62 [*Khosa*]).

[18] The Decision to refer the Applicant to an admissibility hearing under s 44(2) is reviewable on a standard of reasonableness (*Faci v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 693 at para 17).

[19] 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, *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."

[20] Courts have recently held that the standard of review for an allegation of procedural unfairness is 'correctness' (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Khosa*, above, at paras 59 and 61).

[21] While an assessment of procedural fairness accords with recent jurisprudence, it is not a doctrinally sound approach. A better conclusion is that no standard of review at all is applicable

to the question of procedural fairness. The Supreme Court of Canada in *Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11 stated (at para 74) that the issue of procedural fairness,

> requires no assessment of the appropriate standard of judicial review. Evaluating whether procedural fairness, or the duty of fairness, has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation.

[22] In sum, the Decision to refer the Applicant to an admissibility hearing under s 44(2) is reviewable on a standard of reasonableness. No standard of review at all applies to the issue of procedural fairness, abuse of process or issue estoppel raised by the Applicant.

## VI. STATUTORY PROVISIONS

[23] The following provisions of the Act are relevant to this application for judicial review:

| **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 : |
| … | … |
| (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 imprisonment of at least | 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. |

10 years.

| | |
|---|---|
| … | … |
| **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; |
| … | … |

**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.

**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.

## VII. ARGUMENT

### A. *Applicant*

[24] The Applicant argues that the Decision to refer the Applicant to an admissibility hearing is an abuse of process. He cites *Blencoe v British Columbia (Human Rights Commission)*, [2000] SCJ No 43 [*Blencoe*], where the Supreme Court explained (at para 120) that: "In order to find an abuse of process, the court must be satisfied that 'the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted.'" Further, a finding of abuse of process should be reserved for the "clearest of cases" (*Blencoe*, above, at para 120). The Applicant says that the first part of the abuse of process test concerns state conduct that is prejudicial to the proceedings, while the second part concerns state conduct undermining the integrity of the legal system overall.

[25] The Applicant submits that allowing the Minister to commence a second admissibility hearing consists of an abuse of process because it would deal with the same factual allegations that were already determined by the ID in relation to s 36(1)(c) and that are presently the subject of the Minister's appeal to the IAD. A second admissibility hearing would amount to re-litigation of an issue which has already been settled.

[26] The Minister is expected to represent the state's interests while maintaining the integrity of the immigration system and Canada's justice system. This expectation includes a requirement that the Minister not exploit the power of the state by pursuing the same allegation in different

proceedings. The Minister, rather than seeking to uphold the integrity of the justice system, is merely attempting to use multiple proceedings to secure the Applicant's removal from Canada.

[27] The Applicant says that the Decision is also an abuse of discretion. The Minister's Delegate had the discretion to not refer the Applicant to a second admissibility hearing, as the Immigration, Refugees and Citizenship Canada Enforcement Manual confirms. In the circumstances, the Minister's Delegate should have considered whether a second hearing was truly necessary.

[28] The Applicant argues that the proper remedy for a finding of abuse of process is a stay of proceedings. Although this is an extraordinary remedy, it is appropriate in the circumstances because it is the only way to prevent the abuse of process that is now underway.

[29] The Applicant submits that the Minister is also prohibited from commencing the second admissibility hearing because of the doctrine of issue estoppel. The ID has already made a decision on the admissibility of the Applicant. Issue estoppel applies because the Minister is seeking to have the exact same issue tried for a second time.

[30] The Applicant also takes issue with the new evidence received by the Minister. Firstly, this evidence is speculative and unreliable. Secondly, the evidence is not truly new because it is currently being reviewed before the IAD.

[31] The Applicant argues that the Decision could have wider implications for the legal system. Firstly, it could set a dangerous precedent if the Minister is allowed to reconsider decisions whenever the government receives new evidence. Secondly, there could be confusion if the IAD and the ID come to opposing conclusions about the Applicant's admissibility.

[32] Finally, the Applicant submits that the Decision was unreasonable because there is a complete lack of reasons.

B. *Respondent*

[33] The Respondent submits that neither abuse of process nor the doctrine of issue estoppel prevent the Minister from making the impugned Decision. The crux of the issue is the receipt by the Minister of new evidence provided by Chinese authorities. This evidence was not available at the admissibility hearing which focused on the Applicant's alleged serious criminality under s 36(1)(c) and not organized crime under s 37(1)(a).

