Federal Courts Reports

Recueil des décisions des Cours fédérales

A-392-19

2021 FCA 163

The Minister of Public Safety and Emergency Preparedness (*Appellant*)

v.

Edgar Alberto Lopez Gaytan (*Respondent*)

and

The Canadian Association of Refugee Lawyers (CARL) (*Intervener*)

INDEXED AS: CANADA (PUBLIC SAFETY AND EMERGENCY PREPAREDNESS) V. GAYTAN

Federal Court of Appeal, Near, Gleason and LeBlanc JJ.A.—By videoconference, January 20; Ottawa, August 5, 2021.

Citizenship and Immigration — Exclusion and Removal — Inadmissible Persons — Appeal from Federal Court decision determining that it was open to Immigration Division (ID), Immigration Appeal Division (IAD) of Immigration and Refugee Board (collectively, Board) to consider criminal law defence of duress when assessing whether permanent resident or foreign national is inadmissible to Canada for being member of criminal organization or for engaging in criminal activities of said organization, as per Immigration and Refugee Protection Act, s. 37(1)(a) — In concluding as he did, Federal Court Judge dismissed claim that authority to consider criminal law defences in inadmissibility proceedings brought under Act, s. 37(1) is vested exclusively in appellant by virtue of Act, s. 42.1(1) — Having determined that Board could consider respondent's defence of duress, Federal Court saw no basis for interfering with IAD's finding that respondent had successfully established elements of that defence, was not, therefore, inadmissible to Canada under Act, s. 37(1)(a) — Question as to whether, in determining if individual is inadmissible under Act, s. 37(1)(a), ID, IAD are entitled to consider defence of duress, certified as question of general importance — Respondent, Mexican, filed refugee claim — Had been involved with Mexican drug trafficking cartel (Cartel) — Respondent's involvement in Cartel's criminal activities giving rise to inadmissibility proceedings, caused suspension of respondent's refugee claim — Before ID, respondent claimed involvement with Cartel was involuntary; raised defence of duress — ID found respondent not person described in Act, s. 37(1)(a) — On appeal, IAD confirmed ID's findings — Judicial review of that decision dismissed by Federal Court, thus giving rise to present appeal — Issues were, in determining whether individual is inadmissible under Act, s. 37(1)(a), is Board entitled to consider defence of duress and if so, whether IAD's application of defence of duress to respondent's circumstances was reasonable — IAD's finding that it was entitled to consider defence of duress when determining whether individual is inadmissible under Act, s. 37(1)(a) was not only reasonable but correct — Regarding jurisdictional issue, in proceedings brought before it under Act,

which include inadmissibility proceedings, Board, by virtue of Act, s. 162(1) has "sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction" — For its part, Act, s. 42.1 empowering appellant to declare that matters referred to in s. 34 (security), s. 37(1) (organized criminality), part of s. 35 (human or international rights violations) do not constitute inadmissibility —That power, which appellant alone can exercise as per Act, s. 6(3), permits granting of exemption from application of these inadmissibility provisions — That relieving power is meant to exempt non-citizens who innocently contribute to or become members of terrorist or criminal organizations from consequences of inadmissibility — No express language limiting Board's jurisdiction in manner proposed by appellant — Broad language of Act, s. 162(1) suggesting that Board's exclusive authority to consider "all questions of law and fact, including questions of jurisdiction" in proceedings brought before it not so constrained — Nor is there express language in Act granting appellant exclusive authority to consider criminal law defences in context of inadmissibility — Act, s. 42.1 not having limiting effect on Board`s jurisdiction as appellant claimed; not having temporal aspect — Appellant`s view on jurisdiction at odds with Poshteh v. Canada (Minister of Citizenship and Immigration), which involved membership of minor in terrorist organization — Poshteh signals clear understanding on part of Court that broad range of considerations such as mental capacity, duress, falling within expertise of Board — Unequivocally signalled that view adopted by Federal Court Judge regarding Board's jurisdiction to consider duress in inadmissibility matter brought before it under Act, s. 37(1)(a) not only fell within range of possible, acceptable outcomes but was also correct — Inadmissibility proceedings not criminal or quasi-criminal in nature; Board is immigration tribunal — Given text, context, purpose of provisions at issue, despite presence of Act, s. 42.1, Parliament not intending membership to extend to those who were forcibly recruited by terrorist or criminal organization, who performed acts consistent with goals of such organization under duress — This goes to very essence of membership determination under Act, ss. 34, 37 — Therefore, in determining admissibility under Act, s. 37(1)(a), Board is entitled to consider whether membership was result of duress or coercion — Certified question answered in affirmative — With respect to IAD's finding of admissibility, Federal Court right when concluding that appellant merely invited it to reconsider evidence about respondent's available safe avenue of escape — Appellant was asking same thing here — However, it is not role of reviewing court to reassess evidence that was before administrative decision maker, to come up with its own conclusions — IAD applied correct legal test in relation to "safe avenue of escape" criterion; it reasonably applied that test to facts before it — Its conclusion that reasonable, similarly situated person could not have extricated themselves from situation of duress bore hallmarks of reasonable decision: it was internally coherent, stemmed from rational chain of analysis, was justified in relation to facts, law that constrained Board — Therefore, there was no reason to interfere with it — Appeal dismissed.

Citizenship and Immigration — Immigration Practice — Appeal from Federal Court decision determining that it was open to Immigration Division (ID), Immigration Appeal Division (IAD) of Immigration and Refugee Board (collectively, Board) to consider criminal law defence of duress when assessing whether permanent resident or foreign national is inadmissible to Canada for being member of criminal organization or for engaging in criminal activities of said organization, as per Immigration and Refugee Protection Act, s. 37(1)(a) — Respondent previously involved with Mexican drug trafficking cartel (Cartel) before claiming refugee protection in Canada — Federal Court, in concluding as it did, dismissed claim that authority to consider criminal law defences in inadmissibility proceedings brought under Act, s. 37(1) is vested exclusively in appellant by virtue of Act, s. 42.1(1) — Having determined that Board could consider respondent's defence of duress, Federal Court saw no basis for interfering with IAD's finding that respondent had successfully established elements of that defence; was not, therefore, inadmissible to Canada under Act, s. 37(1)(a) — Question certified as to whether, in determining if individual is inadmissible under Act, s. 37(1)(a)), ID, IAD are entitled to consider defence of duress — Whether IAD's application of defence of duress to respondent's circumstances was reasonable — Regarding IAD's finding of admissibility, Federal Court right when concluding that appellant merely invited Federal Court to reconsider evidence about respondent's available safe avenue of escape — Appellant was asking same thing here — However, it is not role of reviewing court to reassess evidence that was before administrative decision maker, to come up with its own conclusions — IAD applied correct legal test in relation to "safe avenue of escape" criterion; it reasonably applied that test to facts before it — Its

conclusion that reasonable, similarly situated person could not have extricated themselves from situation of duress bore hallmarks of reasonable decision: it was internally coherent, stemmed from rational chain of analysis, was justified in relation to facts, law that constrained Board — Therefore, there was no reason to interfere with IAD's decision.

This was an appeal from a Federal Court decision determining that it was open to the Immigration Division (the ID) and the Immigration Appeal Division (the IAD) of the Immigration and Refugee Board (collectively, the Board) to consider the criminal law defence of duress when assessing whether a permanent resident or a foreign national is inadmissible to Canada for being a member of a criminal organization or for engaging in the criminal activities of said organization, as per paragraph 37(1)(a) of the *Immigration and Refugee Protection Act* . In concluding as he did, the Federal Court Judge dismissed the claim that the authority to consider criminal law defences in inadmissibility proceedings brought under subsection 37(1) of the Act is vested exclusively in the appellant by virtue of subsection 42.1(1) of the Act. That provision empowers the appellant to grant ministerial relief from a number of inadmissibility findings when he is satisfied that doing so would not be contrary to the national interest. Having determined that the Board could consider the respondent's defence of duress, the Federal Court saw no basis for interfering with the IAD's finding that the respondent had successfully established the elements of that defence and was not, therefore, inadmissible to Canada under paragraph 37(1)(a) of the Act. The question as to whether, in determining if an individual is inadmissible under paragraph 37(1)(a) of the Act, the ID and the IAD are entitled to consider the defence of duress, was certified as a question of general importance.

The respondent is a citizen of Mexico. He entered Canada in the spring of 2009. A few weeks later, he filed for refugee protection alleging that he feared returning to Mexico because of his involvement with the Sinaloa cartel, a Mexican drug trafficking organization (the Cartel). While the respondent's refugee claim was still pending, his involvement in the Cartel's criminal activities gave rise to an inadmissibility report, which gave rise to an inadmissibility hearing before the ID. These proceedings caused the suspension of the respondent's refugee claim. Before the ID, the respondent did not challenge the appellant's assertion that the Cartel is a criminal organization within the meaning of paragraph 37(1)(a) of the Act; however, he claimed that his involvement with the Cartel had been involuntary in that he had been forcibly recruited into it and honestly believed that he and his mother were at risk of being killed if he did not heed the directions of the Cartel. The ID considered but did not accept the respondent's defence of duress on the ground that he had failed to establish two of the three constituent elements of that defence, namely the immediacy of the threat and the absence of a safe avenue of escape. Later, the Federal Court set aside the ID's decision holding that the ID made a reviewable error in its application of the law relating to the defence of duress to the respondent's circumstances. More particularly, it found that the ID had failed to consider the impact of the respondent's drug addiction on his ability to make a rational assessment of his potential avenues of escape. The matter was remitted to the ID for re-determination and it was determined that the respondent was not a person described in paragraph 37(1)(a) of the Act. It also dismissed the appellant's contention, raised for the first time, that the ID lacked jurisdiction to consider the respondent's defence of duress. The appellant appealed that decision to the IAD, which confirmed the ID's findings on jurisdiction; that the respondent's criminal activities on behalf of the Cartel had been morally involuntary; and that paragraph 37(1)(a) of the Act therefore did not apply to him. The appellant sought judicial review of that decision. That application was dismissed, thus giving rise to the present appeal.

