Federal Court  Cour fédérale

Date: 20210810

Dockets: IMM-5379-20
IMM-5380-20

Citation: 2021 FC 831

Ottawa, Ontario, August 10, 2021

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

XY

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

PUBLIC JUDGMENT AND REASONS

(Confidential Judgment and Reasons issued August 10, 2021)

I. Introduction

[1] This is an application for judicial review of two decisions of the Canada Border Services Agency [CBSA]: (1) a December 5, 2019 decision of the Officer to write a subsection 44(1) inadmissibility report [section 44 report] against the Applicant under subsection 37(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]; and (2) an October 6, 2020 decision of the Minister's Delegate to refer the section 44 report to an admissibility hearing before the Immigration Division of the Immigration and Refugee Board of Canada, finding that there are reasonable grounds to believe that the Applicant is inadmissible under subsections 37(1)(a) and 37(1)(b) of the *IRPA*.

II. Background

[2] The Applicant, XY, is a permanent resident of Canada, having landed with his spouse on November 3, 2002. His spouse and minor son are Canadian citizens.

[3] In a letter, dated May 18, 2018, the Officer notified the Applicant that a section 44 report has been or may be prepared, alleging that the Applicant may be inadmissible to Canada for misrepresentation under subsection 40(1)(a) of the *IRPA*. The Applicant was alleged to have provided false employment information in his application to renew his permanent resident card, in the context of an immigration scheme.

[4] The Applicant provided submissions in response to the procedural fairness letter in July of 2018 and an interview was scheduled with the CBSA for April 16, 2019 to discuss the Applicant's case. During the interview, the Officer referenced an [redacted], accusing the Applicant of bribery and money laundering. The Officer sought the Applicant's "side of the story", verbally indicating the allegations against the Applicant. The Applicant's counsel in attendance stated that the Applicant would not be answering questions in regards to this and sought a written outline disclosing the allegations against the Applicant, on the basis of which a disclosure request would be made.

[5] On September 9, 2019, the Applicant received another procedural fairness letter from CBSA [the "Letter"]. It advised that a section 44 report has or will be prepared alleging the Applicant may be inadmissible to Canada under subsection 37(1)(b) of the *IRPA*, for the Applicant's alleged involvement in "transnational transactions that were attempts to engage in money laundering". Specifically, the Applicant had been under investigation since 2012, when information was received from the Chinese authorities and supported by "various sources". The Applicant had allegedly accepted bribes [redacted] and engaged in money laundering.

[6] The Applicant received summary information from CBSA, obtained from the Chinese authorities, regarding the allegations under subsection 37(1)(b) of the *IRPA*, and including information on allegations under subsections 36(1)(c), 37(1)(a) and 40(1)(a) of the *IRPA*, as enclosed in the "Subsection 44(1) and 55 Highlights – Inland Cases" [the "Highlights"].

[7] The Letter stated that the next step in the process would be to conduct a review of the circumstances of the Applicant's case: "If a report is prepared, a Minister's Delegate may cause an Admissibility Hearing to be held, which could result in a removal order being issued". The Applicant was further invited to make written submissions:

> …providing reasons why a removal order should not be sought. The submission may include details relevant to your case, including, but not limited to, your age at the time you acquired permanent residence, your length of residence in Canada, the location of family support and responsibilities, the conditions in your home country, your degree of establishment, your criminal history, and any history of non-compliance and your current attitude, and any other relevant factors.
>
> [Emphasis removed]

[8] In his response, dated September 24, 2019, the Applicant requested full disclosure of the information and documents that CBSA was relying upon in order to respond to the substance of the allegations [the "Disclosure Request"]. Without such disclosure, the Applicant claimed that he was only in a position to provide submissions on the humanitarian and compassionate [H&C] aspects. Counsel at the time for the Applicant indicated:

> He cannot respond to the case to be met on the allegations that he has violated IRPA because he has not been provided the evidence you have referred to and relied upon that forms the basis for the opinions in the s. 44 report. Your report is a summary of records that you have seen for yourself. [The Applicant] is entitled to see these for himself to consider his own response.
>
> …
>
> As such we are requesting full disclosure of the evidence you have referred to and relied upon that forms the basis for the opinions in the s. 44 report dated September 9, 2019 and all potentially relevant records accessible to you and not otherwise accessible to [the Applicant] that may be relevant to the issues set out in the s. 44 report…

[9] The Disclosure Request was refused by the Officer, in a letter dated September 26, 2019, because:

> …[S]ubmissions in these sorts of circumstances are generally regarding an individual's personal circumstances as to why a report should not be referred. The making of submissions is to allow the minister's delegate an opportunity to exercise their discretion as to whether a removal order ought to be sought based on an individual's personal circumstances and the impact that a removal order would have on them. The Immigration and Refugee Board has not been delegated the discretion to make this assessment; only to assess whether the evidence supports an inadmissibility. Therefore, the appropriate forum for [the Applicant] to launch a comprehensive defense of inadmissibility is during an admissibility hearing should the minister's delegate determine there is sufficient grounds to cause one. Furthermore, at this stage [the Applicant] is only required to know the factual basis of the allegation against him which has already been disclosed in the form of the 44 report highlights. As such the appropriate time for disclosure is when/if a report is forwarded for a hearing.

[10] Counsel for the Applicant responded in an October 21, 2019 letter to confirm the Applicant's understanding - the exercise of the Officer's discretion whether to seek a removal order will be based on the Applicant's personal circumstances, not on whether the evidence indicates that he is inadmissible. The Applicant's submissions addressed the potential personal impact of a removal order on him and his family, and the risk of death or cruel and unusual punishment or treatment, including torture, should the Applicant be returned to China. The Applicant alleges he will likely be tortured if returned to China so that the authorities can pursue a confession. Once convicted, the Applicant would be liable to receive the death penalty in China.

[11] On December 5, 2019, the Officer made the decision to write a section 44 report against the Applicant under subsection 37(1)(b) of the *IRPA*, pursuant to subsection 44(1) of the *IRPA*.

[12] On October 6, 2020, the Minister's Delegate then referred the reports, both under subsections 37(1)(a) and 37(1)(b) of the *IRPA,* for an admissibility hearing before the Immigration Division, pursuant to subsection 44(2) of the *IRPA,* finding that there are reasonable grounds to believe that the Applicant is inadmissible under subsections 37(1)(a) and 37(1)(b) of the *IRPA.*

[13] The Applicant seeks an Order of this Court setting aside the subsection 44(1) decision to write and the subsection 44(2) decision to refer the section 44 report, and referring the matter back to a different Officer for redetermination in accordance with this Court's reasons.

A. *The Legislative Scheme*

[14] A permanent resident may be found inadmissible to Canada, leading to a loss of status and removal from Canada (*Revell v Canada (Citizenship and Immigration)*, 2019 FCA 262 [*Revell*] at para 5, leave to appeal to SCC refused 38891 (2 April 2020)). The grounds for inadmissibility include serious criminality, as set out in subsection 36(1) of the *IRPA* and organized criminality, as set out in subsection 37(1) of the *IRPA*:

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	**c)** commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un

by a maximum term of imprisonment of at least 10 years.	emprisonnement maximal d'au moins dix ans.
…	…
Organized criminality	**Activités de criminalité organisée**
37 (1) A permanent resident or a foreign national is inadmissible on grounds of organized criminality for	**37 (1)** Emportent interdiction de territoire pour criminalité organisée les faits suivants :
(a) being a member of an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment, or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence, or engaging in activity that is part of such a pattern; or	**a)** être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle se livre ou s'est livrée à des activités faisant partie d'un plan d'activités criminelles organisées par plusieurs personnes agissant de concert en vue de la perpétration d'une infraction à une loi fédérale punissable par mise en accusation ou de la perpétration, hors du Canada, d'une infraction qui, commise au Canada, constituerait une telle infraction, ou se livrer à des activités faisant partie d'un tel plan;
(b) engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or laundering of money or other proceeds of crime.	**b)** se livrer, dans le cadre de la criminalité transnationale, à des activités telles le passage de clandestins, le trafic de personnes ou le recyclage des produits de la criminalité.