[34] The Respondent submits that the concept of re-litigation does not apply in this case. The first admissibility hearing concerned serious criminality rather than organized criminality. The new evidence was not available at the time of the first hearing. Sections 36(1)(c) and 37(1)(a) are distinct provisions with different potential consequences for the Applicant.

[35] The Respondent argues that the Minister did not abuse his discretion by commencing the admissibility process under s 37(1)(a). It was within the Minister's discretion to make this

decision. The Minister made the decision after considering the new evidence which was not available at the time of the first ID hearing.

[36] The Respondent says that this is not a set of circumstances which would require a stay of proceedings even if the Applicant demonstrated an abuse of process. The issuance of a stay of proceedings is only warranted in extraordinary circumstances. Furthermore, the public interest in having a final decision in the admissibility hearing is greater than the interest in a stay of proceedings.

[37] The Respondent also argues that issue estoppel does not apply in this case for three reasons. Firstly, the Applicant has not met the three-part test for issue estoppel. Specifically, the Applicant has failed to demonstrate that the same question has already been decided in earlier proceedings or that the previous decision was final. Secondly, there are special circumstances which warrant an exception to issue estoppel. Namely, new evidence that was not available prior to the first hearing has now been introduced. Finally, the doctrine of issue estoppel is not properly before the Court because the ID has not yet examined the organized criminality issue.

[38] The Respondent says that it was not necessary for the Minister to provide written reasons for the Decision. It is possible to infer that the Minister made the decision based on an opinion that the report was well founded.

## VIII. ANALYSIS

### A. *Introduction*

[39] The Applicant is seeking to avoid what he describes as duplicative and unnecessary proceedings that he says are an abuse of process and totally wasteful of time and resources.

[40] He says that the pending IAD decision dealing with s 36(1)(c) admissibility will be determinative of the s 37(1)(a) admissibility process that was initiated by the Decision of the Minster's Delegate that is under review. This is because the Minister's disclosure and evidentiary basis for the s 37(1)(a) (organized crime) admissibility hearing contains the same materials from the Chinese authorities that were disclosed and placed before the IAD for the s 36(1)(c) (serious criminality) *de novo* appeal.

[41] Consequently, the Applicant is asking the Court to stay the s 37(1)(a), admissibility proceedings to prevent abuse of process.

[42] In oral submissions before me, the Applicant has made it clear that, should the IAD reverse the ID's decision on s 36(1)(c) admissibility and render a decision that favours the Minister, then the Minister is entitled to proceed with a s 37(1)(a) reference. However, he says that should the IAD uphold the ID decision on s 36(1)(c) admissibility, then the Minster should not be allowed to re-litigate the same issue by resort to s 37(1)(a) admissibility. This is because the evidence that grounds the present s 37(1)(a) referral is exactly the same evidence that grounds the Minster's appeal to the IAD dealing with the ID's decision in favour of the

Applicant that dealt with s 36(1)(c) inadmissibility. In other words, if the IAD finds there are no grounds to support serious criminality under s 36(1)(c), then there can be no grounds to support organized criminality under s 37(1)(a). The Applicant contends that the IAD will, in effect, answer the question of whether the Applicant has been involved in the commission of a crime in China, whether alone or in concert with others, even though the IAD is not dealing with s 37(1)(a) (organized criminality) in the appeal. The cause of action may be different but the underlying facts are exactly the same, according to the Applicant.

[43] Given this situation, the Applicant says that the referral Decision under s 37(1)(a) (organized criminality) must be quashed on grounds of abuse of process, re-litigation, abuse of discretion, and issue estoppel. In addition, he says that the Decision is unreasonable.

B. *Abuse of Process*

[44] The Applicant takes the position that the s 44(2) referral based on s 37(1)(a) of the Act is an attempt by the Minister to re-litigate an issue finally decided in an earlier proceeding that is both unnecessary and an abuse of the Minister's discretion.

[45] The test for an abuse of process was laid out by the Supreme Court of Canada in *Blencoe*, above:

> 120 In order to find an abuse of process, the court must be satisfied that, "the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted" (Brown and Evans, *supra*, at p. 9-68). According to L'Heureux-Dubé J. in *Power*, *supra*, at p. 616, "abuse of process" has been characterized in the

> jurisprudence as a process tainted to such a degree that it amounts to one of the clearest of cases. In my opinion, this would apply equally to abuse of process in administrative proceedings. For there to be abuse of process, the proceedings must, in the words of L'Heureux-Dubé J., be "unfair to the point that they are contrary to the interests of justice" (p. 616). "Cases of this nature will be extremely rare" (*Power*, *supra*, at p. 616). In the administrative context, there may be abuse of process where conduct is equally oppressive.