The issues were, in determining whether an individual is inadmissible under paragraph 37(1)(a) of the Act, is the Board entitled to consider the defence of duress and, if so, whether the IAD's application of the defence of duress to the respondent's circumstances was reasonable.

Held, the appeal should be dismissed.

The IAD's finding that it was entitled to consider the defence of duress when determining whether an individual is inadmissible under paragraph 37(1)(a) of the Act was not only reasonable but correct.

Regarding the jurisdictional issue, the Board relied on Federal Court precedents in reaching its conclusion. Therefore, it could hardly be faulted for having concluded that those precedents were binding on it. Inadmissibility can be sought on various grounds ranging from national security to public health. These grounds are set out in sections 34 to 42 of the Act (under "Division 4—Inadmissibility"). Inadmissibility for organized criminality is provided for by subsection 37(1) of the Act. According to that provision, a non-citizen is inadmissible either for being a member of a criminal organization or engaging in the activities of the organization, or for engaging, in the context of transnational crime, in activities such as people smuggling or money laundering. In proceedings brought before it under the Act, which include inadmissibility proceedings, the Board, by virtue of subsection 162(1) of the Act, has "sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction". For its part, section 42.1 of the Act empowers the appellant to declare that the matters referred to in section 34 (security), subsection 37(1) (organized criminality), and part of section 35 of the Act (human or international rights violations) do not constitute inadmissibility. That power, which the appellant alone can exercise as per subsection 6(3) of the Act, permits the granting of an exemption from the application of these inadmissibility provisions provided the appellant is satisfied that the presence in Canada of the person seeking the exemption, or for whom it is considered, would not be contrary to the national interest. That relieving power is meant to exempt non-citizens who innocently contribute to or become members of terrorist [or, in the case at bar, criminal] organizations from the consequences of inadmissibility notwithstanding proof that they have been associated with or have been members of such organizations. Relief under section 42.1 is not available to all non-citizens but only to foreign nationals. It may be granted either on application by the foreign national or on the Minister's own initiative. Based on the text of the relevant provisions, there is no express language limiting the Board's jurisdiction in the manner proposed by the appellant. The broad language of subsection 162(1) of the Act rather suggests that the Board's exclusive authority to consider "all questions of law and fact, including questions of jurisdiction" in proceedings brought before it, is not so constrained. Nor is there express language in the Act granting the appellant exclusive authority to consider criminal law defences in the context of inadmissibility. However, the appellant claimed that when read, section 42.1 does have a limiting effect on the Board's jurisdiction. He submitted that the concept of "membership" in sections 34 and 37 of the Act, which is not defined in the Act, was intended to be broadly interpreted. It was difficult to accept the appellant's contention that the interplay between those provisions deprives the Board of any authority to consider duress when determining membership in a terrorist or criminal organization. The contrary view to that of the appellant's was reflected in the prevailing Federal Court case law and did not need to be interfered with. In particular, the appellant's view was at odds with *Poshteh v. Canada (Minister of Citizenship and Immigration)*, which involved membership of a minor in a terrorist organization. *Poshteh* signals a clear understanding on the part of the Court that this broad range of considerations falls within the expertise of the Board. Factors such as mental capacity or engagement in the activities of the terrorist organization free of coercion were considerations that went to the heart of the membership determination in that particular case.*Poshteh* provides persuasive support for the line of cases relied upon by the Federal Court Judge where duress was raised in inadmissibility matters open to ministerial relief and found to be applicable by both the Board and the Federal Court.*Poshteh* unequivocally signalled that the view adopted by the Federal Court Judge regarding the Board's jurisdiction to consider duress in an inadmissibility matter brought before it under paragraph 37(1)(a) of the Act not only fell within a range of possible, acceptable outcomes but was also correct.

The main purpose of subsection 37(1) is to deal with organized criminality in the immigration context. The language of that provision links inadmissibility to forms of conduct which, for the most part, are criminally prohibited. Membership in either a criminal or a terrorist organization attracts criminal liability in Canada. It has been held, time and again, that inadmissibility proceedings are not criminal or quasi-criminal in nature. In matters raised under subsection 37(1) of the Act, the criminal law imposes on the Board, an "immigration tribunal", constraints on how and what it can lawfully decide. It would take much clearer language from Parliament to remove the availability of the consideration of duress from the ambit of matters the Board might consider in an admissibility proceeding. One simply cannot infer such an intent from the mere presence of section 42.1.

As to the relevance of duress—or necessity—in establishing membership, it is not controverted

that the membership clauses in paragraphs 34(1)(f) and 37(1)(a) were intended “to cast a wide net in order to capture a broad range of conduct that is inimical to Canada’s interests”. However broadly the term “member” is to be interpreted, it must have some meaning. It is entirely consistent with the text, context and purpose of the provisions at issue to hold that despite the presence of section 42.1, Parliament did not intend membership to extend to those who were forcibly recruited by a terrorist or a criminal organization and performed acts consistent with the goals of such an organization while under duress. This goes to the very essence of membership determination under sections 34 and 37 of the Act and touches upon one of the core functions of the Board, which is to determine whether membership has been established by weighing various factors and considerations in light of the particular circumstances of each case. Ministerial relief can be sought and processed prior to the Board even being called upon to hold an inadmissibility hearing and exercise its own jurisdiction. Therefore, nothing would prevent a non-citizen in the situation of the respondent from seeking, at the earliest opportunity, the declaration contemplated by section 42.1 as there is “no temporal aspect” to section 42.1. Finally, the appellant’s contention that there is a two-step process designed by Parliament for matters where ministerial relief is available and that case law followed by the Federal Court impermissibly altered it was not accepted. Therefore, in determining admissibility under paragraph 37(1)(a) of the Act, the Board is entitled to consider whether membership was the result of duress or coercion. The certified question was answered in the affirmative.

With respect to the IAD’s finding of admissibility, the appellant claimed that the IAD, in finding that the respondent had been under duress, failed to follow or distinguish authoritative case law governing when drug addiction may excuse a person from not exercising an objectively available safe avenue of escape. Before the IAD, the appellant argued that the respondent had the mental capacity to formulate a plan of escape and the physical capacity and opportunity to carry out that plan; that considered cumulatively, this should have led the IAD to find that the respondent had a safe avenue of escape and did not, therefore, meet all the elements of the defence of duress. The IAD dismissed the appellant’s contention, being of the view that the ID had considered all of the respondent’s circumstances when considering the element of avenue of escape and that a combination of factors limited the respondent’s assessment regarding a safe avenue of escape. The Federal Court was right when it concluded that the appellant was merely inviting it to reconsider the evidence. This is what the appellant was asking here as well. However, it is not the role of a reviewing court to reassess the evidence that was before the administrative decision maker and come up with its own conclusions. The IAD applied the correct legal test in relation to the “safe avenue of escape” criterion and it reasonably applied that test to the facts before it. Its conclusion that a reasonable similarly situated person could not have extricated themselves from the situation of duress bore the hallmarks of a reasonable decision: it was internally coherent, stemmed from a rational chain of analysis and was justified in relation to the facts and law that constrained the Board. Therefore, there was no reason to interfere with it.

STATUTES AND REGULATIONS CITED

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], s. 7.

Criminal Code, R.S.C., 1985, c. C-46, ss. 279.01(1), 462.31(1), 467.1 (1), 467.11(1).

Federal Courts Citizenship, Immigration and Refugee Protection Rules, SOR/93-22, r. 22.

Immigration Act, 1976, S.C. 1976-77, c. 52.

Immigration Act, R.S.C., 1985, c. I-2.

Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 6(3), 33, 34–42, 44–53, 98, 162(1).

Immigration and Refugee Protection Regulations, SOR/2002-227, s. 16.

TREATIES AND OTHER INSTRUMENTS CITED

United Nations Convention Relating to the Status of Refugees, July 28, 1951, [1969] Can. T.S. No. 6, Art. 1F.

CASES CITED

APPLIED:

Agraira v. Canada (Public Safety and Emergency Preparedness), 2011 FCA 103, [2012] 4 F.C.R. 538, 415 N.R. 121, affd 2013 SCC 36, [2013] 2 S.C.R. 559; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, 441 D.L.R. (4th) 1; *Poshteh v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85, [2005] 3 F.C.R. 487; *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609; *Jalloh v. Canada (Public Safety and Emergency Preparedness)*, 2012 FC 317, 2012 CarswellNat 654 (WL Can.); *Poshteh v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 121, [2005] 3 F.C.R. 511.

DISTINGUISHED:

Canada (Citizenship and Immigration) v. Kassab, 2020 FCA 10, [2021] 3 F.C.R. 149, 441 D.L.R. (4th) 369; *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157, [2018] 2 F.C.R. 344.

CONSIDERED:

Lopez Gayton v. Canada (Public Safety and Emergency Preparedness), 2012 FC 1075, 2012 CarswellNat 3550 (WL Can.); *B006 v. Canada (Citizenship and Immigration)*, 2013 FC 1033, [2015] 1 F.C.R. 241, 440 F.T.R. 185; *Canada (Public Safety and Emergency Preparedness) v. Aly*, 2018 FC 1140, 2018 CarswellNat 6697 (WL Can.); *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3; *Najafi v. Canada (Public Safety and Emergency Preparedness)*, 2014 FCA 262, [2015] 4 F.C.R. 162; *Stables v. Canada (Citizenship and Immigration)*, 2011 FC 1319, [2013] 3 F.C.R. 240, 343 D.L.R. (4th) 510; *Saleh v. Canada (Citizenship and Immigration)*, 2010 FC 303, 363 F.T.R. 204; *Gazi v. Canada (Citizenship and Immigration)*, 2017 FC 94, 2017 CarswellNat 134 (WL Can.); *Sittampalam v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 326, [2007] 3 F.C.R. 198; *B010 v. Canada (Citizenship and Immigration)*, 2013 FCA 87, [2014] 4 F.C.R. 326, revd on other grounds 2015 SCC 58, [2015] 3 S.C.R. 704; *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100; *Li v. Canada (Minister of Citizenship and Immigration)*, [1997] 1 F.C. 235, (1996), 138 D.L.R. (4th) 275 (C.A.); *Ugbazghi v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 694, [2009] 1 F.C.R. 454; *Canada (Minister of Citizenship and Immigration) v. Adam*, [2001] 2 F.C. 337, (2001), 196 D.L.R. (4th) 497 (C.A.).

