Federal Court  Cour fédérale

Date: 20111117

Docket: IMM-6618-10

Citation: 2011 FC 1319

Ottawa, Ontario, November 17, 2011

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

MARK ALISTAIR STABLES

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the October 22, 2010 decision by Immigration Division Board Member Ama Beecham, in which the Applicant was found inadmissible to Canada under subsection 37(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] because of his membership in a criminal organization, namely the Hells Angels. Rather than challenging the correctness or reasonability of the decision itself, however, the Applicant uses this judicial review application as a forum to bring a challenge under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK),

1982, c 11 [the "Charter"] to the legislative provision upon which the decision was based – section 37 of *IRPA*. The Applicant argues that the practical unavailability of the ministerial relief supposedly provided for by this provision (and by the analogous provisions found in sections 34 and 35) renders the inadmissibility regime established by these provisions, incompatible with the Charter.

1. Facts

[2] The Applicant is a permanent resident, who has been in Canada for over 40 years arriving from Scotland with his parents, at the age of seven. He joined the Hells Angels motorcycle group in 2000, and terminated his membership with them in December, 2009.

[3] On November 7, 2006, as he was arriving at the Vancouver International Airport, he was interviewed by Immigration officials. He was found carrying some Hells Angels paraphernalia and related phone numbers. As a result of the interview, the Immigration Officer proceeded to write a report of inadmissibility, pursuant to s. 44 of *IRPA*.

[4] Following an admissibility hearing, a decision was made on October 22, 2010 whereby he was found inadmissible to Canada under subsection 37(1)(a) of *IRPA*, due to his membership in a criminal organization. He has been issued a deportation order, although he has not yet been removed. He has applied for ministerial relief through subsection 37(2) of *IRPA*, but has not yet received an answer. He has also been offered a Pre-Removal Risk Assessment ("PRRA"), but declined to file one.

2. The impugned decision

[5] In a 62-page decision, the Immigration Division found the Applicant to be a member of the Hells Angels, an organization that there are reasonable grounds to believe is or has been engaged in 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.

[6] The Applicant admits that he was in the Hells Angels for nine years. He held the position of treasurer of its Ontario operation for seven years, was a full-member of the Hells Angels, bore Hells Angels tattoos, voluntarily joined the Toronto chapter, turned to them for assistance in paying his legal fees, served as the Sergeant-at-Arms of his local chapter and served as president of their Ontario corporation. He claims, however, that he has never been involved in any criminal activity, and has always been outspoken about not voting in favour of any person involved in such activity in joining the club.

[7] The Immigration Division assessed the nature and quality of the Applicant's involvement with the Hells Angels organization. This included the circumstances surrounding his recruitment, his length of involvement, his advancement through the organization, the activities he performed on behalf of the organization, and the fact that he held a high position of trust and authority. It also noted that as of the date of his admissibility hearing, the Applicant did not have any exit date on his Hells Angels tattoo. Based on all of this evidence, the Immigration Division concluded that the Applicant had all the indicia of membership pursuant to subsection 37(1)(a):

> [166] (…) Mr. Stables' knowledge may very well be made out by reference to his position in the Hells Angels; he was a full patch member for 9 years, served at one time as Sergeant at Arms, and functioned as a Treasurer for about 10 Chapters for approximately 7 years in the Hells Angels Ontario Corporation, which positions would have given him a good knowledge about the organization's purpose, mandate, agenda or activities. He was very involved in many aspects of the Hells Angels activities, and it is difficult for the panel to accept the argument that he was isolated from what was going on in the organization and elsewhere, and therefore innocent of any organized crime. The reality is that Mr. Stables was fully integrated into the Hells Angels.

[8] The Immigration Division also found the Hells Angels to be an "organization" as is contemplated by ss. 37(1) of *IRPA* in light of the following:

- It has formal structures like corporations, and also has Chapters. The corporation maintains a separate existence from Canadian Hells Angels Chapters, and the allegations of criminality and organized criminality have been levelled, not at the corporation, but at the Chapters and their members.
- It is governed by bylaws or constitutions. There are world rules, and Chapter/Club rules setting out members' rights and obligations, punishments for infractions, and criteria for being a member, membership advancement, and symbols.
- Each Chapter has an executive made up of a president, a vice-president, a sergeant at arms, secretary treasurer, and a road captain. Each Chapter requires at least 6 full-patch members to function.
- The Hells Angels has a distinct identity, a distinct name, and a distinct logo. It has a leadership structure as well as a recruitment pattern and a plan designed to exclude and eliminate undesirables. It is governed by rules and

> bylaws. The organization has a system to confirm and ensure loyalty and it has an occupied territory or chosen meeting locations. All of these facts are indicia that the Hells Angels fits the profile of an organization.
>
> Certified Tribunal Record, pp. 14-20.

[9] Further, after considering various legal definitions of "criminal organization" and jurisprudence involving an analysis of the Hells Angels activities, the Immigration Division noted the following evidence as supporting its conclusion that the Hells Angels is indeed a criminal organization:

- The Hells Angels is a sophisticated organization which has as its primary line of business, criminal activity.
- Information provided by several police officers confirms the Hells Angels is indeed a criminal organization – a group that will commit crime for money.
- The organization is engaged in drug trafficking, importation of drugs, manufacturing and distribution of drugs, and other offences of thefts, extortions, firearms, and murder.
- The organization collects intelligence on policing, and it operates a number of clubhouses that make it safe to conduct illegal business. Chapters are usually opened for the purpose of manufacturing or distributing drugs. Members who get in trouble with the law are assisted by the club dues that are ultimately used to defray their costs. In essence, the organization exists for, and benefits its members from, the continuing criminal activity of its members.

- The group dynamic is active and present in the fact that the various characteristics and features of the organization foster the orchestration and commission of criminal acts. Its structure, membership, loyalty structures, the influence of its leadership, incumbent obligations of the members to one another, its organizational rules, colours, clubhouse, its dealings with rival gangs and criminal activities, all advance the criminal agenda.
- The Hells Angels accomplishes its criminal aims primarily through lower level associates and through puppet gang to insulate themselves from detection.
- The Hells Angels is considered the primary producer and distributer of illegal drugs in the U.S. Their criminal activity is generally conspiratorial and includes extortion, business infiltration, trafficking in drugs, illegal weapons, and stolen property. The organization is also involved in prostitution, money laundering, and vehicle-theft rings.