[15] The framework for the adjudication and enforcement of inadmissibility allegations is provided under the *IRPA* – a legislative scheme which has been described by the Federal Court of Appeal as comprehensive (*Revell*, above at para 5).

[16] If a CBSA officer [officer] is of the view that a permanent resident is inadmissible, they may prepare a report in accordance with subsection 44(1) of the *IRPA*:

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 setting out the relevant facts, which report shall be transmitted to the Minister.	**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.

[17] This report is transmitted to the Minister or the Minister's delegate [the "Minister"], who may subsequently refer the report to the Immigration Division for an admissibility hearing, as provided for in subsection 44(2) of the *IRPA*:

Referral or removal order	**Suivi**
(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.	**(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.

[18] While the scope of discretion of an officer and the Minister in writing and referring section 44 reports has remained the subject of litigation, it is clear that they retain *some* discretion in exercising this function (*Revell* at para 6; *Tran v Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50 at para 6).

[19] The Immigration Division must then, at the conclusion of the admissibility hearing: (1) recognize a person's right to enter Canada; (2) grant permanent resident status or temporary resident status to a foreign national; (3) authorize a permanent resident or foreign national, with or without conditions, to enter Canada for further examination; or (4) make the applicable removal order (*IRPA*, s 45).

[20] There is no further right of appeal to the Immigration Appeal Division, where a foreign national or permanent resident has been found inadmissible on the basis of organized criminality or in some cases, serious criminality (*IRPA*, s 64(1)-(2)):

No appeal for inadmissibility	**Restriction du droit d'appel**
64 (1) No appeal may be made to the 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.	**64 (1)** L'appel ne peut être interjeté par le 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	**Grande criminalité**
(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).	**(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).

[21] If a removal order comes into force, the permanent resident loses status and becomes a foreign national (*IRPA*, s 46(1)(c)):

Permanent resident	**Résident permanent**

46 (1) A person loses permanent resident status	**46 (1)** Emportent perte du statut de résident permanent les faits suivants :
…	...
(c) when a removal order made against them comes into force;	**c)** la prise d'effet de la mesure de renvoi;

[22] Nevertheless, three avenues remain open to the foreign national: (1) A temporary resident permit, pursuant to section 24 of the *IRPA*; (2) a discretionary exemption from inadmissibility on H&C grounds, under section 25 of the *IRPA*; and (3) a ministerial declaration or ministerial relief, under section 42.1 of the *IRPA*, where an exception to inadmissibility is granted on the basis that it is not contrary to national interest (*Revell* at paras 8-10).

[23] The second avenue, an exemption on H&C grounds, is not available to foreign nationals who are inadmissible for organized criminality (*IRPA*, s 25(1)), under section 37 of the *IRPA*, nor on the basis of security grounds or for violating human and international rights, under section 34 or 35 of the *IRPA* (*IRPA*, s 25(1)).

[24] A foreign national can also apply for a pre-removal risk assessment [PRRA] to stay removal from Canada or seek a deferral of removal (*Revell* at paras 11-12; *IRPA*, ss 48, 112-113). The objective of the PRRA process is to determine whether a person would be subject to a danger of torture or to a risk to their life, or to cruel and unusual treatment, if removed to his or her country of nationality. The result of a favourable PRRA assessment for an applicant who has been deemed inadmissible on the ground of organized criminality is a stay of removal (*IRPA*, ss 112(3), 114(1)(b)). CBSA also retains limited discretion to defer a removal (*Revell* at paras 11-12).

III. Decisions Under Review

[25] Both the Officer and the Minister's Delegate found in their respective decisions that there are insufficient H&C considerations to overcome the serious nature of the inadmissibility allegations.

[26] The Officer provided in the December 5, 2019 decision to write a section 44 report:

> In my determination insufficient humanitarian and compassionate grounds were provided and therefore I recommend that the 44 reports for 36(1)(c), 37(1)(a) and 37(1)(b) be referred to an admissibility hearing, I make this recommendation due to serious nature of the allegations against [the Applicant].

[27] The Minister's Delegate further stated in the October 6, 2020 decision to refer the section 44 reports to an admissibility hearing:

> I have made the decision to refer the S. 44 reports to an admissibility hearing as I believe there are reasonable grounds to believe that [the Applicant] is inadmissible under s. 37(1)(a) and 37(1)(b). I believe there are insufficient humanitarian and compassionate considerations to overcome the seriousness of the allegations under the IRPA.

IV. Issues

[28] The issues are:

A. Is the Application premature?

B. Did the Officer breach the duty of procedural fairness owed to the Applicant?

C. What level of discretion and procedural fairness is owed in a decision to write and refer a section 44 report, particularly considering where a nexus exists to a refugee claim?

V. Standard of Review

[29] Issues that relate to a breach of procedural fairness are reviewed on the standard of correctness (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 34-35, 54-55, citing *Mission Institution v Khela*, 2014 SCC 24 at para 79;).

[30] The parties argued in their written submissions that the standard of review to be applied is that of reasonableness. However, in oral argument they agreed that procedural fairness issues were engaged. The issues put forward by the Applicant relate to the fairness of the process employed by the Officer. They concern whether the Applicant's opportunity to respond to the substance of the inadmissibility allegations was hampered by the Officer. Such participatory rights are contained within the duty of procedural fairness (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*] at para 22):

> 22 Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

[31] Prior to the Supreme Court of Canada's decision in *Vavilov*, an applicant's entitlement to disclosure in the context of a section 44 process under the *IRPA* has previously been reviewed on the standard of correctness (*Jeffrey v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1180 [*Jeffrey*] at para 20; see also *Sharma v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 319 [*Sharma*] at para 15). This approach has not changed in light of *Vavilov*, where the *Vavilov* framework applies to the merits of an administrative decision under review (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 23, 77).

[32] Nevertheless, the scope of discretion engaged by an Officer or the Minister to respectively write and refer a section 44 report is reviewed on the standard of reasonableness (*Vavilov*, above at para 25; *Sharma*, above at para 15).

VI. Analysis

A. *The Parties' Positions*

[33] The Applicant argues that the Officer misunderstood and improperly communicated the scope of his decision-making authority. By indicating to the Applicant that the Officer's discretion to write a section 44 report would be based on the Applicant's personal circumstances, he denied the Applicant a fair opportunity to respond to the inadmissibility allegations. By refusing the Disclosure Request, the Officer further hampered the Applicant's ability to fairly and fully respond. The information relied on by the Officer was obtained directly from the Chinese authorities and the Applicant could not have obtained the information in any other way.

The Highlights were insufficient to meet the requirements of procedural fairness, in a context such as this, where inadmissibility is not based on a conviction in Canada.

[34] The Applicant also asserts that although the alleged errors arise on a lower level of procedural fairness, this Court should reconsider the threshold of procedural fairness and scope of discretion engaged in the context of the Officer's subsection 44(1) and the Minister's subsection 44(2) decisions. The Applicant alleges that there are a number of factors that have been overlooked in prior decisions of this Court and the Federal Court of Appeal in interpreting these subsections of the *IRPA*.