REFERRED TO:

R. v. Hibbert, [1995] 2 S.C.R. 973, 184 N.R. 165; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *R. v. Penunsi*, 2019 SCC 39, [2019] 3 S.C.R. 91, 435 D.L.R. (4th) 65; *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711, 135 N.R. 161; *Revell v. Canada (Citizenship and Immigration)*, 2019 FCA 262, [2020] 2 F.C.R. 355; *R. v. Prokofiew*, 2010 ONCA 423, 100 O.R. (3d) 401, affd 2012 SCC 49, [2012] 2 S.C.R. 639; *Gil Luces v. Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1200, 2019 CarswellNat 4900 (WL Can.); *Konate v. Canada (Public Safety and Emergency Preparedness)*, 2018 FC 129, 2018 CarswellNat 541 (WL Can.); *Castellon Viera v. Canada (Citizenship and Immigration)*, 2012 FC 1086, 418 F.T.R. 116; *Thiyagarajah v. Canada (Citizenship and Immigration)*, 2011 FC 339, 2011 CarswellNat 902 (WL Can.); *Belalcazar v. Canada (Public Safety and Emergency Preparedness)*, 2011 FC 1013, 395 F.T.R. 291; *Jayasekara v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404, [2009] 4 F.C.R. 164; *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68,

[2014] 3 S.C.R. 431; *Tran v. Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50, [2017] 2 S.C.R. 289; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193; *Khan v. Canada (Citizenship and Immigration)*, 2017 FC 397, 2017 CarswellNat 1722 (WL Can.); *Chiau v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 297, (2000), 195 D.L.R. (4th) 422 (C.A.); *R. v. Ryan*, 2013 SCC 3, [2013] 1 S.C.R. 14; *Toronto Coalition to Stop the War v. Canada (Public Safety and Emergency Preparedness)*, 2010 FC 957, [2012] 1 F.C.R. 413; *Damir v. Canada (Citizenship and Immigration)*, 2018 FC 48, [2018] 4 F.C.R. D-2, 2018 CarswellNat 69 (WL Can.); *Gacho v. Canada (Citizenship and Immigration)*, 2016 FC 794, 2016 CarswellNat 3039 (WL Can.); *Mohamed v. Canada (Citizenship and Immigration)*, 2015 FC 622, 481 F.T.R. 1; *Ghaffari v. Canada (Citizenship and Immigration)*, 2013 FC 674, 434 F.T.R. 274; *Kanapathy v. Canada (Public Safety and Emergency Preparedness)*, 2012 FC 459, 2012 CarswellNat 1937 (WL Can.).

APPEAL from Federal Court decision (2019 FC 1152, [2020] 2 F.C.R. 617) determining that it was open to the Immigration and Refugee Board, Immigration Division and Immigration Appeal Division to consider the criminal law defence of duress when assessing whether a permanent resident or a foreign national is inadmissible to Canada for being a member of a criminal organization or for engaging in the criminal activities of said organization, as per paragraph 37(1)(a) of the *Immigration and Refugee Protection Act*. Appeal dismissed.

APPEARANCES

Brendan Friesen for appellant.

Erin C. Roth and *Bjorn Harsanyi, Q.C.*, for respondent.

Prasanna Balasundaram and *Asiya Hirji* for intervenor.

SOLICITORS OF RECORD

Deputy Attorney General of Canada for appellant.

Edelmann & Co., Vancouver, and *Stewart Sharma Harsanyi*, Calgary, for respondent.

Downtown Legal Services and *Neighbourhood Legal Services*, Toronto, for intervener.

The following are the amended reasons for judgment rendered in English by

LeBlanc J.A.:

I. Introduction

[1] This is an appeal by the Minister of Public Safety and Emergency Preparedness (the Minister) from a decision rendered by Manson J. of the Federal Court (the Judge). In his decision, dated September 11, 2019 and reported as 2019 FC 1152, [2020] 2 F.C.R. 617 (the Judgment), the Judge determined that it is open to the Immigration Division (the ID) and the Immigration Appeal Division (the IAD) of the Immigration and Refugee Board of Canada (collectively, the Board) to consider the criminal law defence of duress when assessing whether a permanent resident or a foreign national is inadmissible to Canada for being a member of a criminal organization or for engaging in

the criminal activities of said organization, as per paragraph 37(1)(a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act).

[2] In concluding as he did, the Judge dismissed the claim that the authority to consider criminal law defences in inadmissibility proceedings brought under subsection 37(1) of the Act is vested exclusively in the Minister by virtue of subsection 42.1(1) of the Act. That provision empowers the Minister to grant ministerial relief from a number of inadmissibility findings, i.e. those made pursuant to section 34, paragraphs 35(1)(b) and (c) and subsection 37(1) of the Act, when he is satisfied that doing so would not be contrary to the national interest. In particular, the Judge rejected the Minister's contention that allowing the Board to consider such defences in matters contemplated by subsection 42.1(1) of the Act would deprive that provision of its function.

[3] Having determined that the Board could consider the respondent's defence of duress, the Judge saw no basis for interfering with the IAD's finding that the respondent had successfully established the elements of that defence and was not, therefore, inadmissible to Canada under paragraph 37(1)(a) of the Act.

[4] As permitted by paragraph 74(d) of the Act, the Judge certified the following question of general importance:

> In determining whether an individual is inadmissible under paragraph 37(1)(a) of the [Act], are the [ID] and [IAD] entitled to consider the defence of duress?

[5] For the reasons that follow, I am of the view that the Judge did not err in answering that question in the affirmative. I am also of the view that he did not commit any error in finding that it was reasonably open to the IAD to conclude as it did on the actual merits of the defence of duress raised by the respondent.

II. Background

[6] The respondent is a citizen of Mexico. He entered Canada in the spring of 2009. A few weeks later, he filed for refugee protection alleging that he feared returning to Mexico because of his involvement with the Sinaloa Cartel, a Mexican drug trafficking organization (the Cartel). In particular, he feared for his life because he had attempted to break free from the grip of the Cartel prior to fleeing to Canada.

[7] The respondent's circumstances, as they relate to the Cartel, are not in dispute in the present proceedings. They were summarized as follows by the IAD [at paragraphs 8–9]:

> …. The Respondent is a citizen of Mexico and he characterized himself as a crystal meth addict around the time he turned 18 years old. He bought his drugs from affiliates of the Sinaloa Cartel in his town. He was forcibly recruited to work for the Cartel and worked for them for about 18 months. He would be picked up from his home by members of the Cartel in the morning and would spend the day packaging and selling drugs. At the end of the day, he would be brought home. At times, he also delivered bribe money to the police. During these 18 months, Mr. Lopez Gaytan was physically assaulted and serious threats were made against him and his mother. Instead of receiving payment for his services, Mr. Lopez Gaytan was supplied with drugs to fuel his addiction.
>
> The drug house where the Respondent worked was raided by the police and the Respondent was arrested. He confided in the police in the hope of gaining freedom from

> the Cartel. However, that did not happen. Instead, the police brought him to a location where members of the Cartel beat him, stabbed him with a machete, and threatened to kill him. The following day, Mr. Lopez Gaytan overdosed on crystal meth. He then recalls waking up in a rehabilitation facility. Eventually his mother came to know where he was and moved him to a different facility under an alias. He remained there for three months and he has been free from drug addiction since then. Mr. Lopez Gaytan and his mother lived in a different city for about two years and then returned to their home town. Mr. Lopez Gaytan was identified by a member of the Cartel and he was shot at. He left Mexico the next day. (Appeal book, Vol. 1, page 38.)

[8] In January 2011, while his refugee claim was still pending, the respondent's involvement in the Cartel's criminal activities gave rise to an inadmissibility report prepared under subsection 44(1) of the Act. That report, in turn, gave rise to an inadmissibility hearing before the ID pursuant to subsection 44(2) and section 45 of the Act. These proceedings caused the suspension of the respondent's refugee claim.

[9] Before the ID, the respondent did not challenge the Minister's assertion that the Cartel is a criminal organization within the meaning of paragraph 37(1)(a) of the Act. He likewise did not challenge that he had personally engaged in activities, such as packaging and trafficking drugs and delivering protection money to the police, that were part of the Cartel's criminal enterprise. However, he claimed that his involvement with the Cartel had been involuntary in that he had been forcibly recruited into it and honestly believed that he and his mother were at risk of being killed if he did not heed the directions of the Cartel.

[10] The ID considered, but did not accept, the respondent's defence of duress on the ground that he had failed to establish two of the three constituent elements of that defence, namely the immediacy of the threat and the absence of a safe avenue of escape. In the ID's view, the respondent had not been under duress throughout the entire two-year period he worked for the Cartel.

[11] In September 2012, the ID's decision was set aside in *Lopez Gayt[a]n v. Canada (Public Safety and Emergency Preparedness)*, 2012 FC 1075, 2012 CarswellNat 3550 (WL Can.) (*Lopez Gaytan 2012*). The Federal Court held that the ID made a reviewable error in its application of the law relating to the defence of duress to the respondent's circumstances. More particularly, it found that the ID had failed to consider the impact of the respondent's drug addiction on his ability to make a rational assessment of his potential avenues of escape. The matter was remitted to the ID for re-determination.