Certified Tribunal Record, pp. 20-47

[10] With respect to whether the criminal activity formed part of a pattern, organized, and planned by a number of persons acting in concert in furtherance of the commission of an offence punishable by way of indictment, the Immigration Division concluded:

- The Hells Angels is engaged in concerted criminal activity, primarily the drug business. The criminal activity shows a pattern of similarity both inside and outside of Canada.

- The criminal activities (extortion, conspiracy, drug trafficking, and the importation, exportation, manufacturing, and production of illegal drugs) are all indictable offences under the Criminal Code.

  Certified Tribunal Record, pp. 45-46.

3. Issues

[11] Before this Court, the Applicant took no issue with the factual findings of the Immigration Division. He admitted that he was a full-patch member of the Hells Angels for nine years, although with no criminal charges or convictions. He did not concede that the motorcycle club is a criminal organization.

[12] Instead, the Applicant sought to challenge the constitutionality of ss. 37(1) of *IRPA*, the provision on which the decision of the Immigration Division is based. The Respondent, on the other hand, is of the view that this constitutional challenge has no merit, and was not brought in a timely manner.

[13] More specifically, this application for judicial review raises the following questions:

a) Should the Applicant be permitted to proceed with his constitutional challenge, given his failure to raise these issues in the first instance before the tribunal?

b) Does the legislative scheme of section 37 violate the Applicant's Charter of rights of freedom of expression and freedom of association?

c) Does section 37 of *IRPA* deprive the Applicant of his right to life, liberty and security of the person in a manner that is not in accordance with the principles of fundamental justice?

4. Analysis

[14] The inadmissibility provisions of *IRPA* (s. 34, 35 and 37) aim to protect the safety of Canadian society by facilitating the removal of permanent residents or foreign nationals who constitute a risk to society on the basis of their conduct (*Sittampalam v Canada (MCI)*, 2006 FCA 326 at para 21, [2007] 3 FCR 198 [*Sittampalam*]). A person may be declared inadmissible for being involved with espionage, subversion, or terrorism pursuant to subsection 34(1). Next, subsection 35(1) allows for a person who has violated human or international rights to be declared inadmissible. Finally, subsection 37(1) allows for a declaration of inadmissibility based on membership in a criminal organization.

[15] Each of these provisions has a subsection (2) that provides an exemption, through "ministerial relief", to the declarations of inadmissibility enabled by each subsection (1). That is to say that a person who is found inadmissible under subsections 34(1), 35(1) or 37(1) of *IRPA* may apply to the Minister through subsections 34(2), 35(2) or 37(2) respectively for relief of that inadmissibility status. According to the subsection (2) of each provision, this relief is to be granted where the Minister is satisfied that the person's presence in Canada would not be detrimental to national security.

[16] These provisions read as follows:

34. (1) A permanent resident or a foreign national is inadmissible on security grounds for	34. (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants:
(a) engaging in an act of espionage or an act of subversion against a democratic government, institution or process as they are understood in Canada;	a) être l'auteur d'actes d'espionnage ou se livrer à la subversion contre toute institution démocratique, au sens où cette expression s'entend au Canada;
(b) engaging in or instigating the subversion by force of any government;	b) être l'instigateur ou l'auteur d'actes visant au renversement d'un gouvernement par la force;
(c) engaging in terrorism;	c) se livrer au terrorisme;
(d) being a danger to the security of Canada;	d) constituer un danger pour la sécurité du Canada;
(e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or	e) être l'auteur de tout acte de violence susceptible de mettre en danger la vie ou la sécurité d'autrui au Canada;
(f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b) or (c).	f) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas a), b) ou c).
Exception	Exception
(2) The matters referred to in subsection (1) do not constitute inadmissibility in respect of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest.	(2) Ces faits n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui convainc le ministre que sa présence au Canada ne serait nullement préjudiciable à l'intérêt national.

35. (1) A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for

35. (1) Emportent interdiction de territoire pour atteinte aux droits humains ou internationaux les faits suivants:

(a) committing an act outside Canada that constitutes an offence referred to in sections 4 to 7 of the Crimes Against Humanity and War Crimes Act;

a) commettre, hors du Canada, une des infractions visées aux articles 4 à 7 de la Loi sur les crimes contre l'humanité et les crimes de guerre;

(b) being a prescribed senior official in the service of a government that, in the opinion of the Minister, engages or has engaged in terrorism, systematic or gross human rights violations, or genocide, a war crime or a crime against humanity within the meaning of subsections 6(3) to (5) of the Crimes Against Humanity and War Crimes Act; or

b) occuper un poste de rang supérieur — au sens du règlement — au sein d'un gouvernement qui, de l'avis du ministre, se livre ou s'est livré au terrorisme, à des violations graves ou répétées des droits de la personne ou commet ou a commis un génocide, un crime contre l'humanité ou un crime de guerre au sens des paragraphes 6(3) à (5) de la Loi sur les crimes contre l'humanité et les crimes de guerre;

(c) being a person, other than a permanent resident, whose entry into or stay in Canada is restricted pursuant to a decision, resolution or measure of an international organization of states or association of states, of which Canada is a member, that imposes sanctions on a country against which Canada has imposed or has agreed to impose sanctions in concert with that organization or association.

c) être, sauf s'agissant du résident permanent, une personne dont l'entrée ou le séjour au Canada est limité au titre d'une décision, d'une résolution ou d'une mesure d'une organisation internationale d'États ou une association d'États dont le Canada est membre et qui impose des sanctions à l'égard d'un pays contre lequel le Canada a imposé — ou s'est engagé à imposer — des sanctions de concert avec cette organisation ou association.

Exception	Exception
(2) Paragraphs (1)(b) and (c) do not apply in the case of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest.	(2) Les faits visés aux alinéas (1)b) et c) n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui convainc le ministre que sa présence au Canada ne serait nullement préjudiciable à l'intérêt national.
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 money laundering.	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.

Application	Application
(2) The following provisions govern subsection (1):	(2) Les dispositions suivantes régissent l'application du paragraphe (1):
(a) subsection (1) does not apply in the case of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest; and	a) les faits visés n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui convainc le ministre que sa présence au Canada ne serait nullement préjudiciable à l'intérêt national;
(b) paragraph (1)(a) does not lead to a determination of inadmissibility by reason only of the fact that the permanent resident or foreign national entered Canada with the assistance of a person who is involved in organized criminal activity.	b) les faits visés à l'alinéa (1)a) n'emportent pas interdiction de territoire pour la seule raison que le résident permanent ou l'étranger est entré au Canada en ayant recours à une personne qui se livre aux activités qui y sont visées.