[35] Furthermore, specific consideration must also be given to refugee claimants in this context. In the context of this case, the facts underlying the inadmissibility allegation may also create a basis for a refugee protection claim. The two streams are markedly different, specifically with respect to the parameters of the decision to be made. The Applicant is asking this Court to clarify the proper framework to be followed in this context.

[36] It is the Respondent's position that while the Applicant does not have a right of appeal to the Immigration Appeal Division, he has an adequate alternative remedy available by way of the admissibility hearing before the Immigration Division and through the PRRA process. This Application should be dismissed on the sole basis that it is premature. Further, the discretion of officers and the Minister respectively under subsections 44(1) and 44(2) of the *IRPA* has largely been settled by recent jurisprudence of this Court. The impugned decisions are reasonable and do

not warrant the intervention of this Court. The Officer and Minister's Delegate exercised their limited discretion in accordance with the guidance of this Court and the Federal Court of Appeal.

B. *Preliminary Issue: Prematurity of the Application*

[37] The Respondent argues that this Application should be dismissed on the ground of prematurity alone. The Respondent relies on the Federal Court of Appeal's decision in *Lin v Canada (Public Safety and Emergency Preparedness)*, 2021 FCA 81 [*Lin*]. In *Lin*, the Federal Court of Appeal found that Minister's delegates acting under section 44 of the *IRPA* undertake what is akin to a screening exercise. A full opportunity to adduce evidence and advance factual and legal arguments is instead available before the Immigration Division and the Immigration Appeal Division. The applications in *Lin*, seeking judicial review of the Minister's delegates' decisions to refer the appellants to inadmissibility hearings, were therefore premature. The available and adequate administrative resources had not been pursued. Any exception to this general rule is very rare, requiring exceptional circumstances (*Lin*, above at paras 4-6).

[38] The underlying decisions in *Lin* concerned allegations of inadmissibility for misrepresentation, pursuant to subsection 40(1)(a) of the *IRPA*. The Respondent acknowledges that the Applicant in this current Application does not have a similar right of appeal to the Immigration Appeal Division, as the appellants possessed in *Lin*, owing to the operation of subsection 64(1) of the *IRPA*.

[39] Having access to both the Immigration Division and Immigration Appeal Division, the Federal Court of Appeal concluded in *Lin* that (*Lin* at para 4):

> ... The appellants will have a full opportunity to adduce evidence and advance their factual and legal arguments and concerns regarding the relevant issues in the Immigration Division and the Immigration Appeal Division. This includes any procedural fairness or substantive issues regarding the section 44 screening process that undermine the Immigration Division's ability to proceed. It also includes whether there were any misrepresentations giving rise to the grant of permanent residence, the relevant knowledge of the appellants, and any humanitarian and compassionate considerations. Thus, in the present cases, proceedings before the Immigration Division and the Immigration Appeal Division are both available and adequate: *Strickland v. Canada (Attorney General)*, 2015 SCC 37, [2015] 2 S.C.R. 713 at para. 42.

[40] The Respondent nonetheless asserts that the Applicant in this case has an adequate alternative remedy available at the admissibility hearing before the Immigration Division in light of: (1) the convenience of the alternative remedy; (2) the nature of the error alleged; (3) the nature of the other forum which would deal with the issue, including remedial capacity; (4) the expertise of the alternative decision maker; and (5) economical use of judicial resources and costs (*Strickland v Canada*, 2015 SCC 37 [*Strickland*] at para 42; *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61 at paras 30-32, leave to appeal to SCC refused 34311 (3 November 2011)).

[41] I agree with the Applicant that the consideration of prematurity requires a close attention to the facts. The section 44 process is inclusive of a variety of inadmissibility grounds, and applies to both permanent residents and foreign nationals. I note the Federal Court of Appeal's statements in *Cha v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126 [*Cha*] at paragraphs 21 to 22:

> [21] Subsection 44(2) of the Act applies to all grounds of inadmissibility. These grounds encompass such diverse areas as

> security, human or international rights violations, serious criminality, criminality, organized criminality, health, financial reasons, misrepresentation and non-compliance with the Act. The complexity of the facts at issue varies from ground to ground. Some grounds have legal components, others not. The subsection applies to permanent residents and to foreign nationals, who are not usually subject to the same treatment under the terms of the Act. The subsection applies both to the power of the Minister's delegate to refer the report to the Immigration Division and to his power to issue the removal order himself.
>
> [22] The scope of the discretion, therefore, may end up varying depending on the grounds alleged, on whether the person concerned is a permanent resident or a foreign national and on whether the report is referred or not to the Immigration Division. There may be a room for discretion in some cases, and none in others. This is why it was wise to use the term "may".

[42] I find that the circumstances in *Lin* are distinguishable from the current facts of this case and that the Applicant does not have an adequate alternative remedy in the form of an admissibility hearing before the Immigration Division. For the reasons below, this Application is not premature.

[43] The section 44 process does not result in a change of status for an applicant. The Federal Court of Appeal in *Sharma* aptly describes at paragraph 25: “While these decisions are important in the sense that they trigger the process that may ultimately strip the appellant of his permanent residency, they are of no immediate and practical consequence for the appellant”. The Immigration Division, seized of a section 44 report, will make the determination in this regard. The jurisprudence that likens the process under section 44 of the *IRPA* to a screening process is instructive.

[44] However, in discussing the duty of fairness owed by an officer and the Minister in the subsection 44(1) decision to write and subsection 44(2) referral decision, the Federal Court of Appeal stated (*Sharma* at para 24):

> [24] That being said, I am prepared to accept that the decisions to make a report and to subsequently refer it to the ID are not without significance. Considering that, once referred, the options of the ID appear to be very limited since it "shall make" a removal order if satisfied that the foreign national or the permanent resident is inadmissible, it would appear that the only discretion (albeit very limited) to prevent a foreign national or permanent resident from being removed rests with the immigration officer and the Minister or his delegate…

[45] Section 45 of the *IRPA* provides:

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	**d)** prendre la mesure de renvoi applicable contre l'étranger non

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.	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.

[46] The factors enumerated in the Supreme Court of Canada's decision in *Strickland*, at paragraph 42, is not a closed checklist. A Court must consider the available alternative and the appropriateness of judicial review, and question whether the alternative remedy is adequate in all the circumstances to address the applicant's grievance (*Strickland* at paras 42-43).

[47] Considering the limited discretion of the Immigration Division, which "shall make" a removal order, where a permanent resident is deemed inadmissible and the discretion that an officer or the Minister may exercise to prevent a foreign national or permanent resident from being removed, I do not find this Application is premature, given the "nature of the other forum which could deal with the issue, including its remedial capacity" being more narrow than the section 44 screening process that precedes it (*Strickland* at para 42). Judicial review is appropriate in the circumstances (*Strickland* at para 43).

[48] Although defined as a screening process, the section 44 process covers a breadth of inadmissibility grounds, engaging different considerations in each context. In the current circumstances of this case, I do not find that the admissibility hearing before the Immigration Division constitutes an adequate alternative remedy, rendering this Application premature.

C. *Duty of Procedural Fairness*

[49] The Applicant's allegations as it relates to the breach of procedural fairness of the Officer and Minister's Delegate are two-fold. First, in the decisions to write and refer the section 44 reports, the Officer and Minister's Delegate considered the seriousness of the allegation of inadmissibility to be paramount, after having foreclosed the Applicant's ability to respond to those allegations. Second, the Officer failed to provide relevant disclosure to the Applicant, as sought in the Disclosure Request.