[12] On re-determination, the Minister asserted for the first time that the ID lacked jurisdiction to consider the respondent's defence of duress. On November 27, 2017, the ID dismissed that contention on the ground that it ran contrary to the Federal Court's decision in *B006 v. Canada (Citizenship and Immigration)*, 2013 FC 1033, [2015] 1 F.C.R. 241, 440 F.T.R. 185 (*B006*), where a similar argument had unsuccessfully been made by the Minister. Then, applying the elements of the defence of duress to the respondent's circumstances in light of the Federal Court's directions in *Lopez Gaytan 2012*, it determined that the respondent was not a person described in paragraph 37(1)(a) of the Act.

[13] The Minister appealed that decision to the IAD. On December 31, 2018, the IAD dismissed the appeal (the 2018 Decision). First, it summarily rejected the Minister's jurisdictional argument, stating that the Federal Court's decision in *Canada (Public*

Safety and Emergency Preparedness) v. Aly, 2018 FC 1140, 2018 CarswellNat 6697 (WL Can.) (*Aly*) was determinative of the issue. Then, it confirmed the ID's findings that the respondent's criminal activities on behalf of the Cartel had been morally involuntary and that paragraph 37(1)(a) of the Act therefore did not apply to him.

[14] The Minister sought judicial review of both aspects of the 2018 Decision.

III. The Judgment

[15] As indicated at the outset of these reasons, the Minister's challenge of the 2018 Decision proved unsuccessful. After noting that the "Federal Court has consistently found that the defence of duress is applicable in inadmissibility proceedings" (Judgment, at paragraph 17), the Judge agreed with his colleagues in *B006* and *Aly* that the ability to raise the criminal law defences of duress or necessity as a basis for relief under subsection 42.1(1) of the Act did not preclude claimants from raising them in an admissibility hearing, hereby dismissing the Minister's contention that allowing the Board to consider these defences in such proceedings "would deprive subsection 42.1(1) of its function" (Judgment, at paragraph 19). He also agreed that this Court's decision in *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FCA 103, [2012] 4 F.C.R. 538, 415 N.R. 121 (*Agraira*) provided no support for the argument advanced by the Minister. More particularly, the Judge was satisfied that *Agraira* "was simply providing an example of factors that could be considered in a ministerial relief application, not ruling out the possibility of [a defence of] duress being raised at inadmissibility hearings" (Judgment, at paragraph 21).

[16] The Judge then considered the Minister's submission that cases in which the Federal Court had found that the defence of duress could be considered by the Board when dealing with paragraph 37(1)(b) of the Act ought to be distinguished from cases involving paragraph 37(1)(a). He saw no principled reason for drawing such a distinction, as the underlying rationale for both defences is moral involuntariness (Judgment, at paragraphs 26–27). He further rejected the Minister's contention that the defence of duress was not relevant in inadmissibility proceedings because, in the criminal law context, it only serves to negate the *mens rea* requirement of an offence, whereas in inadmissibility proceedings no such mental element is required to demonstrate inadmissibility. Quoting from Lamer C.J.'s judgment in *R. v. Hibbert*, [1995] 2 S.C.R. 973, 184 N.R. 165 (*Hibbert*), he held that duress can provide a defence not only by negating the requisite *mens rea* of the conduct in question but also by excusing the actions of the individual, resulting in *mens rea* being an irrelevant consideration when duress operates as an excuse (Judgment, at paragraphs 28–29).

[17] For the same reason, the Judge found that the distinction the Minister drew between the use of the terms "engaging in" and "committing" in certain inadmissibility provisions of the Act had no effect on the applicability of the defence of duress because when it operates as an excuse, that defence "goes to the voluntariness of the act in question, whether that be membership in an organization or otherwise" (Judgment, at paragraphs 30–31).

[18] As for the merits of the 2018 Decision, the Judge noted that the only issue to be determined was whether the respondent had a "safe avenue of escape". He found no reason to interfere with the IAD's findings on that point, being satisfied that the respondent's drug addiction was one of a number of factors considered by the IAD, the

others being the repeated beatings, the continuous death threats, and the honest belief that the Cartel was willing and able to track down the respondent and his mother. In short, the Judge was satisfied that the IAD's conclusion, i.e. that a reasonable similarly situated person could not have extricated themselves from the situation of duress the respondent found himself in, fell within a range of rational outcomes (see Judgment, at paragraphs 37–43).

IV. Issues and Standard of Review

[19] This appeal raises the following issues:

1) In determining whether an individual is inadmissible under paragraph 37(1)(a) of the Act, is the Board entitled to consider the defence of duress?

2) If so, was the IAD's application of the defence of duress to the respondent's circumstances reasonable?

[20] It is trite that on appeal from a decision of the Federal Court sitting in judicial review, this Court must determine whether the Federal Court chose the appropriate standard of review and, if so, whether it properly applied it in reviewing the impugned decision. This requires the Court to "step into the shoes" of the Federal Court and effectively focus on the administrative decision under review (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 (*Agraira SCC*), at paragraphs 45–47).

[21] Here, the Judge chose to review the 2018 Decision on a standard of reasonableness. Both parties are of the view that the Judge made the proper choice and that this choice remains valid under the review framework laid out by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, 441 D.L.R. (4th) 1 (*Vavilov*). In *Vavilov*, the Supreme Court stated that when reviewing an administrative decision, the reviewing court "should start with the presumption that the applicable standard of review for all aspects of that decision will be reasonableness" (*Vavilov*, at paragraph 25).

[22] That presumption extends to matters where the impugned decision turns on the decision maker's interpretation of its home statute. This was already well established by cases such as *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at paragraph 30 and *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293, at paragraphs 22–23. It was reiterated in *Vavilov* (at paragraph 25).

[23] On reasonableness review, the focus of the inquiry "must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome" (*Vavilov*, at paragraph 83). Ultimately, the reviewing court must be satisfied that the administrative decision is "based on an internally coherent and rational chain of analysis and… is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at paragraph 85). When the matter at issue concerns more specifically the decision maker's interpretation of its home statute, reasonableness review means that although the decision maker's interpretation must be consistent with the text, context, and purpose of the provision, as required by the usual principles of statutory interpretation (*Vavilov*, at paragraph 120), the reviewing court

must refrain from undertaking a *de novo* analysis of the question or from asking itself "what the correct decision would have been". It must instead, "examine the administrative decision as a whole, including the reasons provided by the decision maker and the outcome that was reached" (*Vavilov*, at paragraph 116).

[24] The reasonableness review framework clearly applies to the second question in issue in the present matter. However, it is less clear that it applies to the first one, the jurisdictional issue as *Vavilov* sets out a limited number of instances where the presumption of reasonableness review can be rebutted. One such instance concerns questions regarding "the jurisdictional boundaries between two or more administrative bodies" (*Vavilov*, at paragraph 63) as "the rule of law requires courts to intervene where one administrative body has interpreted the scope of its authority in a manner that is incompatible with the jurisdiction of another". This is to avoid "pulling a party in two different and incompatible directions" (*Vavilov*, at paragraph 64). The examples given by the Supreme Court in support of this exception to the presumption of reasonableness review all deal with administrative bodies deriving their authority from different statutory regimes, not, as is the case here, from the same statutory framework. The issue of the applicability of this exception to the case at bar not having been raised or addressed by the parties, it is preferable to leave it for another day.

[25] That said, I am satisfied, for the reasons that follow, that the IAD's finding that it is entitled to consider the defence of duress when determining whether an individual is inadmissible under paragraph 37(1)(a) of the Act, is not only reasonable, but correct.

V. Analysis

A. *The jurisdictional issue*

[26] The Board relied on Federal Court precedents in reaching its conclusion on jurisdiction. Therefore, it can hardly be faulted for having concluded that those precedents were binding on it (see *Vavilov*, at paragraph 112). As a result, the focus of the inquiry must be on the Judge's treatment of these precedents. What needs to be determined in this context is whether the interpretation of the interplay between section 42.1 and the other relevant provisions of the inadmissibility framework articulated in those precedents, accepted as good law by the Judge, should be disturbed on appeal, keeping in mind that these provisions are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament (*Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at paragraph 26; *R. v. Penunsi*, 2019 SCC 39, [2019] 3 S.C.R. 91, 435 D.L.R. (4th) 65, at paragraph 36).

(1) The parties' position

[27] The Minister submits that the Judgment is inconsistent with the scheme of the Act as well as with appellate jurisprudence. He claims that, contrary to the true essence of the Act's inadmissibility framework, the Judgment permits the Board to exercise a relieving authority that Parliament has vested in him, and no one else, as per the operation of subsection 6(3) of the Act, that is the authority to relieve someone from the objective fact of their inadmissibility, when this is not contrary to the national interest. According to that framework, when ministerial relief is available, inadmissibility becomes

a two-step process where duress can only be raised as an excuse for a person's conduct at the ministerial relief stage.

[28] The Minister further claims that the Judgment is inconsistent with the scheme of the Act because it imports into the inadmissibility framework criminal law notions that have no direct application to it. The legal defence of duress, he claims, is aimed at protecting persons charged with an offence from unconstitutional punishment, that is from punishment for morally involuntary actions, whereas inadmissibility is purely a finding that an individual falls within a class of persons defined by Parliament. As such, inadmissibility is not concerned with moral blameworthiness, is not imposed as a punishment for an individual's actions, and does not engage one's rights under the *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44] (the Charter), as would punishing an accused for his or her morally involuntary actions. According to the Minister, the Judge made a critical error in failing to account for these crucial distinctions.

[29] Finally, the Minister asserts that his position on the jurisdictional issue is consistent with appellate jurisprudence, and in particular with the Supreme Court of Canada's decision in *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3 (*Suresh*) and the judgments of this Court in *Agraira*, *Najafi v. Canada (Public Safety and Emergency Preparedness)*, 2014 FCA 262, [2015] 4 F.C.R. 162 (*Najafi),* and *Canada (Citizenship and Immigration) v. Kassab*, 2020 FCA 10, [2021] 3 F.C.R. 149, 441 D.L.R. (4th) 369 (*Kassab*). He further contends that the line of reasoning emanating from these judgments has been followed in a number of Federal Court cases, namely *Stables v. Canada (Citizenship and Immigration)*, 2011 FC 1319, [2013] 3 F.C.R. 240, 343 D.L.R. (4th) 510 (*Stables*), *Saleh v. Canada (Citizenship and Immigration)*, 2010 FC 303, 363 F.T.R. 204 (*Saleh*) and *Gazi v. Canada (Citizenship and Immigration)*, 2017 FC 94, 2017 CarswellNat 134 (WL Can.) (*Gazi*).