[17] The Applicant contends that if courts have upheld the constitutionality of these provisions in the past, despite the broad, inclusive definitions of such concepts as "member" and "organization engaged in criminal activity" found in ss. 37(1), it was essentially because of the existence of ministerial relief. The thrust of Mr. Stables' argument is that in the last five years or so, ministerial relief has become practically unavailable given the long delays, the low number of claims processed each year, and the low success rate of processed claims. As a result, he argues that the inadmissibility provisions have ceased to be in compliance with the Charter, and in particular with its subsections 2(b), 2(d) and section 7.

[18] To support this claim, the Applicant has filed substantial affidavit evidence, attached as exhibits to the affidavit of Ori Bergman dated December 10, 2010. This affidavit sets out the research done by the Applicant's counsel with respect to the processing of ministerial relief applications. Counsel for the Applicant filed an Access to Information Request, but did not receive a response in time to meet the deadline for filing evidence. Subsequently, counsel then sent an email request to lawyers through the Canadian Bar Association's Immigration Bar discussion group ("listserv") for any information dealing with ministerial relief applications for persons inadmissible under s. 34, 35 or 37. Eight responses were received, all tending to show a substantial decrease in the numbers of ministerial relief granted under ss. 34(2) since 2002, when the Supreme Court released its decision in *Suresh v Canada (MCI)*, 2002 SCC 1, [2002] 1 SCR 3 [*Suresh*] and more particularly since 2005.

[19] According to the affiant, an analysis of all of the data collected shows that since 2002, a total of 217 applications were made under ss. 34(2). Out of those 217 applications, 9 were decided prior to 2006, with 8 of those receiving positive decisions. After 2006, only 13 applications have been granted, although it is unclear as to how many were refused and how many are still pending.

[20] After leave was granted, on May 19, 2011, the Applicant brought a motion for an extension of time to file a further affidavit, having finally received a response to his Access to Information Request regarding ministerial relief. Applicant's counsel submitted that the inclusion of this new evidence was necessary in order to provide a full evidentiary record. It was also argued that the affidavits of Ori Bergman already filed, show that the Applicant has been duly diligent in procuring evidence to bring before this Court, and that the inclusion of the new evidence would not be

prejudicial to the Respondent, since the exhibit in question is a government document already in the Respondent's possession.

[21] The Applicant sought the same information with respect to ss. 34(2), 35(2) and 37(2). With respect to ss. 37(2), which is the most relevant for the purpose of this application for judicial review, the information provided by the Canada Border Services Agency ("CBSA") is to the effect that 11 ministerial relief applications have been submitted as of April 20, 2011, none of which have been granted. The result was not much different under the equivalent subsection 19(1)(c.2) of the former *Immigration Act*, RSC 1985, c I-2 [*Immigration Act*]: between 1996 and 2002, one application had been made and none had been granted. It is interesting to note that there were 12 ministerial relief claims pending under subsection 37(2) at the time the Access to Information Request was processed, which would tend to show that all of the applications submitted remain to be decided.

[22] For ease of reference, the following chart provides the answers to all of the questions as they pertain to each of subsections 34(2), 35(2) and 37(2):

Ministerial Relief
ATIP request: A-2011-00189

	Request – Documents relating to:	**Section 34(2) of the IRPA and comparable Section 19(1)(f)(iii)(B) of the former Immigration Act, R.S.C. 1985 –** **Response**	**Section 35(2) of the IRPA and comparable section 19(1)(l) of the former Immigration Act, R.S.C. 1985 –** **Response**	**Section 37(2) of the IRPA and comparable section 19(1)(c.2) of the former Immigration Act, R.S.C. 1985 –** **Response**
1) a.	The number of Ministerial relief applications that have been submitted to date since the *Immigration and Refugee Protection Act* (IRPA) was enacted	247	18	11

	Request – Documents relating to:	**Section 34(2) of the IRPA and comparable Section 19(1)(f)(iii)(B) of the former Immigration Act, R.S.C. 1985 –** **Response**	**Section 35(2) of the IRPA and comparable section 19(1)(l) of the former Immigration Act, R.S.C. 1985 –** **Response**	**Section 37(2) of the IRPA and comparable section 19(1)(c.2) of the former Immigration Act, R.S.C. 1985 –** **Response**
b.	The number of Ministerial relief applications that have been granted to date	24	3	0
2)a.	The number of Ministerial relief applications that have been submitted from 1992 up until when the IRPA was enacted *(Information on record with the CBSA includes the timeframe from 1996 until IRPA was enacted)*	37	3	1
b.	The number of IRPA Ministerial relief applications that have been granted in this time frame (Information on record with the CBSA includes the timeframe from 1996 until IRPA was enacted)	115	0	0
3)	The number of Ministerial relief requests submitted PER year since IRPA was enacted	2002 – 20 2003 – 34 2004 – 32 2005 – 25 2006 – 20 2007 – 15 2008 – 16 2009 – 37 2010 – 37 2011 - 11	2002 – 0 2003 – 3 2004 – 1 2005 – 1 2006 – 2 2007 – 0 2008 – 4 2009 – 2 2010 – 5 2011 - 0	2002 – 0 2003 – 1 2004 – 1 2005 – 0 2006 – 0 2007 – 0 2008 – 1 2009 – 4 2010 – 2 2011 - 2
4)	The number of Ministerial relief requests granted by the Minister PER year since the IRPA was enacted up to the present day	2002 – 0 2003 – 0 2004 – 0 2005 – 2 2006 – 5 2007 – 8 2008 – 7 2009 – 0 2010 – 1 2011 – 1	2002 – 0 2003 – 0 2004 – 1 2005 - 0 2006 – 0 2007 - 0 2008 – 1 2009 – 0 2010 – 0 2011 - 1	0

	Request – Documents relating to:	**Section 34(2) of the IRPA and comparable Section 19(1)(f)(iii)(B) of the former Immigration Act, R.S.C. 1985 –** **Response**	**Section 35(2) of the IRPA and comparable section 19(1)(l) of the former Immigration Act, R.S.C. 1985 –** **Response**	**Section 37(2) of the IRPA and comparable section 19(1)(c.2) of the former Immigration Act, R.S.C. 1985 –** **Response**
5)	The number of Ministerial relief claims currently pending	223	15	12

[23] The Respondent opposed the motion for an extension of time, arguing that the proposed evidence, which concerns the acceptance rates of ministerial relief applications, is not relevant to the present application since each application for ministerial relief is different. Further, the Respondent submits that the new evidence is unreliable as it is incomplete, giving only limited information about the number of applications approved rather than more fulsome statistics, including the number of applications not granted or the details of the approved applications.