[50] While the duty of procedural fairness under both the subsection 44(1) and section 44(2) decisions under the *IRPA* have largely been considered concurrently below, where differences exist, they are referred to explicitly.

[51] The errors described by the Applicant allegedly arise in that the Officer unreasonably found and communicated to the Applicant that "submissions in these sorts of circumstances are generally regarding an individual's personal circumstances as to why a report should not be referred" and "at this stage [the Applicant] is only required to know the factual basis of the allegation against him which has already been disclosed in the form of the s. 44 report highlights. As such the appropriate time for disclosure is when/if a report is forwarded for a hearing".

[52] The Applicant submits the alleged errors arise even on a lower threshold of procedural fairness generally found in the jurisprudence. In consideration of the factors outlined in *Baker*, above, this Court and the Federal Court of Appeal have found that a lower level of procedural

fairness is engaged by discretion exercised by an officer or the Minister pursuant to section 44 of the *IRPA*.

[53] The five, non-exhaustive *Baker* factors are: (1) the nature of the decision; (2) the statutory scheme; (3) the importance of the decision to the affected individuals; (4) the legitimate expectations of the person challenging the decision; and (5) the administrative decision-maker's choice of procedure (*Baker* at paras 23-28).

[54] In brief, the Federal Court of Appeal has found that in balancing all of the *Baker* factors, "the duty of fairness is clearly not at the high end of the spectrum in the context of decisions made pursuant to subsections 44(1) and (2)" on the basis of (*Sharma* at paras 22-29):

A. Decisions of an officer or the Minister under subsections 44(1) and 44(2) of the *IRPA* bear none of the hallmarks of a judicial or quasi-judicial process. Although, decisions to make and refer a section 44 report are not without significance. This factor favours a heightened level of procedural fairness;

B. The subsection 44(1) report, the subsection 44(2) referral and the Immigration Division's removal order are not necessarily determinative of whether an applicant/appellant will be removed from Canada, as there are possibilities of seeking relief under other provisions of the *IRPA*. Subsection 44(1) and 44(2) decisions are of no immediate and practical consequence;

C. No legitimate expectation was found to exist in *Sharma*; and

D. The *IRPA* does not set out any particular procedure to be followed in making a section 44 report and referring it to the Immigration Division – the procedure to be followed has been left to the decision-maker.

[55] Similarly, in *Hernandez*, this Court considered the factors laid out in *Baker* and found that they "point toward a more relaxed duty of fairness". At a minimum, the duty of procedural fairness required that the affected person be given an opportunity to make submissions and to know the case against him or her (*Hernandez v Canada (MCI)*, [2005] FCJ No 533 [*Hernandez*] at paras 70-72).

[56] In light of the Applicant's submission that a number of factors further support a higher level of procedural fairness, as it relates to the decisions to both write and refer a section 44 report, the *Baker* factors warrant re-examination in the particular context of this case. The Applicant asks this Court to rely on the decision in *Hernandez*, above, as the most appropriate starting point. The Applicant argues that the Federal Court's decision in *Hernandez* has comprehensively taken into account the circumstances allegedly informing the duty of procedural fairness and the scope of discretion exercised under subsections 44(1) and 44(2) of the *IRPA*, including the legislative history of the *IRPA*.

[57] The Applicant further submits the following factors for this Court's consideration, as outlined at paragraph 57 of the Applicant's Further Memorandum of Fact and Law:

A. The use of the word "may" write/refer in section 44 of the *IRPA*, which is a significant and intentional change from the use of the word "shall";

B. The presumptive rule in section 11 of the *Interpretation Act*, RSC, 1985, c I-21 [*Interpretation Act*] is that "may" is permissive and "shall" is not;

C. Historically, permanent resident status has been recognized as critical, which should be removed only "for very serious reasons" and after consideration of "ameliorating or compassionate factors such as length of residence". Before the creation of the Immigration Appeal Board, this power vested with the Minister. Through the *IRPA* amendments, Parliament can be seen as seeking to bring this power back to the Minister not to be removing it (*Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3 at para 38);

D. That permanent residence is a status recognized in the *Charter*, under section 6 mobility rights, and when citizenship was first created as a lawful status in 1947, it automatically captured persons who were domiciled in Canada for at least 5 years (domiciled status has since become known as permanent residence) (*The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11*);

E. That Articles 12 and 13 of the *International Covenant on Civil and Political Rights*, which Canada acceded to on May 19, 1976, provide for the rights of entry into one's own country, which encompasses long-term permanent residents, and for expulsion only for compelling reasons of national security, with a right for review of the reasons against expulsion. Articles 17 and 23 also provide for the rights against interference with family and home, and the recognition of the family as the

natural and fundamental unit of society which is entitled to protection by society and the State;

F. That the Supreme Court of Canada has recognized that deportation can have "a more significant impact on the accused than the criminal sanction itself… They may be forced to leave a country they called home for decades. They may return to a country were they no longer have any personal connections, or even speak the language, if they emigrated as children. If they have family in Canada, they and their family members face dislocation or permanent separation" (*R v Wong*, [2018] 1 SCR 696 at para 72);

G. That new bars and restrictions enacted since 2012 on mechanisms that previously allowed for the possibility that permanent residents could retain their status after a report was written, considering their personal circumstances, means that the section 44 decisions are of greater significance to the rights and interests of the person concerned than was previously the case: access to the Immigration Appeal Division was further restricted in 2012 to exclude persons with sentences of more than 6 months' imprisonment and in 2013 H&C applications under section 25 of the *IRPA* excluded persons inadmissible under sections 34, 35 and 37 from having applications considered. The Supreme Court of Canada also clarified that ministerial relief applications available to the later group of persons need only consider security interests and not H&C type circumstances (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 [*Agraira*] at para 84);

H. In section 34, 35 and 37 inadmissibility cases, there is no other place for the best interests of the child to be considered. It would be contrary to the *Convention on the Rights of the Child* if a meaningful best interests of the child analysis were not conducted at the section 44 *IRPA* stage;

I. That the "broad and unrestricted" interpretation that has been given to inadmissibility provisions makes this discretion even more important to ensure prospective removal is rationally tied to the objectives of the *IRPA* to prioritize security in each individual case, as balanced against the rights and interests of the person concerned and their families; and

J. That it is an absurd interpretation of the *IRPA* that would afford foreign nationals greater substantive consideration of their rights and interests in an application for permanent residence under section 25 of the *IRPA* than long-time permanent residents with Canadian children who stand to lose that status.

(1) The Nature of the Decision

[58] For the reasons below, the nature of a subsection 44(1) and subsection 44(2) decision favours a more nuanced level of procedural fairness than simply applying a "lower level". While the decisions are administrative in nature, they are significant steps within the inadmissibility process as a whole, particularly when the inadmissibility grounds concern organized criminality.

[59] The Federal Court of Appeal in *Sharma* and the Federal Court's decision in *Hernandez* have recognized the administrative nature of subsection 44(1) and 44(2) decisions, which bear "none of the hallmarks of a judicial or quasi-judicial decision" (*Sharma* at para 22; *Hernandez* at para 50). I further note the Federal Court of Appeal's statement in *Lin* that the "process is akin to a screening exercise in that there is no finding of inadmissibility, nor alteration of status" (*Lin* at para 4). On this basis, the Federal Court in *Hernandez* found that this factor supported a relatively low duty of fairness (*Hernandez* at para 56).