[30] According to the Minister, the common principle underlying this line of cases is that membership is to be interpreted broadly, while duress is a factor to be raised and considered personally by him in a subsequent application for ministerial relief under subsection 42.1(1), making it thereby possible for those who can establish that their participation in a criminal organization was coerced to be relieved from the consequences of inadmissibility. For the Minister, the line of jurisprudence followed by the Judge runs contrary to that principle as it narrows the intended broad meaning of membership and impermissibly alters the two-step process laid out in the Act's inadmissibility framework in matters where ministerial relief is available and does so at the expense of the safety and security of Canadians, which are the two key considerations in determining whether such relief is warranted.

[31] The respondent does not agree with any of these submissions. He contends that the Minister's position prevents a harmonious reading of the Act, one that is both consistent, internally and externally, and predictable. He claims, in that regard, that although common law defences are part of the criminal law, they do provide context for the interpretation of the criminality and security provisions of the Act, as evidenced by the fact that they have been widely found applicable to inadmissibility matters for over 20 years, regardless of the availability of ministerial relief. Moreover, the Minister's approach, if accepted, would irrationally "forgive" nonculpable conduct and would not

serve any of the Act's objectives, as articulated in section 3 of the Act, since there would be nothing for the Minister to relieve.

[32] The intervener, the Canadian Association of Refugee Lawyers, which supports the conclusion reached by the Judge, claims that from the perspective of refugee protection, the Minister's approach will effectively eliminate criminal law defences in the context of inadmissibility determinations, while preserving them for exclusion determinations made pursuant to Article 1F of the *United Nations Convention Relating to the Status of Refugees*, July 28, 1951, [1969] Can. T.S. No. 6 (the Convention) and section 98 of the Act, despite both processes assessing identical legal elements, including, in most instances, identical alleged criminal conduct. Such an approach, according to the intervener, would run contrary to principles of statutory interpretation and to binding case law; lead to inconsistent results between inadmissibility determinations under sections 34, 35 and 37 of the Act and exclusion determinations under section 98; and put Canada at odds with its international law obligations.

[33] I will first examine the relevant provisions of the Act. I will then turn to the jurisprudence relied upon by the Minister. For ease of reference, relevant provisions not reproduced in the body of these reasons are set forth in the annex.

(2) The relevant statutory framework

[34] The most fundamental principle of immigration law is that "non-citizens do not have an unqualified right to enter or remain in the country." When a non-citizen is permitted to enter or remain in Canada, that permission is usually subject to conditions and the failure to respect them may give rise to an inadmissibility finding (*Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711, at page 733, 135 N.R. 161; *Revell v. Canada (Citizenship and Immigration)*, 2019 FCA 262, [2020] 2 F.C.R. 355 (*Revell*), at paragraph 54).

[35] Inadmissibility can be sought on various grounds ranging from national security to public health. These grounds are set out in sections 34 to 42 of the Act (under "Division 4—Inadmissibility"). One of their objectives is to protect the safety of Canadian society (*Sittampalam v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 326, [2007] 3 F.C.R. 198 (*Sittampalam*), at paragraph 21). Sections 44 to 53 of the Act ("Division 5—Loss of Status and Removal") outline a comprehensive scheme for the adjudication of inadmissibility allegations and the enforcement of inadmissibility determinations.

[36] Relevant to the present matter are sections 34 to 37 of the Act, which set out inadmissibility grounds aimed at "facilitat[ing] the removal of [non-citizens] who constitute a risk to Canadian society on the basis of their conduct, whether it be criminality, organized criminality, human or international rights violations, or terrorism" (see *Sittampalam*, at paragraph 21, cited in *Stables*, at paragraph 14).

[37] Inadmissibility for organized criminality is provided for by subsection 37(1) of the Act. According to that provision, a non-citizen is inadmissible either for being a member of a criminal organization or engaging in the activities of the organization, or for engaging, in the context of transnational crime, in activities such as people smuggling or money laundering. Subsection 37(1) reads as follows:

Organized criminality

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

> **(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
>
> **(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.

[38] For non-citizens who are in Canada, inadmissibility proceedings normally begin when the Minister is provided with the report of an immigration officer setting out the facts that led the officer to believe that a person is inadmissible. Then, subject to two exceptions which have no application in the present matter, the Minister may refer the report to the ID for an admissibility hearing pursuant to subsection 44(2) of the Act if he is of the opinion that the report is well-founded. If satisfied at the conclusion of the hearing that the permanent resident or foreign national who is the subject of the report is inadmissible, paragraph 45(d) of the Act directs the ID to make the applicable removal order.

[39] The authority to prepare such a report and to refer it to the ID is “permissive”, meaning that both the officer and the Minister retain discretion to consider the particular circumstances of the person being investigated when determining whether to issue a report or defer the matter to the ID (see *B010 v. Canada (Citizenship and Immigration)*, 2013 FCA 87, [2014] 4 F.C.R. 326, at paragraph 93, reversed on other grounds by 2015 SCC 58, [2015] 3 S.C.R. 704 (*B010*)).

[40] Pursuant to section 33 of the Act, it is sufficient, in order to establish inadmissibility under sections 34 to 37, that there be “reasonable grounds to believe” that the facts giving rise to inadmissibility “have occurred, are occurring or may occur.” This relatively low evidentiary standard requires more than mere suspicion but less than proof on the balance of probabilities, meaning that such standard will be met “where there is an objective basis for the belief which is based on compelling and credible information” (*Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100, at paragraph 114).

[41] In proceedings brought before it under the Act, which include inadmissibility proceedings, the Board, by virtue of subsection 162(1) of the Act, has “sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction” (my emphasis).

[42] For its part, section 42.1 of the Act empowers the Minister to declare that the matters referred to in section 34 (security), subsection 37(1) (organized criminality), and part of section 35 of the Act (human or international rights violations) do not constitute inadmissibility. That power, which the Minister alone can exercise as per subsection 6(3) of the Act, permits the granting of an exemption from the application of these inadmissibility provisions provided the Minister is satisfied that the presence in Canada

of the person seeking the exemption, or for whom it is considered, would not be contrary to the national interest.

[43] In making that determination, the Minister, as per subsection 42.1(3), "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." In *Agraira SCC*, the Supreme Court held that the test is no longer focused solely on national security, as was the case prior to the amendments made in 1977 to the inadmissibility provisions of the *Immigration Act, 1976*, S.C. 1976-77, c. 52, but is instead premised on a "broader array of domestic and international considerations constituting the 'national interest'" (*Agraira SCC*, at paragraphs 69–70).

[44] That relieving power is meant to exempt non-citizens "who innocently contribute to or become members of terrorist [or, in the case at bar, criminal] organizations" from the consequences of inadmissibility notwithstanding proof that they have been associated with or have been members of such organizations (*Suresh*, at paragraph 110, cited in *Agraira*, at paragraph 63). Relief under section 42.1 is not available to all non-citizens but only to foreign nationals. It may be granted either on application by the foreign national or on the Minister's own initiative. Section 42.1 reads as follows:

> **Exception — application to Minister**
>
> **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.
>
> **Exception — Minister's own initiative**
>
> **(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 national if the Minister is satisfied that it is not contrary to the national interest.
>
> **Considerations**
>
> **(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.

[45] Clearly, when one looks at the text of the relevant provisions, there is no express language limiting the Board's jurisdiction in the manner proposed by the Minister. The broad language of subsection 162(1) of the Act rather suggests that the Board's exclusive authority to consider "all questions of law and fact, including questions of jurisdiction" in proceedings brought before it, is not so constrained. Nor is there express language in the Act granting the Minister exclusive authority to consider criminal law defences in the context of inadmissibility.

[46] However, the Minister claims that when read, as it should be, in context and purposively, section 42.1 does have a limiting effect on the Board's jurisdiction. He submits that the concept of "membership" in sections 34 and 37 of the Act, which is not defined in the Act, was intended to be broadly interpreted mainly because the Minister

retained discretion, and still does under section 42.1 of the Act, to relieve innocent individuals caught by this broad interpretation from the consequences of inadmissibility, including those who can establish that their participation in a criminal or terrorist organization was coerced. The Minister therefore contends that it cannot have been Parliament's intention to allow the Board to circumvent that broad interpretation through the consideration of criminal law defences aimed at excusing the conduct of such individuals, this task having been exclusively vested in him with a view that the availability of a relieving measure for coerced participation in the activities of such organizations be measured against the national interest and its two predominant features, national security and public safety.

[47] It is true that the term "member" in sections 34 and 37 is to receive a broad interpretation and that one of the contextual factors that allows for such an interpretation is the Minister's authority, under section 42.1, to provide relief from the consequences of inadmissibility. That being said, I have some difficulty with the Minister's contention that the interplay between those provisions deprives the Board of any authority to consider duress when determining membership in a terrorist or criminal organization. Put differently, I am not satisfied that, whatever the applicable standard of review is, the contrary view, which is reflected in the prevailing Federal Court jurisprudence, should be interfered with. This is so for a number of reasons.

[48] First, it strikes me that the Minister's approach is at odds with a careful reading of *Poshteh v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85, [2005] 3 F.C.R. 487 (*Poshteh*), rendered a few years only after the coming into force of the Act and relied upon by the Minister in the present proceedings. Although *Poshteh* involved membership of a minor in a terrorist organization, it contains, in my view, pronouncements of persuasive value that are applicable to any membership case.