[24] On June 6, 2011, Justice Near directed that this motion be dealt with as a preliminary motion before the judge hearing the application for judicial review. The matter was therefore argued before me at the outset of the hearing. After hearing counsel for both sides, I indicated that I would grant the motion and allow the Applicant to file the additional affidavit of Ms. Bergman, essentially for two reasons. First, I accept that counsel for the Applicant showed due diligence in obtaining official statistics in support of their case, and that the delay in obtaining the information sought, resulted only from the difficulty of tracking down the correct institution in charge of the relevant information. Second, I am also of the view that there is no hardship to the Respondent if the motion is allowed, and that it is best to have a more fulsome evidentiary record. As for the Respondent's

argument with respect to the weight to be given to that evidence, it is best left to the discussion of the merits raised by the application for judicial review.

[25] As part of my decision, I also granted the Respondent permission to file an additional affidavit within ten days of the hearing. On June 16, 2011, counsel for the Respondent wrote to the Court advising that it would not be filing any further evidence in relation to the supplementary affidavit of Ms. Bergman.

> a) Should the Applicant be permitted to proceed with his constitutional challenge, given his failure to raise these issues in the first instance before the tribunal?

[26] Counsel for the Respondent contends that the Applicant is prevented from raising constitutional arguments before this Court because he failed to advance any of these arguments before the Immigration Division.

[27] The Supreme Court has held that tribunals with expertise and authority to decide questions of law are in the best position to hear and decide the constitutionality of their statutory provisions, and should play a primary role in determining Charter issues within their jurisdiction. Writing for the majority in *Cuddy Chicks Ltd v Ontario (Labour Relations Board)*, [1991] 2 SCR 5 at para 16, Justice LaForest captured the usefulness and the value of a tribunal's factual findings when considering a constitutional question in the following terms:

> It must be emphasized that the process of *Charter* decision making is not confined to abstract ruminations on constitutional theory. In the case of *Charter* matters which arise in a particular regulatory context, the ability of the decision maker to analyze competing policy concerns is critical…The informed view of the Board, as manifested in a sensitivity to relevant facts and an ability to compile a cogent record, is also of invaluable assistance.

> Quoted with approval by Mr. Justice Gonthier, for a unanimous Court, in *Nova Scotia (Workers' Compensation Board) v Martin*, 2003 SCC 54 at para 30, [2003] 2 SCR 504.

[28] As a result of the *Cuddy Chicks* trilogy (the two other cases of that trilogy being *Douglas/Kwantlen Faculty Assn v Douglas College*, [1990] 3 SCR 570 and *Tétreault-Gadoury v Canada (Employment and Immigration Commission)*, [1991] 2 SCR 22) and further jurisprudential evolution (extensively summed up in *R v Conway*, 2010 SCC 22, [2010] 1 SCR 765), there is no doubt that administrative tribunals with the power to decide questions of law have the authority to resolve constitutional questions that are inextricably linked to matters properly before them, unless such questions have been explicitly withdrawn from their jurisdiction.

[29] It is also beyond dispute that the Immigration Division has both the jurisdiction to determine Charter issues and the authority to grant relief for a Charter breach by not applying the impugned provisions. It is a court of competent jurisdiction as described in ss. 24(1) of the Charter, and it clearly has the power to decide questions of law. Subsection 162(1) of *IRPA* grants each Division of the Board sole and exclusive jurisdiction to hear and determine questions of law and fact, including questions of jurisdiction, and Rule 47 of the *Immigration Division Rules*, SOR/2002-229 specifically addresses the procedure for challenging the constitutional validity, applicability, or operability of any legislative provision under *IRPA*. Since Charter jurisdiction has not been excluded from that jurisdiction, the Immigration Division is therefore empowered to grant Charter remedies arising in the course of carrying out its statutory mandate.

[30] I agree with the Respondent, therefore, that the Applicant should not be permitted to advance his arguments with respect to the constitutionality of subsection 37(1)(a) of *IRPA* for the first time before this Court. Not only would such a course of action ignore the jurisdiction of the Immigration Division, it would also be antithetical to the purpose of judicial review – that is, that the Federal Court should be assessing the propriety of administrative tribunals' determinations on Charter issues, not making those determinations afresh or on their behalf.

[31] The only justification provided by the Applicant for not bringing his constitutional challenge before the Immigration Division is that it would have been premature to do so, as neither he nor his counsel could have been aware of the effective unavailability of ministerial relief at the time of his admissibility hearing. It may well have been difficult to gain a better understanding of the practical effectiveness of the ministerial relief provisions of *IRPA*, as asserted by the affiant, a student at law with counsel for the Applicant. However, this process could have commenced at the time a section 44 report was issued alleging that the Applicant is inadmissible under subsection 37(1)(a) due to his membership in a criminal organization or, at the very least, at the time the report was referred to the Immigration Division by the Minister. After all, there was no need for the Applicant to wait until he was declared inadmissible by the Immigration Division to gather that information. Since it is subsection 37(1)(a) of *IRPA* that is being challenged, it was not a precondition for the Applicant to apply for ministerial relief before he could challenge the constitutionality of the inadmissibility scheme.

[32] As a result, the application for judicial review could be dismissed on this very narrow ground. In the exercise of my discretion, however, I will proceed to assess the merits of the

Applicant's argument, if only because it has been vigorously argued by counsel on both sides. In the event that I may have erred in concluding that the issue should have first been raised before the Immigration Division, the following are my reasons for dismissing the judicial review on the merits.

> b) Does the legislative scheme of section 37 violate the Applicant's Charter of rights of freedom of expression and freedom of association?