[46] The Supreme Court considered the test again in *R v Babos*, 2014 SCC 16:

> [32] The test used to determine whether a stay of proceedings is warranted is the same for both categories and consists of three requirements:
>
> (1) There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome" (*Regan*, at para. 54);
>
> (2) There must be no alternative remedy capable of redressing the prejudice; and
>
> (3) Where there is still uncertainty over whether a stay is warranted after steps (1) and (2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits" (*ibid*., at para. 57).

[47] This test has been recognized and followed by this Court. See, for example, *Canada (Citizenship and Immigration) v Parekh*, 2010 FC 692 at para 24 and *Ching v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 839.

[48] The Applicant says that the s 44(2) referral Decision under review meets the high and exceptional standard for abuse of process for several reasons.

[49] By analogy with criminal prosecution (see *Boucher v The Queen*, 1954 CanLII 3 (SCC) at 23-24), the Applicant argues that the Minister at the referral stage must be mindful of the public interest in the proper administration of justice which requires, *inter alia*, that the Minister not exploit the power of the state to repeatedly pursue the same allegations in duplicative proceedings, and not be allowed to re-litigate a question which has been fairly decided against him. See *Toronto (City) v CUPE, Local 79*, 2003 SCC 63:

> 37 In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would . . . bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, *per* Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:
>
> > The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. *It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel*. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).
> >
> > *One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined.* [Emphasis added.]
>
> As Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. (See, for example, *Franco v. White* (2001), 53 O.R. (3d) 391 (C.A.); *Bomac Construction Ltd. v. Stevenson*, [1986] 5 W.W.R. 21 (Sask. C.A.); and *Bjarnarson v.*

*Government of Manitoba* (1987), 38 D.L.R. (4th) 32 (Man. Q.B.), aff'd (1987), 21 C.P.C. (2d) 302 (Man. C.A.).) This has resulted in some criticism, on the ground that the doctrine of abuse of process by relitigation is in effect non-mutual issue estoppel by another name without the important qualifications recognized by the American courts as part and parcel of the general doctrine of non-mutual issue estoppel (Watson, *supra*, at pp. 624-25).

38 It is true that the doctrine of abuse of process has been extended beyond the strict parameters of *res judicata* while borrowing much of its rationales and some of its constraints. It is said to be more of an adjunct doctrine, defined in reaction to the settled rules of issue estoppel and cause of action estoppel, than an independent one (Lange, *supra*, at p. 344). The policy grounds supporting abuse of process by relitigation are the same as the essential policy grounds supporting issue estoppel (Lange, *supra*, at pp. 347-48):

> The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

…

51 Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.

52 In contrast, proper review by way of appeal increases confidence in the ultimate result and affirms both the authority of

> the process as well as the finality of the result. It is therefore apparent that from the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original result should not be binding in the new context. This was stated unequivocally by this Court in *Danyluk*, *supra*, at para. 80.
>
> [Emphasis in original.]

[50] The Applicant says that the present case is analogous to *Thambiturai v Canada (Solicitor General)*, 2006 FC 750, where the Court decided that a decision to vacate constituted an abuse of process by re-litigation and that it was unfair of the Minister to seek to have the exact same issue determined under a different provision of the Act. The vacation proceedings were determined to be unnecessary and duplicitous.

[51] In written submissions, the Applicant summarizes his case for abuse of process in this application as follows:

> 63. This case [*Thambiturai*] is clearly highly analogous [to] the case at hand. Here also, the Minister is attempting to have the exact same issue determined under a different provision of *IRPA*. While section 36(1) deals with allegations of committing an offence, section 37(1) deals with committing crimes as part of a group. **In both cases the allegations contained in the section 44 (1) reports are based on the same facts and will be determined by reference to the same issue namely: Are there reasonable grounds to believe that the Applicant committed the alleged loan fraud in China?** If the answer to that question is no, then it is irrelevant whether the Minister is making the allegation under s. 36 or s. 37.

[Emphasis in original.]