[60] Both subsections 44(1) and 44(2) of the *IRPA* use the permissive language "may", which denotes some level of discretion of the part of the officer or the Minister, although it may be limited. The change from the use of the word "shall" in the equivalent provisions in prior iterations of the *Immigration Act* (for example, *Immigration Act*, 1985, C I-2, s 27(1)) and in light of the parliamentary committee proceedings discussed in *Hernandez* at paragraphs 18 to 19, while not determinative, suggest discretion was intended at the "front end" of the section 44 process. The Federal Court of Appeal in *Sharma* has further recognized that the extent of discretion under subsections 44(1) and 44(2) of the *IRPA* will be 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 (*Sharma* at para 23).

[61] In *Cha*, as mentioned above, although the Federal Court of Appeal stated that "may" can be sometimes read in context as "must" or "shall", thereby rebutting the presumptive rule in section 11 of the *Interpretation Act*, the Court further recognized that the scope of discretion may end up varying depending on "the grounds alleged, on whether the person concerned is a

permanent resident or a foreign national and on whether the report is referred or not to the Immigration Division. There may be room for discretion in some cases, and none in others. This is why it was wise to use the term "may"" (*Cha*, above at paras 19, 22).

[62] I also note that in the Federal Court of Appeal's decision in *Cha* a "low degree of participatory rights is warranted" is further distinguishable as it concerned a foreign national, not a permanent resident, and the decision under review was only in respect of issuing a removal order.

[63] While the nature of the subsection 44(1) decision to write and the subsection 44(2) decision to refer an inadmissibility report under the *IRPA* have been considered concurrently thus far, there is the matter of the respective nature of each decision.

[64] As it relates to writing a section 44 report under subsection 44(1) of the *IRPA*, the officer "may prepare a report setting out the relevant facts". Under subsection 44(2) of the *IRPA*, the Minister must be of the opinion "that the report is well-founded" to refer the report to the Immigration Division for an admissibility hearing. The Minister further retains some authority in certain prescribed circumstances to directly make a removal order under subsection 44(2) of the *IRPA*. In this respect, the Minister arguably possesses a broader scope of discretion under subsection 44(2), than the officer under subsection 44(1), whose task is one of fact-finding. However, as both decisions are in issue in this Application, this distinction is ultimately not determinative.

[65] Therefore, I find that this factor rather favours a more nuanced consideration of procedural fairness. Particularly, I find this to be the case where a permanent resident is faced with an inadmissibility allegation of organized criminality.

[66] Decisions to make and refer section 44 reports to the Immigration Division are not without significance. The outcomes following an admissibility hearing are limited, as the Immigration Division "shall make" a removal order if it finds that the permanent resident is inadmissible (*IRPA*, s 45). The only discretion appears to be conferred by an officer and the Minister and the use of the word "may" in subsections 44(1) and 44(2) of the *IRPA*. As described in *Hernandez* at paragraph 47, although in the context of a serious criminality inadmissibility allegation:

> … As discussed earlier in these reasons, under s. 36(1) of the IRPA, the Applicant is inadmissible; there is no room for any other finding. Once the s. 44(2) Referral is made to the Immigration Division, the only outcome of the inquiry, that I can see, is a removal order. Finally, an appeal to the IAD has been removed for persons in the position of the Applicant. Thus, the only power to prevent the Applicant's removal rested with the immigration officer and the Minister's delegate. Only if either one or the other of these two officials had decided not to take further action would the Applicant be able to avoid the issuance of a removal order under s. 45(d).

(2) The Statutory Scheme and the Importance of the Decision to the Affected Individuals

[67] I find that the statutory scheme and the importance of the decision to the affected individuals also favour a level of procedural fairness that at the very least considers the exercise of reasonable discretion in determining the Applicant's position under subsections 44(1) and 44(2) of the *IRPA*. For the reason below, I find that the decisions in issue are ultimately

determinative of whether the Applicant will be removed from Canada, particularly in the context of an organized criminality inadmissibility allegation, and the consequences of these decisions carry a particular importance for permanent residents in Canada.

[68] As stated by the Supreme Court of Canada in *Baker* at paragraph 24:

> …The role of the particular decision within the statutory scheme and other surrounding indications in the statute help determine the content of the duty of fairness owed when a particular administrative decision is made. Greater procedural protections, for example, will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted…

[69] Prior jurisprudence of this Court and the Federal Court of Appeal have generally found that the decisions to write and refer a section 44 report and the Immigration Division's removal order are not necessarily determinative of an applicant's removal from Canada, considering the other forms of available relief under the *IRPA*. These forms of relief include an exemption on the basis of H&C considerations under section 25 of the *IRPA* and the PRRA process pursuant to section 112 of the *IRPA* (*Hernandez* at para 59; *Sharma* at para 25). As such, the inadmissibility process is not "the end of all possibilities for the Applicant to remain in Canada" (*Hernandez* at para 59).

[70] While I agree in principle with the rationale used in the above cases, a closer examination of the statutory scheme and its application in the context of this case reveals that the subsection 44(1) and 44(2) decisions under the *IRPA* offer limited recourse for further relief, as it relates to an applicant subject to an organized criminality inadmissibility allegation.

[71] Within the inadmissibility process itself, as indicated above, a subsection 44(1) and 44(2) decision to write and refer a section 44 report confer the only discretionary power to prevent an applicant's removal in the inadmissibility process (*Hernandez* at para 58; *Sharma* at para 24).

[72] Moreover, as it relates to the *IRPA* scheme more broadly, the particular circumstances of an applicant must be considered contextually in order to determine which avenues of relief are further available. As described above, subsections 44(1) and 44(2) of the *IRPA* encompass all grounds of inadmissibility – including, security, human or international rights violations, serious criminality, criminality, organized criminality, health, financial reasons, misrepresentation and non-compliance with the *IRPA* – with varying consequences for an applicant (*Cha* at paras 21-22).

[73] The options for a permanent resident found inadmissible on the basis of organized criminality under section 37 of the *IRPA* are limited. There is no further right of appeal to the Immigration Appeal Division (*IRPA*, ss 64(1), (2)). Moreover, an exemption based on H&C grounds is not available (*IRPA*, ss 25(1), 46(1)(c)). In this respect, this case is distinguishable from the facts in the decisions of *Sharma* and *Hernandez*, where the Courts considered an appellant or applicant inadmissible on account of serious criminality.

[74] While an applicant may be able to apply for a temporary resident permit, a PRRA or deferral of removal, these are temporary or provisional measures. A temporary resident permit applies for a "finite period of time" and a PRRA operates to "stay removal from Canada", in the case of inadmissibility on the basis of organized criminality (*IRPA*, ss 112(3), 114(1)(b)).

[75] In oral submissions, counsel for the Respondent emphasized the importance of the PRRA process. However, I do find that this avenue is analogous to the Immigration Appeal Division process or to an exemption on the basis of the H&C considerations, in the context of assessing the level of procedural fairness owed to an applicant, due to its provisional nature. Again, I find that a more nuanced assessment is required on the basis of this particular ground of alleged inadmissibility – organized criminality.

[76] Further, pursuant to section 48 of the *IRPA*, removal orders must be executed as soon as possible. An officer charged with the matter would retain little discretion to defer removal (*IRPA*, s 48(2); *Revell* at para 12).