[33] It is not in dispute that freedom of expression does not protect expressive activity that takes the form of violence. Violence or criminal activity do not involve any of the recognized rationales underlying the constitutional protection of freedom of expression, namely its role as an instrument of democratic government, of truth and of personal fulfilment. Similarly, freedom of association has been found to encompass only lawful activities and cannot protect a person who chooses to belong to a criminal organization. As the Supreme Court stated in *Suresh v* Canada, above, at para 107:

> It is established that s. 2 of the Charter does not protect expressive or associational activities that constitute violence: Keegstra, supra. This Court has, it is true, given a broad interpretation to freedom of expression, extending it, for example, to hate speech and perhaps even threats of violence: Keegstra; R. v. Zundel, [1992] 2 S.C.R. 731. At the same time, the Court has made plain that the restriction of such expression may be justified under s. 1 of the Charter: see Keegstra, at pp. 732-733. The effect of s. 2(b) and the justification analysis under s. 1 of the Charter suggest that expression taking the form of violence or terror, or directed towards violence or terror, is unlikely to find shelter in the guarantees of the Charter.

[34] Based on the existing jurisprudence, I am therefore of the view that section 37 withstands constitutional scrutiny on a subsection 2(b) or (d) Charter analysis, so long as the discretion it affords is exercised in accordance with the statute. Counsel for the Applicant contends, however, that the Charter should protect persons who are not threats to the national interest. Relying on case

law according to which mere membership in a group responsible for international crimes is not enough to constitute complicity unless the organization has a limited brutal purpose (*Yuen v Canada (MCI)* 2000, 195 DLR (4th) 625 (FCA), 102 ACWS (3d) 587), the Applicant further argues that freedom of association must encompass his joining of the Hells Angels, as this is an organization whose sole objective is not to commit crimes but which also pursues laudable objectives.

[35] These two arguments can be easily disposed of. When read in its entirety, it is clear that s. 37 of *IRPA* is sufficiently circumscribed to ensure that so-called "innocent" members of criminal organizations are not inadmissible. This is precisely the purpose of ministerial relief, as set out in subsection 37(2). As the Supreme Court found in *Suresh*, above, at paras 109-111, the availability of ministerial relief under ss. 37(2) ensures that those persons who may unwittingly become members of criminal organizations without any knowledge of the organization's criminal activity, or who can establish that their participation in such an organization was coerced, are not caught by ss. 37(1) (see also *Agraira v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FCA 103 [*Agraira*]). To that extent, the right to freedom of association would therefore not be infringed. I shall address the Applicant's argument to the effect that ministerial relief cannot salvage the inadmissibility provisions because of the dysfunctionality of that process in the context of my analysis of section 7 of the Charter.

[36] As for the argument that the Hells Angels is an organization that pursues a number of activities, some of which are not criminal in nature, this is simply not borne out by the evidence. Having carefully reviewed the evidence and case law that was before it, the Immigration Division

found that the Hells Angels is an organized crime group that exists to perpetuate crime. In concluding a 25 page section on that topic, the Immigration Division wrote:

> [116] There is enough evidence to prove, on reasonable grounds, a connection between criminal offences of Hells Angels members, associates and puppet groups, and the organization. There is evidence of the criminality of its members. Their criminal acts have included drug trafficking, extortion, firearms and explosives offences, and the rampancy of such criminal acts are probative in establishing that the Hells Angels is a criminal organization. It is also apparent that the affiliation with the Hells Angels furnishes members with opportunities to be involved in crime at a depth that may not otherwise be available to them. The panel is also satisfied that the nature and existence of the hierarchy within the Hells Angels, the influence of its leadership, and the incumbent obligations of the members and associates to one another, all foster and under gird the criminal event. This is also an organization that relishes in the power and notoriety of its members, and will employ violence and intimidation to preserve its power and enhance its reputation. It maintains the sanctuary or fortress of a Hells Angels clubhouse to minimize criminal exposure and infiltration.

[37] The Applicant has not even tried to challenge this finding, let alone endeavour to demonstrate that it is unreasonable. In those circumstances, it cannot seriously and credibly be contended that section 37 violates the Applicant's freedoms of expression and association, or that section 2 protects his right to join the Hells Angels, given the violent and criminal activities of that organization. Nor can the Applicant claim that he was an innocent member of that organization. This is not a case where the Applicant did not know the nature of the organization until it was too late – either he did not care or chose to be wilfully blind to its activities. Clearly, the framers of the Charter could not have intended that the Applicant's membership in the Hells Angels could be protected through his freedom of association and expression, despite the overwhelming criminal history of the organization.

> c) Does section 37 of *IRPA* deprive the Applicant of his right to life, liberty and security of the person in a manner that is not in accordance with the principles of fundamental justice?

[38] Counsel for the Applicant submitted that the terms "member", "organized criminality" and "pattern of criminal activity" found in ss. 37(1) of *IRPA* are unconstitutionally vague and overbroad, and are therefore not in accordance with the principles of fundamental justice as required by section 7 of the Charter. Since he is not a refugee, the Applicant claims that he could be deported while he is waiting for his ministerial application to be processed.

[39] This argument is flawed and cannot be sustained. It is well established that the principles of fundamental justice in section 7 of the Charter are not independent self-standing notions, and are to be considered only when it is first demonstrated that an individual is being deprived of the right to life, liberty or security of the person. As Justice Bastarache stated, on behalf of the majority of the Supreme Court in *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 47, [2000] 2 SCR 307 [*Blencoe*]:

> […] before it is even possible to address the issue of whether the respondent's s. 7 rights were infringed in a manner not in accordance with the principles of fundamental justice, one must first establish that the interest in respect of which the respondent asserted his claim falls within the ambit of s. 7.

[40] It has been held, time and again, that a finding of inadmissibility does not, in and of itself, engage an individual's section 7 interests (see, for example, *Poshteh v Canada (MCI)*, 2005 FCA 85 at para 63, [2005] 3 FCR 487 [*Poshteh*]; *Barrera v Canada (MEI)*, [1993] 2 FC 3 at pp 15-16, 99 DLR (4th) 264. Even if it is true that the Applicant, not being a refugee, could be deported while he awaits the processing of his ministerial relief application, it would still not be sufficient to trigger

the application of section 7 rights (*Medovarski v Canada (MCI)*, 2005 SCC 51 at para 46, [2005] 2 SCR 539; *Canada (MEI) v Chiarelli*, [1992] 1 SCR 711, at paras 12, 13; *Hoang v Canada (MEI)* 24 ACWS (3d) 1140 (FCA), 120 NR 193 (FCA)).