[52] The essence of the Applicant's case before me is that s 37(1)(a) organized crime proceedings will be unnecessary and abusive if the IAD decides *de novo* to reject the new evidence as being insufficient to establish s 36(1)(c) serious criminality, and he says the Minister's Delegate should have taken this into account when making the Decision under review. In simple terms, the Applicant now seems to be suggesting that the Minister's Delegate should have waited until the IAD had rendered its s 36(1)(c) *de novo* decision on the evidence, before concluding that there were reasonable grounds to believe the Applicant had engaged in organized fraud.

[53] Presumably, the Minister's Delegate might have taken a wait and see approach, but this does not mean that his Decision was an abuse of process, because there was nothing before him to suggest that the evidence (which has not been previously considered by the ID) did not provide reasonable grounds for s 37(1)(a) organized criminality.

[54] I can see that the s 37(1)(a) organized crime proceedings might become abusive if:

(a) The Minister were to subject the Applicant to s 37(1)(a) proceedings before the ID based upon the same evidence before the IAD, if the IAD rejects that evidence as insufficient grounds for s 36(1)(c) serious criminality; or

(b) The Minister puts the Applicant through a s 37(1)(a) admissibility hearing before the ID before the IAD has pronounced upon the evidence at issue.

[55] At the time of the hearing of this application before me, I have seen no evidence that these concerns cannot be addressed by other means. The Applicant has provided no evidence that he has requested the Minister not to proceed until the IAD has rendered its decision (and he says that decision is imminent) or that, if the Minister does attempt to proceed, he cannot seek a postponement before the ID. He argues that if the ID refuses then he would have to come back before the Court, but that does not answer the issue because it does not establish that the Applicant's concerns cannot be handled by other appropriate means. In my view, there is as yet no abuse of process because we don't know what the IAD will decide, or what the Minister will do when that decision is available, or what the ID will do if the Applicant requests a postponement of the s 37(1)(a) organized crime proceedings based upon possible duplication if the IAD decides the s 36(1)(c) *de novo* appeal in favour of the Applicant.

[56] I understand that the issue is the value of the new evidence that is both before the IAD in *de novo* hearings for s 36(1)(a) and that was before the Minister's Delegate when he made his s 44(2) referral. But as yet there has been no re-litigation or other abuse of process based upon that evidence that cannot be addressed by other means than having this Court declare an abuse of process that, in my view, is not in any event available on the facts before me.

[57] The Applicant cannot satisfy the jurisprudence for an abuse of process based upon something that has yet to occur, and might never occur, and that at the present time can be addressed by other means.

[58] In other words, I think the Respondent is right to say that, given the Applicant's concession that the Minister is within his rights to proceed with s 37(1)(a) organized crime proceedings if the IAD accepts reasonable grounds for s 36(1)(c) serious criminality, then this application is premature and the Applicant cannot, on the facts, satisfy the test for abuse of process to date, or seek a remedy for an abuse of process that may never occur.

## C. *Issue Estoppel*

[59] For similar reasons, the Applicant has not established issue estoppel. Even if the issue is defined as the value of the evidence that was before the IAD and which was also before the Minister's Delegate when he made the Decision before me, the IAD has not yet rendered a decision. So, the issue is again premature and can be raised before the ID when, or if, it becomes necessary to do so.

## D. *Unreasonableness and Bad Faith*

[60] There is nothing before me to suggest that the Minister's Delegate, in making the s 44(2) Decision, acted in bad faith, erred in law, acted on the basis of irrelevant considerations or rendered an unreasonable decision. The reasonable grounds finding was based upon evidence that, at the time the Decision was made, had not been rejected as insufficient by either the ID or the IAD. And the decision as to when or whether the s 37(1)(a) organized crime grounds should be heard and decided by the ID was not for the Minister's Delegate to make.

## IX. CERTIFICATION

[61] The parties agree there is no question for certification and the Court concurs.

## JUDGMENT IN IMM-1553-18

**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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| **DOCKET:** | IMM-1553-18 |
| **STYLE OF CAUSE:** | R. G. v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | JANUARY 28, 2019 |
| **JUDGMENT AND REASONS:** | RUSSELL J. |
| **DATED:** | MARCH 12, 2019 |

**APPEARANCES:**

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|---|---|
| Britt Gunn<br>Steven Blakey | FOR THE APPLICANT |
| Daniel Engel | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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| Britt Gunn<br>Barrister and Solicitor<br>Toronto, Ontario | FOR THE APPLICANT |
| Attorney General of Canada<br>Toronto, Ontario | FOR THE RESPONDENT |