[77] As such, the only option for a foreign national to directly challenge the inadmissibility finding is through a section 42.1 ministerial declaration under the *IRPA*:

Exception — application to Minister	**Exception — demande au ministre**
42.1 (1) The Minister may, on application by a foreign national, declare that the matters referred to in section 34, paragraphs 35(1)(b) and (c) and subsection 37(1) do not constitute inadmissibility in respect of the foreign national if they satisfy the Minister that it is not contrary to the national interest.	**42.1 (1)** Le ministre peut, sur demande d'un étranger, déclarer que les faits visés à l'article 34, aux alinéas 35(1)b) ou c) ou au paragraphe 37(1) n'emportent pas interdiction de territoire à l'égard de l'étranger si celui-ci le convainc que cela ne serait pas contraire à l'intérêt national.
Exception — Minister's own initiative	**Exception — à l'initiative du ministre**
(2) The Minister may, on the Minister's own initiative, declare that the matters referred to in section 34, paragraphs 35(1)(b) and (c) and subsection 37(1) do not constitute inadmissibility in respect of a foreign	**(2)** Le ministre peut, de sa propre initiative, déclarer que les faits visés à l'article 34, aux alinéas 35(1)b) ou c) ou au paragraphe 37(1) n'emportent pas interdiction de territoire à l'égard de tout étranger s'il est convaincu que

national if the Minister is satisfied that it is not contrary to the national interest.	cela ne serait pas contraire à l'intérêt national.
Considerations	**Considérations**
(3) In determining whether to make a declaration, the Minister may only take into account national security and public safety considerations, but, in his or her analysis, is not limited to considering the danger that the foreign national presents to the public or the security of Canada.	**(3)** Pour décider s'il fait la déclaration, le ministre ne tient compte que de considérations relatives à la sécurité nationale et à la sécurité publique sans toutefois limiter son analyse au fait que l'étranger constitue ou non un danger pour le public ou la sécurité du Canada.

[78] If relief is granted, the foreign national becomes eligible to make an H&C application under section 25 of the *IRPA* (*Revell* at para 10):

> [10] Section 42.1 provides that the Minister of Public Safety and Emergency Preparedness may declare that subsection 37(1) organized criminality does not constitute inadmissibility in respect of a foreign national if he or she is satisfied that this exception is not contrary to the national interest. This declaration may be made on his or her own initiative or on the basis of an application. Under subsection 42.1(3), in determining whether or not to make this declaration the Minister may only consider "national security and public safety considerations" but he or she "is not limited to considering the danger that the foreign national presents to the public or the security of Canada" in the analysis. When section 42.1 relief is granted, the foreign national becomes eligible to make an H&C application under section 25.

[79] As such, while this is not a situation where the Applicant has no recourse, the avenues are more limited than the circumstances considered in *Sharma* and *Hernandez*. I further note the Applicant's argument that H&C factors are more properly considered in the context of a section 25 H&C application under the *IRPA*, and ministerial relief should not serve as an alternative form of humanitarian review (*Agraira*, above at para 84). Accordingly, there is limited

opportunity for consideration of such factors, including the best interests of the child, in the avenue of relief that remains accessible to the Applicant.

[80] Amendments to the *IRPA* have implemented bars and restrictions on mechanisms that previously allowed for the possibility that permanent residents could retain their status after a section 44 report was written. The *IRPA* statutory scheme should be considered contextually in this case, where a permanent resident is facing allegations of inadmissibility on the basis of organized criminality.

[81] Further, I accept that the subsection 44(1) and 44(2) decisions may carry a particular importance for permanent residents considering their close ties to Canada when compared to foreign nationals. Nevertheless, I acknowledge that Parliament's intention to make security a top priority must be kept in mind by officers and the Minister, and their scope of discretion has generally been found to apply with equal force to foreign nationals and permanent residents (*IRPA*, s 3(1)(h), (i)); *Sharma* at para 23).

(3) The Legitimate Expectations of the Person Challenging the Decision

[82] As found at paragraph 26 of *Baker*, "[i]f the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness". This takes into account the promises and regular practices of decision-makers (*Baker* at para 26; *Hernandez* at para 62).

[83] In this case, the Officer expressly indicated to the Applicant that at this stage, only the personal circumstances of the Applicant were relevant in his decision of whether to write the section 44 report:

> …The making of submissions is to allow the minister's delegate an opportunity to exercise their discretion as to whether a removal order ought to be sought based on an individual's personal circumstances and the impact that a removal order would have on them.

[84] The Applicant had a legitimate expectation that this process would be followed, as stated in the October 21, 2019 response letter to the Officer, which confirmed the Applicant's understanding.

[85] I note that different conclusions were reached in *Sharma* and *Hernandez* as it relates to the relevance of Immigration, Refugees and Citizenship Canada's Enforcement Manual ENF 5 [ENF 5 Manual] on the legitimate expectations of the appellant or applicant, respectively. I do not find the ENF 5 Manual determinative in my assessment of this factor, when clear direction was provided by the Officer (*Sharma* at paras 26-27; *Hernandez* at para 64).

(4) The Administrative Decision-Maker's Choice of Procedure

[86] The *IRPA* does not set out any particular procedure to be followed in making a section 44 report and referring it to the Immigration Division – the procedure to be followed has been left to the decision maker. However, for this reason, the applicable ENF 5 Manual deserves consideration (*Sharma* at para 28; *Hernandez* at para 69). It requires that persons reported understand both the case against them and the nature and purpose of the report.

[87] Moreover, as indicated above, in the procedural fairness letter, dated September 9, 2019, the Officer provided that the Applicant may make a written submission in respect of “any other relevant factors”.

(5) Application to this Case

[88] In balancing the above factors, I find in the circumstances here that the duty of procedural fairness requires that the Applicant be afforded an opportunity to provide submissions on the substance of the inadmissibility allegations and an appropriate level of disclosure to understand the case against him. In this case, this includes disclosure sufficient for the Applicant to address concerns related to the reliability of the evidence gathered by the Chinese authorities that formed the basis of the inadmissibility allegations.

[89] The Officer invited the Applicant to make submissions in the procedural fairness letter, dated September 9, 2019. The procedural fairness letter enumerated a list of personal circumstances the Applicant could speak to and further invited the Applicant to address “any other relevant factors”.

[90] The Officer was then put on notice that the Applicant intended to respond to the inadmissibility allegations, assuming relevant disclosure could be obtained. The Disclosure Request was made in the Applicant’s letter to the Officer, dated September 24, 2019.

[91] However, the Officer’s response on September 26, 2019 foreclosed the Applicant’s opportunity to make submissions on the inadmissibility allegations, stating “[t]he making of

submissions is to allow the minister's delegate an opportunity to exercise their discretion as to whether a removal order ought to be sought based on an individual's *personal circumstances*". On this basis, the Officer found that it was not appropriate to disclose anything further at the time of the Disclosure Request. [Emphasis added]

[92] Jurisprudence of this Court has established that an applicant is entitled to disclosure in the course of the section 44 process under the *Act*, "where the information sought is material and otherwise unknown and unavailable" (*Durkin v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 174 [*Durkin*] at para 14; see also *Jeffrey*, above at paras 24, 27).

[93] In *Durkin*, the Federal Court provided that (*Durkin*, above at para 14):

> …a duty of fairness applies to the process described in s. 44 of the *IRPA* such that an appropriate level of disclosure is required. For a permanent resident with substantial ties to Canada, the scope of available discretion under these provisions may also be somewhat broader than that for a foreign national and can give rise to a heightened level of procedural fairness.