[41] Such a finding is consistent with the basic constitutional foundation of Canadian immigration law, to wit, that only Canadian citizens have the absolute right to enter and remain in Canada. Non-citizens do not have an unqualified right to enter or remain in Canada, and their ability to do so is strictly dependant on their satisfaction of the admissibility criteria decided by Parliament.

[42] It is true that in *Suresh*, above, the Supreme Court determined that the removal of a Convention refugee from Canada to a country where a person would face a risk of torture engages the rights protected under s. 7 of the Charter and cannot proceed unless it is consistent with the principles of fundamental justice. It was the risk of torture on removal, though, and not the fact of removal itself, that engage the applicant's section 7 interests in that case. In the present case, the Applicant has raised no argument that his life, liberty or security is in danger if he is returned to Scotland, and he has declined the offer to file an application for a Pre-Removal Risk Assessment. In those circumstances, and in the absence of any demonstration of risk in the United Kingdom for which there is no adequate state protection, his potential removal cannot engage his section 7 rights. Even accepting that the Applicant may be stressed by his impending removal, this would not be sufficient to engage his right to security of the person. The Supreme Court made it clear in *Blencoe*, above, (at para 82), that "[…] only serious psychological incursions resulting from state interference

with an individual interest of fundamental importance" will qualify as a violation of security of the person. There is no such evidence in the case at bar.

[43] Even if I were to assume, for the sake of the argument, that the Applicant's right to liberty or security are infringed by a declaration of inadmissibility, he would still have to demonstrate that he has been deprived of these rights in a way that is inconsistent with the principles of fundamental justice. As already mentioned, according to the Applicant, subsection 37(1) breaches these principles, because of the vagueness of its key concepts such as "member", "organized criminality" and "pattern of criminal activity". The Applicant submits that because of the broad interpretation that has been given to these terms, it does not permit to distinguish between members who have as their purpose in joining a group the furtherance of the criminal goals of the organization, as opposed to those who join for many possible alternative purposes. Nor does it allow to differentiate between organizations which have as their main purpose criminal activity, and those whose primary goals are non-violent in nature. Similarly, a newly recruited member in an organization currently committed to peaceful means of conduct, could be barred from admissibility because of the past conduct of that organization.

[44] I hasten to say that the Applicant has no personal basis to argue that the range of application of s. 37 is overly broad. He is an admitted member of the Hells Angels, he spent nine years in the organization, and held senior positions in both its local chapter and at the regional level. Moreover, the evidence is overwhelmingly to the effect that the Hells Angels is first and foremost a criminal organization, and no evidence has been led that this organization committed no crimes during the Applicant's nine years of full-patch membership.

[45] That being said, it is undeniable that Courts have often upheld a very broad application of subsection 37(1), on the basis that such an interpretation was consistent with Parliament's objective to ensure the security of Canadians. Illustrative of that trend is the decision of my colleague, Justice Boivin, in *Ismeal v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 198 [*Ismael*]. Having reviewed the jurisprudence on the subject, he stated:

> [20] This notion of membership has been given an unrestricted and broad interpretation in Canadian case law, particularly where issues of Canada's national security are involved. An individual need not be an actual card-carrying or formal member of an organization, nor is it necessary that the person concerned to have an obligation to participate in acts of terrorism. In *Chiau v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 297, 265 N.R. 121 at par. 25, 55-62, the Federal Court of Appeal stated that being a member means simply "belonging" to an organization (see also *Poshteh* at par. 27 to 32; *Suresh (Re)*, (1997), 140 F.T.R. 88, 75 A.C.W.S. (3d) 887 at par. 21-23; *Ahani (Re)*, (1998), 146 F.T.R. 223, 79 A.C.W.S. (3d) 601 at par. 21; *Qureshi v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 7, 78 Imm. L.R. (3d) 8 at par. 19-25; *Kanendra v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 923, 47 Imm. L.R. (3d) 265 at par. 21-26; *Denton-James v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1548, 262 F.T.R. 198 at par. 12-16; *Canada (Minister of Citizenship and Immigration) v. Owens*, (2000), 191 F.T.R. 119, 100 A.C.W.S. (3d) 639 at par. 16-18).

[46] It is true that most of the case law on this subject has evolved in the context of section 34. Contrary to the Applicant's submission, there is no reason to draw a distinction between s. 34, 35 and 37 for the purposes of interpreting the notions of membership and participation in an organization. I agree with the Immigration Division that the rationale underlying the broad interpretation of these concepts is the same. The fact that the Government holds a list of terrorist organizations while there is no such list in relation to criminal organizations is of no consequence. Membership in both kinds of organizations attract criminal liability in Canada, both pose a threat to

the national interest, and the prohibition to belong to both types of organization furthers the overriding objective of providing for the safety and security of Canadians.

[47] Indeed, no authority was cited by counsel for the Applicant in support for her proposition that a more restrictive approach should be adopted in delineating membership for the purposes of s. 37. Nor would she be likely to find any. In *Sittampalam,* above, the Court of Appeal came to the opposite conclusion and determined that the same "unrestricted and broad" interpretation of the word "organization" espoused in the context of terrorism and espionage, should also govern when applying subsection 37(1). Since the Court based that finding on the objective of *IRPA* to prioritize security, there is no reason to believe that a different reasoning should apply when interpreting membership.

[48] For the Applicant to succeed in asserting that the terms "member" and "criminal organization" are impermissibly vague, he must meet a very high threshold. As the Supreme Court stated in *R v Nova Scotia Pharmaceutical Society,* [1992] 2 SCR 606, a law will only be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate. Absolute certainty is not necessary, so long as citizens have a broad understanding of what is permissible and what is not. Writing for the Court, Justice Gonthier wrote:

> 60. Legal rules only provide a framework, a guide as to how one may behave, but certainty is only reached in instant cases, where law is actualized by a competent authority. In the meanwhile, conduct is guided by approximation. The process of approximation sometimes results in quite a narrow set of options, sometimes in a broader one. Legal dispositions therefore delineate a risk zone, and cannot hope to do more, unless they are directed at individual instances.