[49] Two issues were considered in *Poshteh*. The first was whether, irrespective of his age, there were reasonable grounds to believe that Mr. Poshteh had been a member of a terrorist organization, namely the Mujahedin-e-Khalq (the MEK). Mr. Poshteh's involvement with the MEK had been limited to distributing propaganda leaflets for a little over two years and ended just a few weeks before Mr. Poshteh's 18th birthday. The Court, after noting the absence of a definition of the term "member" in the Act and that the courts had not established a precise and exhaustive definition of that term, endorsed the Federal Court's view that "member" was to be interpreted broadly. That view stemmed from three main considerations: the absence of a formal test for membership; the fact that section 34 deals with subversion and terrorism and thereby engages two prominent objectives of the Act, public safety and national security; and the possibility, in appropriate circumstances, of obtaining ministerial relief from the consequences of inadmissibility pursuant to former subsection 34(2) of the Act (*Poshteh*, at paragraphs 27–29).

[50] *Poshteh* was the Court's first opportunity to consider how the term "member" is to be interpreted under the Act's amended inadmissibility regime, which in 2002 replaced the one that had been in place under the former *Immigration Act*, R.S.C., 1985, c. I-2.

[51] The Court rejected Mr. Poshteh's contention that for there to be a finding of membership, evidence of a significant level of integration within an organization should be required. It found that such a test would be inconsistent with the broad interpretation to be given to the term "member" (*Poshteh*, at paragraph 31). On the facts, the Court

concluded that the Federal Court judge had committed no error in deferring to the Board's decision, despite Mr. Poshteh's claim of limited involvement in the MEK's activities. In so concluding, the Court underscored the fact that the assessment of the factors supporting or pointing away from a finding a membership fell "within the expertise of the Immigration Division" (*Poshteh*, at paragraphs 36–38).

[52] The second issue considered by this Court was whether Mr. Poshteh's status as a minor was a relevant consideration under paragraph 34(1)(f) of the Act and if so, what factors were to be taken into account in determining membership. Mr. Poshteh's primary argument was that in the case of a minor, the term "member" in paragraph 34(1)(f) ought to be interpreted narrowly so as to apply only to individuals directly involved in violence or holding leadership positions within a terrorist organization (*Poshteh*, at paragraph 12).

[53] This argument proved unsuccessful, the Court holding that lesser involvement by a minor could result in a finding of membership (*Poshteh*, at paragraph 53). The Court first noted in that regard that, contrary to paragraph 36(3)(e) of the Act, as it then read, there was no express exemption for minors in paragraph 34(1)(f). Because of that and because the Act expressly provides for individual assessments for admissibility, an exercise that involves "different considerations", a person's status as a minor is "simply a further consideration in the individual assessment made under paragraph 34(1)(*f*)" (*Poshteh*, at paragraphs 40–45).

[54] Then, the Court examined what considerations would be relevant when it comes to age. It held that in such context, "matters such as whether the minor has the requisite knowledge or mental capacity to understand the nature and effect of his actions" would be relevant considerations in a membership determination made under paragraph 34(1)(f) (*Poshteh*, at paragraph 47). Such matters, the Court said, would require the Board, in assessing membership, to view the requisite knowledge or mental capacity of the minor "on a continuum" and, in the case of a young child, "to carefully consider the level of understanding of such a child" (see *Poshteh*, at paragraphs 48 and 51).

[55] But even more importantly for the purposes of the present appeal, the Court went on to stress that it is open to the minor, in defending against a membership allegation, to raise whatever other factors they consider relevant to their circumstances, including "issues of duress or coercion" (*Poshteh*, at paragraph 52). Such issues did not apply to Mr. Poshteh's situation since it was he who had sought to become a member of the MEK (*Poshteh*, at paragraph 52). However, this determination is entirely consistent with the Court's general statement at paragraph 45 that a membership claim, whether made against an adult or a minor, requires an individual assessment which engages different considerations. Age, in the case of a minor, is one of them; duress or coercion is another.

[56] In my view, *Poshteh* signals a clear understanding on the part of the Court that this broad range of considerations falls within the expertise of the Board. This is evidenced, *inter alia*, by the fact that the Court was satisfied that Mr. Poshteh's age, including his knowledge and mental capacity, had been properly dealt with by the Board (*Poshteh*, at paragraph 54). There is no reason to think that the Court would have adopted a different view had Mr. Poshteh also raised issues of duress or coercion. In fact, as I have already indicated, it is quite clear that, despite an express reference to subsection 34(2) (now subsection 42.1(1)), the Court considered that the defence of

duress or coercion would have been available to Mr. Poshteh as part of the considerations to be assessed by the Board in determining the question of membership. It is equally clear that the defence of duress or coercion is not age-specific and that it would have been available to Mr. Poshteh not because of his status as a minor (he was found to have achieved the requisite mental capacity) but because he was a foreign national facing inadmissibility based on allegations of membership in a terrorist organization.

[57] Therefore, as I read *Poshteh*, factors such as mental capacity or engagement in the activities of the terrorist organization free of coercion were considerations that went to the heart of the membership determination in that particular case.

[58] Although *Poshteh* concerned membership in the context of section 34 of the Act, there is no principled reason to distinguish section 34 from subsection 37(1) for the purposes of interpreting the notions of membership and participation in a terrorist or criminal organization (*Stables*, at paragraphs 46–47). The Minister did not contend otherwise at the hearing of this appeal and for good reasons as none of the appellate decisions, he invokes to persuade this Court that his position on the jurisdictional issue should prevail, deals with subsection 37(1) membership issues. In fact, three of them—*Suresh*, *Agraira* and *Najafi*—are section 34 membership cases whereas the fourth one—*Kassab*—is a section 35 matter.

[59] Therefore, in my view, *Poshteh* provides persuasive support for the line of cases relied upon by the Judge where duress was raised in inadmissibility matters open to ministerial relief and found to be applicable by both the Board and the Federal Court. This is the case even if the Court's mention of duress at paragraph 52 of its reasons is to be considered *obiter dictum*. In other words, there is no reason to brush it aside. Rather, it ought to be read with the Court's statement regarding the ID's expertise in assessing factors that point towards or away from membership. Moreover, the Court considered the ID's finding that Mr. Poshteh's involvement with the MEK had not been coerced as an indicator of membership in said organization. Taken together, those elements of this Court's reasons provide a clear indication of its position as to whether duress is a relevant consideration in determining membership and whether or not it can be raised before the Board.

[60] In an oft-quoted passage from *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609 (*Henry*), the Supreme Court of Canada stated that the weight of *obiter* "decreases as one moves from the dispositive *ratio decidendi* to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative" and that beyond the wider circle of analysis there will be non-binding "commentary, examples or exposition that are intended to be helpful and may be found to be persuasive" (*Henry*, at paragraph 57). In other words, *obiter dicta* move along a continuum (*R. v. Prokofiew*, 2010 ONCA 423, 100 O.R. (3d) 401, at paragraph 20, affd without reference to this point, 2012 SCC 49, [2012] 2 S.C.R. 639).

[61] Viewed as *obiter dictum*, the passage in *Poshteh* concerning duress is, if not part of the "wider circle" of the analysis that led the Court to conclude as it did (see paragraphs 56 and 57 of these reasons), at the very least a persuasive example of a factor the Board can consider when determining membership. Put another way, it has persuasive effect.

[62] In sum, *Poshteh* unequivocally signals that the view adopted by the Judge regarding the Board's jurisdiction to consider duress in an inadmissibility matter brought before it under paragraph 37(1)(a) of the Act not only falls within a range of possible, acceptable outcomes, but is also correct.

[63] I pause to point out that in a significant number of cases, including recent ones, the Minister did not object, either before the Board or the Federal Court, to duress being considered in determining membership. See for example: *Gil Luces v. Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1200, 2019 CarswellNat 4900 (WL Can.); *Konate v. Canada (Public Safety and Emergency Preparedness)*, 2018 FC 129, 2018 CarswellNat 541 (WL Can.) (*Konate*); *Castellon Viera v. Canada (Citizenship and Immigration)*, 2012 FC 1086, 418 F.T.R. 116; *Thiyagarajah v. Canada (Citizenship and Immigration)*, 2011 FC 339, 2011 CarswellNat 902 (WL Can.); *Belalcazar v. Canada (Public Safety and Emergency Preparedness)*, 2011 FC 1013, 395 F.T.R. 291.

[64] Of note is the Minister's concession before the Supreme Court of Canada in *B010* that the criminal law defences of duress and necessity are "available in principle" in the context of inadmissibility proceedings brought under paragraph 37(1)(b) of the Act (*B010*, at paragraph 73). This concession was made in response to one of the appellants' arguments in that case that he should be able to raise these defences should he fall within that provision of the Act. Although the Supreme Court declined to decide the issue, it agreed with this Court that there was no merit to that appellant's claim that the Board had failed to consider his defences of duress and necessity (*B010*, at paragraph 73).

[65] The Minister asserted before the Judge that cases brought under paragraph 37(1)(b) of the Act were to be distinguished from those initiated under paragraph 37(1)(a), implying thereby that duress could be considered by the Board in paragraph 37(1)(b) matters, but not in matters initiated under paragraph 37(1)(a). The Judge rejected this contention, stating that there were no principled reasons for drawing such a distinction as "[t]he defences of necessity and duress are both classified as excuses[ ] the underlying rationale [being] moral involuntariness" (Judgment, at paragraph 27).

[66] Although the Minister has not directly challenged that finding, the positions he has taken in *B010* and before the Judge illustrate some of the inconsistencies in his approach. If duress can be raised before the Board in a matter brought under paragraph 37(1)(b), as conceded by the Minister in *B010* and, for all intents and purposes, in this case at the judicial review stage, then there is indeed no principled reason for it to be unavailable in a paragraph 37(1)(a) matter. In *B010*, the Supreme Court made it clear that the focus of subsection 37(1) of the Act, taken as a whole, was to deal with organized criminal activity pursuant to Canada's international law obligations and that paragraphs 37(1)(a) and (b) were to be characterized as "instances" of such activity (see *B010*, at paragraph 37). It also made it clear that the concept of "organized criminality" underlying both provisions, is to be given an interpretation consistent and harmonious with that given to "criminal organization" in subsection 467.1(1) of the *Criminal Code*, R.S.C. 1985, c. C-46 (see *B010*, at paragraphs 41–46).