[94] Mr. Durkin was a long-standing permanent resident of Canada, holding British Citizenship. He was facing the prospect of a hearing before the Immigration Division to determine whether he was inadmissible to Canada, pursuant to subsection 36(1)(c) or 37(1)(a) of the *IRPA*. In 2013, Mr. Durkin was indicted by a Grand Jury in Alabama, for an alleged conspiracy to commit securities and wire fraud. The Federal Court found (*Durkin* at para 32):

> [32] The stated rationale for the refusal to disclose the United States law enforcement material to Mr. Durkin was that he would be entitled to later disclosure in the context of an admissibility hearing. This misses the point. The invitation to a person involved in the s 44 process to provide submissions is for the purpose of possibly avoiding a referral for an admissibility hearing. This is

> also the only point in the process that a person can call upon the Delegate for leniency notwithstanding the person's technical inadmissibility. At the later point of an admissibility hearing the only open issue is whether the grounds for establishing inadmissibility have been established. Accordingly, in a situation where disclosure is actually needed to support a claim for leniency to the Delegate, the duty of fairness may require it.

[95] Unlike the circumstances in *Durkin*, I find that the Applicant in this case lacked the information necessary to answer the evidence of inadmissibility held by CBSA. This information was provided by the Chinese authorities and supported by other unknown sources. The information was not available to the Applicant publicly or through other avenues.

[96] The Applicant has raised concerns with the procedural fairness of investigations undertaken by the Chinese authorities. In such circumstances, it cannot be said that the Applicant was in a position to respond to the inadmissibility allegations of CBSA. He was entitled to receive the material information relied on by CBSA that was otherwise unknown or unavailable to him.

[97] Counsel for the Respondent points this Court to the Highlights, stating that the Applicant was well aware of the detailed, factual basis underpinning the inadmissibility allegations. I do not agree that the factual basis provided constitutes sufficient disclosure in this case, where the fairness of investigations undertaken by the Chinese authorities has been put into issue. These were detailed in the Applicant's October 21, 2019 submissions, [redacted].

[98] As previously discussed above, I note that the section 44 process under the *IRPA* has been described by this Court and the Federal Court of Appeal as akin to a screening process (*Lin* at para 4). The Federal Court of Appeal in *Cha* at paragraph 35 has further described that officers and the Minister "are simply on a fact-finding mission, no more, no less".

[99] In *Cha*, a foreign national with a student authorization was convicted in Ottawa of driving a vehicle while impaired, contrary to subsection 253(b) of the *Criminal Code*, RSC, 1985, c C-46. While *Cha* describes an officer's role in assessing readily and objectively ascertainable facts concerning admissibility, the current case is distinguishable in that it does not concern a conviction in Canada, but allegations from the authorities in China. The facts underlying an inadmissibility allegation in such a case are not "readily and objectively ascertainable" in the same way. The role of an officer under subsection 44(1) of the *IRPA* is not necessarily as straightforward in such a case. I do not find the reliability of the facts in question to be immaterial in the Officer's exercise of discretion under subsection 44(1) of the *IRPA* to "prepare a report setting out the relevant facts".

[100] These circumstances support the Applicant's entitlement to relevant disclosure and to make submissions on the admissibility allegations themselves, including on the reliability of the evidence.

[101] The Applicant further asserts that the Officer did not fairly conduct the interview by failing to provide proper notice about the purpose of the interview. There is no duty on the part of the Officer to conduct an interview and the Applicant was advised of the additional grounds of

alleged inadmissibility both during the interview and in a subsequent procedural fairness letter. The Applicant was invited to make submissions in response (*Mannings v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 823 [*Mannings*] at para 102). The Applicant has not substantiated that the Officer breached a duty of procedural fairness in this regard.

D. *The Section 44 Inadmissibility Framework: Level of Discretion and Procedural Fairness Owed*

[102] The Applicant further states that the question remains unsettled as to the actual scope of discretion held by officers and the Minister in their decisions to respectively write and refer a section 44 report, and the level of procedural fairness owed in this context. It is the Applicant's position that a wider scope of discretion and procedural fairness ought to be found to exist in light of a number of factors that have not been considered in past decisions of this Court. These decisions, finding a more narrow discretion exists, have allegedly failed to conduct a fulsome statutory analysis on the proper interpretation of the applicable provisions.

[103] Using *Hernandez* as the starting point, the Applicant raises the same considerations at paragraph 57 of his Further Memorandum of Fact and Law, as previously outlined above.

[104] The Applicant further argues that this Application raises the question of how section 44 of the *IRPA* should be engaged where the person concerned is a refugee claimant, particularly where the facts underlying the inadmissibility allegation have a nexus to the refugee claim. The Applicant argues that the following considerations should be undertaken:

A. An officer must consider whether the evidence relied upon is truly reliable or if there is a risk that it is a part of persecutory efforts by the foreign state;

B. An officer must also then consider Canada's obligations under the *Refugee Convention* and whether the circumstances are more appropriately determined through the refugee claim exclusion framework; and

C. Alternatively, an officer must turn their mind towards the exceptions to non-refoulement, under subsection 115(2) of the *IRPA*.

[105] The Applicant alleges that the Officer and Minister's Delegate in this case pursued an inadmissibility ground that would preclude the Applicant's access to the Refugee Protection Division, without reasonably considering the refugee-related context of whether this course of action was actually appropriate. Section 115 of the *IRPA* provides:

Protection	**Principe**
115 (1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.	**115 (1)** Ne peut être renvoyée dans un pays où elle risque la persécution du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques, la torture ou des traitements ou peines cruels et inusités, la personne protégée ou la personne dont il est statué que la qualité de réfugié lui a été reconnue par un autre pays vers lequel elle peut être renvoyée.
Exceptions	**Exclusion**
(2) Subsection (1) does not apply in the case of a person	**(2)** Le paragraphe (1) ne s'applique pas à l'interdit de territoire :

(a) who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the Minister, a danger to the public in Canada; or	**a)** pour grande criminalité qui, selon le ministre, constitue un danger pour le public au Canada;
(b) who is inadmissible on grounds of security, violating human or international rights or organized criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada.	**b)** pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée si, selon le ministre, il ne devrait pas être présent au Canada en raison soit de la nature et de la gravité de ses actes passés, soit du danger qu'il constitue pour la sécurité du Canada.

[106] Further, a section 37 inadmissibility finding will preclude an individual from being conferred refugee protection status, pursuant to subsection 112(3)(a) of the *IRPA*:

Restriction	**Restriction**
(3) Refugee protection may not be conferred on an applicant who	**(3)** L'asile ne peut être conféré au demandeur dans les cas suivants:
(a) is determined to be inadmissible on grounds of security, violating human or international rights or organized criminality;	**a)** il est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée;

(1) Level of Procedural Fairness

[107] The duty of procedural fairness has already been considered above. To the extent the Applicant asks this Court to undertake an academic exercise and broadly declare that officers and the Minister are held to a higher duty of procedural fairness, I find that it is not appropriate to do so.

[108] Given my decision, that varying levels of procedural fairness may apply in the particular context of a section 44 inadmissibility process, depending largely on the inadmissibility ground, it would be inappropriate to now declare that a particular level of procedural fairness applies to all circumstances.

(2) Scope of Discretion

[109] For similar reasons, I also find that the circumstances of this case are not appropriate for making a broad declaration related to an officer's or the Minister's scope of discretion under subsections 44(1) and 44(2) of the *IRPA*.