[49] As McLachlin C.J.C. explained in *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4, [2004] 1 SCR 76 [*Canadian Foundation for Children*], a vague law prevents a person from realizing when he or she is entering an area of risk for sanction. On this basis, I agree with the Respondent that it is an untenable position for the Applicant to argue that he was not aware of the risk, or possible immigration or criminal sanction, by entering into his long-standing and high-level association with the Hells Angels.

[50] Be that as it may, various Courts have repeatedly been able to define the meaning of the terms "membership", "organization" and "criminal organization", which would tend to demonstrate that these terms do give sufficient guidance for legal debate (see, for example, *Sittampalam*, above; *Thanaratnam v Canada (MCI)*, 2004 FC 349, [2004] 3 FCR 301).

[51] The recent decision of Justice Mosley in *Toronto Coalition to Stop the War v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 957, 374 FTR 177, further confirms that the term "membership" is capable of being rather clearly ascertained in the immigration law context, despite the Court's confirmation that a broad and unrestrictive approach should be afforded to the terms "membership" and "organization". In that case, Justice Mosley acknowledged that the phrase "member of an organization" in subsection 34(1) of *IRPA* is to be given an unrestricted and broad definition, but added that "[…] an unrestricted and broad definition is not a license to classify anyone who has had any dealings with a terrorist organization as a member of that group" (at para 118). Accordingly, he found that Mr. Galloway's participation in a convoy which delivered financial and material assistance to Gaza in an effort to break the Israeli blockade, could not make him a party to any terrorist crimes committed by Hamas, a listed terrorist

entity under subsection 83.05(1) of the *Criminal Code*, RSC 1985, c C-46. In other words, the delivery of a convoy of humanitarian aid could not be construed as providing a support function or financial backing amounting to an agreement to participate in the affairs of a terrorist organization. To conclude otherwise would overreach the parliamentary intent and the legislative language. This decision illustrates that the operating concepts found in s. 34, 35 and 37 of *IRPA*, though quite broad and open-ended, are not without limit and do provide sufficient guidance for a legal debate, whatever decision the Federal Court of Appeal may reach on this issue as a result of the questions certified by Justice Mosley.

[52] It is the Applicant's main thesis that the Courts have previously upheld the inadmissibility provisions only because their otherwise unconstitutional nature was saved by the availability of ministerial relief. Indeed, the courts have given a broad, inclusive definition to the terms "member" and "organization" on the basis that ministerial relief under subsection (2) would be available to those who were caught in the overly-wide net of subsection (1). The courts have also taken a broad temporal analysis (finding individuals inadmissible even if they became a member of an impugned organization after that organization's questionable activities have ceased) on the basis that such alleviating factors would be taken into account at the ministerial relief stage. Now that the circumstances have changed, it is argued, section 37 can no longer be considered constitutional.

[53] This argument is flawed for a number of reasons. First of all, none of the cases cited by the Applicant in support of his proposition clearly states that the inadmissibility scheme put in place in s. 34, 35 and 37 would be in violation of section 7 of the Charter, were it not for the possibility to seek ministerial relief pursuant to subsections 34(2), 35(2) and 37(2). In the context of *Suresh*,

above, the overbreadth argument was raised in the context of freedom of association and expression, and the Supreme Court was quick to point out that violent activity does not attract constitutional protection. The Court added that it was not the intention of Parliament to include in the class of suspect persons, those who innocently contribute to or become members of terrorist organizations. They went on to say that such an interpretation is "supported" by the ministerial relief provision that was found in s. 19 of the *Immigration Act*, essentially to the same effect as paragraph 34(2). This is a far cry from saying that the inadmissibility provision found in subsections 19(1)(e) and (f) of the *Immigration Act*, now replaced by subsection 34(1) of *IRPA*, would have been found unconstitutional had it not been for the presence of the discretion given to the Minister to grant relief from that inadmissibility. Quite to the contrary, the Court found that so long as the Minister exercises his discretion in accordance with the Act, there can be no violation of ss. 2(b) or (d) of the Charter (*Suresh*, above, at para 108).

[54] None of the other cases cited by the Applicant to bolster his position are conclusive either. The Applicant relied, in particular on *Poshteh*, above; *Ismael*, above, and *Al Yamani v Canada (MCI)*, 2006 FC 1457, 304 FTR 222. A careful reading of these decisions does not lend itself to the conclusion that an effective and speedy ministerial relief system is an essential requirement to the constitutional validity of the inadmissibility provisions. They merely support the view that Parliament never intended innocent persons who were ignorant of the criminal or terrorist activities of an organization with which they have been associated, to be caught by the inadmissibility provisions, and that subsection 34(2) provides further assurance to that effect.

[55] To accept the Applicant's argument would amount to stating that the availability of ministerial relief is an element of fundamental justice in the context of an inadmissibility regime. Such a contention does not meet the three criteria for recognition as a principle of fundamental justice set out by the jurisprudence (see *Canadian Foundation for Children*, above, at para 8) for a useful summary of these principles. There is no support for the contention that pre-removal access to the ministerial relief process is a legal principle, that this legal principle is fundamental to our societal notion of justice (in fact, the status afforded to permanent residents under the Constitution and *IRPA* suggests otherwise), and it has not been demonstrated that the principle is capable of being identified with some precision. Indeed, this Court found in *Samad v Canada (MCI)*, 2011 FC 324 at paras 13-15 that there is no legitimate expectation to the postponement of an inadmissibility proceeding while a ministerial relief petition remains outstanding. This is further confirmation that the notion of a pre-removal access to an effective ministerial relief process is not a principle of fundamental justice.

[56] I agree with the Respondent that when considered as a whole, the process by which an applicant could face a finding of inadmissibility and consequent enforcement of a removal order, reveals that the process is consistent with the principles of fundamental justice:

- The Applicant is afforded the opportunity to advance submissions why a s. 44 report should not be prepared or referred to the Immigration Division for assessment;

- The Applicant is afforded with a hearing before the Immigration Division on the merits of the inadmissibility allegation (s. 45 *IRPA*). The Immigration Division process affords the Applicant a hearing, before an impartial arbiter,

a decision on the facts and the law, and the right to know and answer the case against him, the very things that fundamental justice would require in the circumstances;

- Prior to removal, the Applicant is afforded an opportunity to apply for PRRA to assess any alleged risks in his or her country of origin (s. 112 *IRPA*);

- Should the PRRA determine that the Applicant is a person in need of protection, his or her removal cannot proceed unless he or she is found to be a danger to the public (s. 115(2) *IRPA*);

- Each of the above processes is subject to this Court's oversight by way of judicial review.