[67] As the respondent rightly puts it, there is no rational basis for carving out paragraph 37(1)(a) and treating it differently from paragraph 37(1)(b) by making the defence of duress available before the Board in one instance but not in the other, as

both provisions serve a common purpose and should be interpreted and applied in light of the same criminal law concepts.

[68] This leads me to my next point. In *Vavilov*, the Supreme Court stated that both statutory and common law will impose constraints on how and what an administrative decision maker can lawfully decide and will be relevant in assessing the reasonableness of the decision (see *Vavilov*, at paragraphs 106–114). As an example of such constraints, the Supreme Court gave that of "an immigration tribunal" having to determine whether a person's conduct constitutes a criminal offence under Canadian law in a matter raised under sections 35 to 37 of the Act. It held that "it would clearly not be reasonable" for that tribunal, in such instances, "to adopt an interpretation of a criminal law provision that is inconsistent with how Canadian criminal courts have interpreted it" (*Vavilov*, at paragraph 112).

[69] There are other instances where the criminal law was found to be relevant in interpreting provisions of the Act. Such was the case with the "serious non-political crime" exclusion clause in Article 1F(b) of the Convention, incorporated into section 98 of the Act (*Jayasekara v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404, [2009] 4 F.C.R. 164, at paragraph 44; see also *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68, [2014] 3 S.C.R. 431, at paragraphs 61–62). This was also the case with the issue of whether a conditional sentence could be assimilated to a "term of imprisonment" for the purposes of paragraph 36(1)(a) of the Act (see *Tran v. Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50, [2017] 2 S.C.R. 289, at paragraphs 24–34).

[70] Moreover, in *Li v. Canada (Minister of Citizenship and Immigration)*, [1997] 1 F.C. 235, (1996), 138 D.L.R. (4th) 275 (C.A.), 1996 CarswellNat 1133 (WL Can.), this Court determined that when inadmissibility is based on a conviction for an offence committed outside Canada, the test of equivalence of an offence under foreign and Canadian law requires a comparison of not only the essential elements of the Canadian and foreign offences, but also of the defences particular to those offences (*Li*, at paragraphs 18–19).

[71] As we have just seen, the main purpose of subsection 37(1) is to deal with organized criminality in the immigration context. The language of that provision links inadmissibility to forms of conduct which, for the most part, are criminally prohibited. See for example the following provisions of the *Criminal Code*: subsection 467.11(1) ("Participation in activities of criminal organization"), subsection 279.01(1) ("Trafficking in persons"), and subsection 462.31(1) ("Laundering proceeds of crime").

[72] As the Federal Court rightly pointed out in *Stables*, membership in either a criminal or a terrorist organization "attract[s] criminal liability in Canada" (*Stables*, at paragraph 46).

[73] It has been held, time and again, that inadmissibility proceedings are not criminal or quasi-criminal in nature. As such, a finding that a person is criminally inadmissible is not imposed as a "punishment" within the meaning of the criminal law and does not engage, in and of itself, Charter rights (see *Revell*, at paragraphs 41 and 54). Be that as it may, *Vavilov* makes it clear, in my view, that in matters raised under subsection 37(1) of the Act, the criminal law imposes on the Board, an "immigration tribunal", constraints on how and what it can lawfully decide (*Vavilov*, at paragraph 112).

[74] In light of the foregoing, it would take much clearer language from Parliament to remove the availability of the consideration of duress from the ambit of matters the Board might consider in an admissibility proceeding. One simply cannot infer such an intent from the mere presence of section 42.1.

[75] I pause to stress that it is not disputed that duress may be raised before the Board in matters where inadmissibility is not subject to ministerial relief. As the respondent points out, the Minister could have initiated inadmissibility proceedings against him for having committed a criminal offence overseas, as permitted by paragraph 36(1)(c) of the Act. According to the Minister's logic, this would have made duress a relevant consideration because inadmissibility proceedings for serious criminality are not subject to ministerial relief, even though these proceedings would have been based on the same set of facts as the one that led the Minister to raise subsection 37(1)(a) in the case at bar. I agree with the respondent that such an approach, if allow to stand, would lead to absurd results, as duress would then be available depending solely on which inadmissibility provision the Minister decides to proceed with. Such result cannot not have been intended by Parliament (*Rizzo & Rizzo Shoes Ltd. (Re*), [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193, at paragraph 27).

[76] This brings me to my fourth point. It concerns the relevance of duress—or necessity—in establishing membership. It is not controverted that the membership clauses in paragraphs 34(1)(f) and 37(1)(a) were intended "to cast a wide net in order to capture a broad range of conduct that is inimical to Canada's interests" (*Ugbazghi v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 694, [2009] 1 F.C.R. 454, at paragraph 47). It is not disputed either that ministerial relief was intended to alleviate the consequences of inadmissibility for those who are caught in that net but who can establish that they joined or contributed to an organization's activities while ignoring the organization's terrorist or criminal purpose (see *Suresh*, at paragraph 109–110; *Stables*, at paragraph 35). This is why it has been held that "direct knowledge" of the organization's activities or purpose is not a pre-requisite for a finding of membership in either the section 34 or section 37 context; evidence of a non-citizen's "belonging" to the organization is sufficient (*Khan v. Canada (Citizenship and Immigration)*, 2017 FC 397, 2017 CarswellNat 1722 (WL Can.) (*Khan*), at paragraphs 29–30, citing *Chiau v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 297, at paragraph 57, (2000), 195 D.L.R. (4th) 422 (C.A.)).

[77] There is no question that these are legal constraints shaping the exercise of the Board's powers in inadmissibility matters.

[78] However, does someone "belong" to a criminal or terrorist organization if that person has been forcibly recruited and forced to engage in the activities of the organization? The Federal Court answered this question in the negative in *Jalloh v. Canada (Public Safety and Emergency Preparedness)*, 2012 FC 317, 2012 CarswellNat 654 (WL Can.) (*Jalloh*), holding that "a person cannot be considered to be a member of a group when his or her involvement with it is based on duress" (*Jalloh*, at paragraph 37; see also *Konate*, at paragraph 20).

[79] I agree. However broadly the term "member" is to be interpreted, it must have some meaning. It is entirely consistent with the text, context and purpose of the provisions at issue to hold, as did the Federal Court in *Jalloh* and, in my view, this Court in *Poshteh*, that despite the presence of section 42.1, Parliament did not intend

membership to extend to those who were forcibly recruited by a terrorist or a criminal organization and performed acts consistent with the goals of such an organization while under duress.

[80] This goes to the very essence of membership determination under sections 34 and 37 of the Act and touches upon one of the core functions of the Board, which is to determine whether membership has been established by weighing various factors and considerations in light of the particular circumstances of each case (see *Poshteh*, at paragraphs 21, 36 and 45). Just as the defence of duress serves to excuse a defendant of moral culpability and to protect them against a finding of guilt and punishment for morally involuntary conduct (see e.g. *Hibbert*, at paragraphs 48 and 52–55; *R. v. Ryan*, 2013 SCC 3, [2013] 1 S.C.R. 14, at paragraph 23), the importation of this defence into the immigration context provides a robust framework for determining actual membership for the purposes of admissibility. Again, coerced membership cannot reasonably have been intended to be captured by sections 34 and 37 of the Act.

[81] I would add that coerced membership is to be distinguished from cases where membership in an organization is admitted—and not coerced—but challenged for the purposes of admissibility. Such challenges may be based on claims that membership was purely “informal”, in the sense that the person concerned participated only in a limited or non-violent fashion in the organization’s activities, for example by occasionally distributing propaganda (see e.g. *Poshteh*, at paragraph 5; see also *Stables*, at paragraph 6: the applicant admitted having been in the Hells Angels, but denied involvement in any criminal activity). Challenges can also be based on a lack of knowledge of the violent, subversive, or criminal purpose of the organization (see *Khan*, at paragraph 17), or on a person having genuinely withdrawn from membership once they realized that it was not what they wanted to do with their life (*Sittampalam*, at paragraph 27). Coerced membership is also to be distinguished from cases where the person concerned raises similar considerations without admitting membership (see e.g. *Toronto Coalition to Stop the War v. Canada (Public Safety and Emergency Preparedness)*, 2010 FC 957, [2012] 1 F.C.R. 413, at paragraphs 7 and 12–18).

[82] Although it need not be decided in the present matter, one could say that the foregoing are instances where such mitigating factors, may be better advanced—or can only be advanced—through an application for ministerial relief under section 42.1 of the Act. However, whatever the legal soundness of that proposition, this does not deprive the Board from considering whether the person facing inadmissibility on membership grounds was forced into that situation which, again, in my view, goes to the very heart of the membership determination. I pause to reiterate that in making such a determination, the Board need only be satisfied that there are reasonable grounds to believe that a non-citizen is or was a member of a terrorist or criminal organization. It is not, in so doing, constrained by the standard of proof applicable in criminal matters.

[83] My fifth and last concern regarding the position advanced by the Minister in this appeal relates to his contention that the line of jurisprudence followed by the Judge impermissibly alters the two-step process designed by Parliament for matters where ministerial relief is available. According to the Minister, that process requires the Board to determine first whether inadmissibility has been made out through a strict application of the broad meaning of membership and then leave it to the Minister, pursuant to the

authority conferred upon him by section 42.1, to alleviate the consequences of inadmissibility.

[84] This view of the inadmissibility framework, where ministerial relief is available, seems difficult to reconcile with a further judgment rendered by this Court in the case of Mr. Poshteh. In that case, the Minister sought reconsideration of the Court's decision, claiming he was concerned with what the Court had said in dismissing Mr. Poshteh's contention that his section 7 Charter rights were engaged by the Board's finding of inadmissibility. The Court had found that Mr. Poshteh's Charter rights were not engaged because there were a number of proceedings available to him before he would reach the stage at which his deportation from Canada could occur and where, as a result, his Charter rights could be engaged. As an example of such proceedings, the Court referred to Mr. Poshteh's right to seek ministerial relief under subsection 34(2) of the Act (now subsection 42.1(1)).