[110] The divergence as it relates to the scope of discretion afforded to an officer or the Minister under section 44 of the *IRPA* has been described by Federal Court of Appeal as follows (*Sharma* at para 44):

> [44] The scope of the discretion that can be exercised pursuant to section 44 has divided the Federal Court, and the Judge below found as much. One line of cases, exemplified by such decisions as *Correia v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 782, 253 F.T.R. 153; *Leong v. Canada (Solicitor General)*, 2004 FC 1126, 256 F.T.R. 298; and *Richter v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 806, 73 Imm. L.R. (3d) 131, aff'd by 2009 FCA 73, [2009] F.C.J. No. 309, adopted a narrow interpretation of section 44 and determined that officers have no discretion to consider factors beyond an individual's alleged inadmissibility. Conversely, another series of decisions adopted a broader approach and held that officers have a wide enough discretion to consider the personal circumstances of an individual, in addition to the facts underlying the alleged inadmissibility (see, for example, *Hernandez*, 2005; *Spencer*; and *Faci v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 693, [2011] F.C.J. No. 893).

[111] Recent jurisprudence of this Court tends to support a more limited discretion to consider H&C factors (*Mannings*, above at paras 76-79; *McLeish v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 705 at paras 8, 56).

[112] In *McAlpin v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 422 [*McAlpin*], the Federal Court set out the following framework, adapting that set out in *Melendez v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 1363 at paragraph 34 (*McAlpin*, above at para 70):

> 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.

[113] In contrast to several of the authorities cited by the parties, the concern of the Applicant is not the Officer or Minister's Delegate's discretion to consider the Applicant's personal circumstances, but rather that the Officer foreclosed an opportunity for the Applicant to fully and fairly respond to the inadmissibility allegations, particularly in circumstances where the seriousness of these allegations were relied on to support the decisions to write and refer the section 44 reports.

[114] The question posed by the Applicant in this respect is therefore not grounded in the facts of this current case. As was the case in *Sharma*, a determination in this matter is best left for a case where the applicant is alleging entitlement to the full H&C analysis (*Sharma* at para 48):

> [48] In those circumstances, I agree with the Judge that the appellant has no basis to complain about the scope of the mandate adopted by the Officer since he received the most favourable approach. The appellant's submissions in this respect are therefore academic, and a determination of the precise extent of an officer's discretion would have no bearing on the outcome of this case. Therefore, it is preferable to leave this issue for another day, and in particular whether a person concerned is entitled to a full scale H&C analysis at the stage of the inadmissibility report.

(3) Nexus to a Refugee Claim

[115] The facts do not support that the Officer and Minister's Delegate pursued the inadmissibility ground of organized criminality with the intention that it would preclude the Applicant's access to the Refugee Protection Division, neither does the record support that the policy choices of Parliament – the *IRPA* regime related to persons subject to allegations of organized criminality – necessarily require an officer or the Minister to undertake the type of analysis proposed by the Applicant.

[116] The Applicant made submissions to the Officer regarding his personal circumstances, including his fears of returning to China, based on the conditions he would face in China [redacted]. The Officer and Minister's Delegate did not find these circumstances sufficient to overcome the serious nature of the inadmissibility allegations.

[117] There is a seriousness with which Parliament has chosen to deal with those persons subject to allegations of organized criminality. The legislative changes to the *IRPA*, as highlighted by the Applicant, demonstrate this. For example, as of 2013, an inadmissibility finding under section 37 of the *IRPA* precludes the filing of an application for H&C relief (*Faster Removal of Foreign Criminals Act*, SC 2013, c 16).

[118] While limited avenues of relief may heighten the level of procedural fairness owed to an applicant, these forms of relief still operate as alternative measures for an applicant subject to a removal order and in need of protection, as permitted under the PRRA process in section 112 of the *IRPA*, which operates to stay removal.

[119] In a similar vein, the Applicant has broadly alleged several *Charter* value considerations, without demonstrating to this Court how they apply to the particular circumstances of this case. In *B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58, the Supreme Court of Canada considered the constitutionality of subsection 37(1)(b) of the *IRPA*, finding that:

> [75] The argument is of no assistance in any event, as s. 7 of the Charter is not engaged at the stage of determining admissibility to Canada under s. 37(1). This Court recently held in *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68, [2014] 3 S.C.R. 431, that a determination of exclusion from refugee protection under the IRPA did not engage s. 7, because "even if

> excluded from refugee protection, the appellant is able to apply for a stay of removal to a place if he would face death, torture or cruel and unusual treatment or punishment if removed to that place" (para. 67). It is at this subsequent pre-removal risk assessment stage of the IRPA's refugee protection process that s. 7 is typically engaged. The rationale from *Febles*, which concerned determinations of "exclusion" from refugee status, applies equally to determinations of "inadmissibility" to refugee status under the IRPA.

E. *Proposed Questions for Certification*

[120] The Applicant has proposed the following questions for certification:

A. May [or must] a Minister's delegate under the *IRPA* consider complex issues of fact and law including the best interests of children and/or H&C issues, in relation to a possible referral of a permanent resident under section 37 of *IRPA* to an admissibility hearing before the Immigration Division, in relation to which the *IRPA* bars consideration of H&C and may bar best interests of the children factors? – adapted from the certified question in *Obazughanmwen v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 683;

B. To what extent does a Minister's delegate acting pursuant to section 44(2) of the *IRPA* have an obligation to consider personal mitigating circumstances including *Charter* values before referring the case of a permanent resident to the Immigration Division on the ground of serious criminality [and organized criminality]? – adapted from the certified question in *Surgeon v. Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1314; and

C. To what extent does a Minister's delegate acting pursuant to section 44(2) of the *IRPA* have an obligation to consider Canada's obligations under the *Refugee Convention*, including the reliability of the evidence it is relying upon, whether the allegations are tied to state persecutory efforts, and/or whether the allegations would ultimately give rise to invoking an exception to the non-refoulement principle, in deciding to refer the case of a refugee claimant to the Immigration Division on the grounds of organized criminality?

[121] The threshold for certifying a question is whether there is a serious question of general importance which could be dispositive of the appeal (*Canada (Minister of Citizenship and Immigration) v Zazai*, 2004 FCA 89):

> [12] The corollary of the fact that a question must be dispositive of the appeal is that it must be a question which has been raised and dealt with in the decision below. Otherwise, the certified question is nothing more than a reference of a question to the Court of Appeal. If a question arises on the facts of a case before an applications judge, it is the judge's duty to deal with it. If it does not arise, or if the judge decides that it need not be dealt with, it is not an appropriate question for certification.

[122] The first two questions proposed for certification would not be dispositive of the appeal. They concern the scope of an officer or the Minister's discretion as it relates to H&C factors. The Applicant had the opportunity to make submissions on his personal circumstances before the Officer and the Officer and Minister's Delegate's consideration of these factors are not in dispute. Instead, the Applicant's arguments focus on the lack of opportunity he had to make submissions related to the inadmissibility allegations.

[123] The third question, however, meets the threshold for certification.

VII. Conclusion

[124] For the reasons above, this Application is granted. Both the decisions of the Officer to write the section 44 report and of the Minister's Delegate to refer the section 44 report are set aside. The matter is remitted to a different Officer for redetermination.

JUDGMENT in IMM-5379-20 and IMM-5380-20

THIS COURT'S JUDGMENT is that:

1. The Application is granted and both decisions to write and refer the section 44 report are set aside;

2. The matter is remitted to a different officer for reconsideration; and

3. The following question is certified:

> To what extent does a Minister's delegate acting pursuant to section 44(2) of the IRPA have an obligation to consider Canada's obligations under the *Refugee Convention*, including the reliability of the evidence it is relying upon, whether the allegations are tied to state persecutory efforts, and/or whether the allegations would ultimately give rise to invoking an exception to non-refoulement principle in deciding to refer the case of a refugee claimant to the Immigration Division on the grounds of organized criminality?

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	IMM-5379-20 IMM-5380-20
STYLE OF CAUSE:	XY v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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