[57] In *Khalil v Canada (MCI)*, 2007 FC 923, [2008] 4 FCR 53, the plaintiffs made the exact same argument as in the present case. They contended that the Minister's discretion to determine whether an inadmissible person's presence is detrimental to national interest pursuant to paragraph 34(2) is so broad, that the remedy is largely illusory. They also relied on the testimony of a departmental official, according to whom the policy regarding the use of the ministerial exemption has changed and is being used in a more restrictive fashion, to show that the relief is not being applied constitutionally. Relying on the decision of the Supreme Court in *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69, Justice Layden-Stevenson determined that the complaint had more to do with the administration of the statute by officials, rather than with the statute itself. While maladministration of legislation undoubtedly can infringe upon an individual's Charter rights, it does not afford a basis for striking down the underlying legislation.

As she put it, “legislation that is constitutionally valid should not be struck down because it is being applied in an unconstitutional manner” (at para. 344).

[58] In my view, this is a complete answer to the Applicant’s argument. Counsel tried to distinguish that case on the basis that Mrs. Haj Khalil, the main applicant, was a Convention refugee and could therefore not be removed, contrary to Mr. Stables situation, and that it rested on the delay in processing the application of ministerial relief as opposed to the diminishing rate of approval. These distinctions are of no consequence in assessing the persuasiveness of that case for our purpose.

[59] I have already outlined the various steps that must be satisfied by the Respondent before an applicant can be removed for reason of inadmissibility. It is true that Mr. Stables, not being a Convention refugee, would have to demonstrate that he is a person in need of protection to benefit from the principle of non-refoulement set out at s. 115 of *IRPA*. That does not, however, detract from the fact that he will not be removed to a country where his life, liberty or security would be imperiled, and those are the very rights that section 7 of the Charter is meant to protect.

[60] As for the statistics themselves, they do not bear out the Applicant’s thesis. According to the figures released as a result of the Access to Information Request submitted by the Applicant, it appears that none of the 11 applications for ministerial relief filed pursuant to ss. 37(2) since 2002 have been granted so far. This certainly points to long delays in processing these requests, but it cannot be inferred that these requests will be dismissed or that the rate of success has been dramatically altered since 2002. The same can be said with respect to the statistics related to ss.

34(2) and 35(2). A huge proportion of these requests are still pending, and it is therefore difficult to determine whether the rate of success has significantly diminished since the coming into force of *IRPA*. These delays are no doubt troubling, but there may be a number of valid and compelling explanations for each and every case. The evidence concerning the timeliness or acceptance rates of ministerial relief cannot equate to a finding that relief under these provisions is illusory. As each ministerial relief application is unique and assessed on its individual merits, no conclusion can be drawn from those statistics without knowing the context of the specific case. If there is a concern regarding delay, the proper recourse would be to seek mandamus from the Court, not to argue that the provision is somehow unfair or unconstitutional.

[61] Finally, the decline in the acceptance rates of ministerial relief may well be explained by the transfer of responsibility from the Minister of Citizenship and Immigration to the Minister of Public Safety and Emergency Preparedness with the passage of the *Canada Border Services Act*, SC 2005, c 38. Among the consequential amendments following the passage of that statute, *IRPA* was amended to transfer the non-delegable responsibility for making the determination under subsection 34(2) from the Minister of Citizenship and Immigration to, first, "the Minister as defined in section 2 of the *Canada Border Services Agency Act*" (see *IRPA*, s 4, as am by SC 2005, c 38, s 118) and later to the Minister of Public Safety (*IRPA*, s. 4, as am by SC 2008, c 3, s 1). The Minister of Citizenship and Immigration retained the power to grant exemptions from the requirements of *IRPA* based on humanitarian and compassionate grounds pursuant to s. 25 of that Act.

[62] As a result of this legislative change, the Federal Court of Appeal found in *Agraira*, above, that ministerial relief should be available in truly exceptional circumstances and that the principal

consideration when assessing such relief applications must be national security and public safety as opposed to a wider range of factors. Writing for the Court, Justice Pelletier stated:

> [50] The Minister of Public Safety exercises his discretion under subsection 34(2) of the *IRPA* in the context of the entire legislative scheme. When that scheme is taken as a whole, it is clear that the transfer of responsibility of the processing of applications for ministerial relief to the Minister of Public Safety was intended to bring security concerns to the forefront in the treatment of those applications. As a result, the notion of "national interest" in the context of subsection 34(2) must be understood in terms of the Minister of Public Safety's mandate. In my view, this means that the principal, if not the only, consideration in the processing of applications for ministerial relief is national security and public safety, subject only to the Minister's obligation to act in accordance with the law and the Constitution. As a finding of inadmissibility does not necessarily result in the removal of the foreign national from Canada, the exercise of the Minister's discretion does not raise any issue of Canada's international obligations.
>
> [51] The test whether a foreign national's presence in Canada is detrimental to the national interest is not a net-detriment test. The Minister of Public Safety is not required to balance the possible contribution to the national interest by an applicant against the possible detriment to the national interest and to refuse only those applications that result in a net detriment to the national interest. There is nothing in the statutory language which mandates such a balancing and the very specific mandate of the Minister of Public Security militates against such a balancing requirement.
> *Ibid* at paras 50, 51.

[63] As the Court of Appeal further stated, this does not make subsection 34(2) illusory, even though "it is clearly intended to be exceptional" (*Ibid* at para 65). The same can obviously be said of subsections 35(2) and 37(2). For the reasons already spelled out, this is no basis to find the inadmissibility regime unconstitutional, and there is certainly no indication in the Federal Court of Appeal decision that narrowing the scope of ministerial relief was liable to undermine the validity of these legislative provisions.

[64] This application for judicial review shall therefore be dismissed. This does not prevent the Applicant from seeking a mandamus if he is concerned with the delay in processing his application for ministerial relief, or from filing an application for judicial review in the eventuality that his application for ministerial relief is dismissed.

[65] At the hearing, the parties sought permission to make representations with respect to proposed certified questions upon reading my reasons. The Applicant shall therefore have ten days from the release of this judgment to make submissions in that regard, and the Respondent shall have an additional ten days to respond.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed. The Applicant may file proposed certified questions within ten days of the release of this judgment, and the Respondent shall have an additional ten days to respond.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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