[85] The Minister claimed that this passage was at odds with *Canada (Minister of Citizenship and Immigration) v. Adam*, [2001] 2 F.C. 337, (2001), 196 D.L.R. (4th) 497 (C.A.) (*Adam*), where the Court held that once a finding of inadmissibility had been made, ministerial relief was no longer available. According to the Minister, it was wrong to imply in *Poshteh* that Mr. Poshteh could still invoke subsection 34(2) to try to satisfy the Minister that his presence in Canada would not be detrimental to the national interest, as he had already been found inadmissible (*Poshteh v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 121, [2005] 3 F.C.R. 511 (*Poshteh No. 2*), at paragraph 6).

[86] In *Adam*, the Minister had taken the view, accepted by the Court, that ministerial relief would have to be sought before a decision on admissibility was made. However, in *Poshteh No. 2*, the Court noted that *Adam* had been rendered under the former *Immigration Act*, as amended, and that subsection 34(2) of the Act was worded differently from its predecessor, which had used the past tense (*Poshteh No. 2*, at paragraphs 8–9). This led the Court to conclude that, contrary to its predecessor, there was "simply no temporal aspect to subsection 34(2)" and that "[n]othing in subsection 34(2) appear[ed] to fetter the discretion of the Minister as to when he might grant a ministerial exemption" (*Poshteh No. 2*, at paragraph 10).

[87] Section 42.1 is drafted using the same verb tense as former subsection 34(2). The Court's holding in *Poshteh No. 2* means that there is no support for the Minister's view that inadmissibility, where ministerial relief is available, is a sequential, two-step process, in which the Board and the Minister play specific but complementary roles. That decision rather suggests that these roles, although both part of the inadmissibility framework, are independent from one another, meaning that their exercise is not imperatively subject to a particular sequence. In other words, one does not limit or preclude the other, provided, of course, that the Board and the Minister act within the confines of their respective jurisdictions.

[88] I am satisfied that *Poshteh No. 2* clearly contemplates that ministerial relief can be sought and processed prior to the Board even being called upon to hold an inadmissibility hearing and exercise its own jurisdiction. This appears to have been the case, for example, in *Agraira* (see *Agraira*, at paragraphs 11–12). Therefore, nothing would prevent a non-citizen in the situation of the respondent from seeking, at the earliest opportunity, the declaration contemplated by section 42.1 as there is "no

temporal aspect" to section 42.1, although from a purely strategic standpoint, this may not be the preferred option.

[89] To the extent, then, that the concept of a two-step process is central to the Minister's contention that the Board is pre-empted, in matters where ministerial relief is available, from fully exercising the jurisdiction it would normally exercise, this contention cannot stand.

[90] Now, is there anything in the jurisprudence invoked by the Minister that otherwise supports his approach? As indicated previously, the Minister asserts that the principle that membership is to be interpreted broadly, while duress is only to be considered personally by him in a subsequent application for ministerial relief, clearly emerges from this Court's decisions in *Agraira*, *Najafi*, and *Kassab*, as well as from a number of Federal Court decisions, namely *Stables*, *Saleh*, and *Gazi*.

[91] Based on the foregoing reasons, and those that follow, I disagree.

(3) The jurisprudence invoked by the Minister

[92] *Agraira* concerned an application for ministerial relief brought under former subsection 34(2) of the Act. Mr. Agraira admitted to membership in a terrorist organization but claimed that he had only been involved in distributing leaflets and garnering support for the organization. He sought ministerial relief while the report provided for under subsection 44(1) of the Act was being finalized. Although recommended to the Minister by the officer in charge of the case, ministerial relief was denied. Judicial review proceedings ensued. The primary issue in that case had to do with the interpretation to be given to the term "national interest" in subsection 34(2) and the role of ministerial guidelines in the application of that provision. This Court held that the notion of "national interest" had to be understood within the context of national security and public safety, and that these concerns had to be at the forefront in the treatment of applications for ministerial relief (*Agraira*, at paragraph 50).

[93] The Court then considered whether the emphasis on national security and public safety meant that "individuals who commit an act described in subsection 34(1) cannot obtain ministerial relief because they committed the very act that confers jurisdiction on the Minister to exercise the discretion conferred by subsection 34(2)". The Court found that if this was to be the case, it "would deprive the provision 34(2) of any effect, an absurd result" (*Agraira*, at paragraph 62).

[94] It is in that particular context that the Court, referring to *Suresh*, made the remarks on which the Minister relies in the present matter [*Agraira*, at paragraph 64]:

> As I read the Supreme Court's decision, it concluded that the saving provision of section 19 of the *Immigration Act* would apply to protect persons who innocently joined or contributed to organizations that, unbeknownst to them, were terrorist organizations. There may be other cases in which persons who would otherwise be caught by subsection 34(1) of the *IRPA* may justify their conduct in such a way as to escape the consequence of inadmissibility. For example, those who could persuade the Minister that their participation in a terrorist organization was coerced might well benefit from ministerial relief.

[95] I do not read this paragraph as pre-empting the Board from considering duress when determining a membership claim. I read it, as did the Judge in relying on *B006*, as

simply providing an example of factors that can be considered in a ministerial relief application. In fact, *Agraira* was never about the role of the Board nor the potential tensions between that role and the ministerial relief power; it did not rule out the possibility of duress being raised at inadmissibility hearings.

[96] Considered in its proper context, this paragraph discredits the view that since the term “national interest” is to be interpreted with an emphasis on national security and public safety, an individual who had committed an act described in former subsection 34(1) could not secure ministerial relief under former subsection 34(2) because they had committed the very act that conferred jurisdiction on the Minister to grant the relief sought. Such a view, if accepted, would render ministerial relief illusory.

[97] In my view, *Agraira* has no impact on the principles laid out in *Poshteh* concerning the Board’s role or the legal constraints on its exercise of jurisdiction, including its ability to consider duress, where raised, in determining whether actual membership has been established. Nor does it impact the principle laid out in *Poshteh No. 2* that ministerial relief operates independently of inadmissibility proceedings, as it has no temporal aspect, such that one process does not limit or preclude the other.

[98] For essentially the same reasons, *Najafi* does not assist the Minister either. In that case, Mr. Najafi had been found inadmissible under paragraphs 34(1)(b) and (f) of the Act for being a member of the Kurdish Democratic Party of Iran (KDPI), an organization engaged in the subversion by force of the Iranian government, and for engaging in the activities of that organization. He admitted membership but claimed that the KDPI had used force in an attempt to subvert the Iranian government in furtherance of an oppressed people’s right to self-determination which, he asserted, was perfectly legitimate under international law.

[99] The Court devoted much attention to interpreting the terms “subversion by force of any government” in paragraph 34(1)(b) of the Act. It held that these terms were intended to have a broad application at the inadmissibility stage and were not to be construed as encompassing only use of force that is not legitimate or lawful pursuant to international law (see *Najafi*, at paragraphs 78–89). In so stating, the Court, referring to *Suresh* as it had done in *Agraira*, noted that the Minister had the ability to exempt innocent members of an organization that had engaged in the subversion by force of a government if satisfied that their admission to Canada would not be detrimental to the national interest, especially in cases where the granting of an exemption would require the resolution of complex international law issues regarding the legitimacy or lawfulness of the use of force against a government (*Najafi*, at paragraphs 80–82).

[100] Again, I do not read *Najafi*, where membership was admitted, as precluding the Board from considering duress when determining a membership claim or as overruling *Poshteh* or *Poshteh No. 2*.

[101] *Kassab* concerned an inadmissibility matter based on paragraph 35(1)(b) of the Act. That provision renders a non-citizen inadmissible for “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*” (my emphasis). The *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations), at section 16, define

a “prescribed senior official” as a person “who, by virtue of the position they hold or held, is or was able to exert significant influence on the exercise of government power or is or was able to benefit from their position,” and enumerates a number of positions such as heads of state, members of cabinet, and senior members of the public service or of the military, where the incumbent is presumed to be capable of exerting such influence.

[102] The Federal Court, in *Kassab*, determined that for an individual to be found inadmissible, despite evidence that they held one of the positions enumerated in section 16 of the Regulations, it was necessary to conduct a broader analysis to determine whether that individual was actually able to exert significant influence on the exercise of government power or to benefit from their position. This Court concluded that such a view of the interplay between paragraph 35(1)(b) of the Act and section 16 of the Regulations was incorrect. It did, however, endorse the Federal Court’s statement that once it is found that a non-citizen has held any of the positions enumerated in section 16, “there is an irrefutable presumption that the individual is or was a prescribed senior official” (*Kassab*, at paragraph 21, citing paragraph 26 of the Federal Court’s reasons, which refer to *Adam*, at paragraph 7; my emphasis).

[103] Thus, once it is established that the individual concerned has held any one of these positions for a designated government, there are no other inquiries to be performed by the Board for it to find the individual inadmissible. This is fundamentally different from what occurs in membership claims brought under sections 34 or 37 of the Act, where the term “member” is not defined by regulation and where the determination of membership is not governed by presumptions. As a result, for those who can establish that they were unable to exert significant influence on their government despite holding an enumerated position, ministerial relief becomes their only recourse against a finding of inadmissibility. That is essentially what the Court said in *Kassab* when referring to section 42.1 of the Act.

[104] *Kassab* is therefore entirely distinguishable from cases, like the present one, where inadmissibility is based on membership in a terrorist or criminal organization. In a paragraph 35(1)(b) matter, how and what the “immigration tribunal” can lawfully decide is constrained by the language of that provision, the related regulatory provision, and the irrefutable presumption of inadmissibility emanating from this Court’s jurisprudence. The Board is not subject to those same constraints when it comes to determining membership in a section 34 or 37 matter.

[105] Although not part of the “appellate jurisprudence” he raised as allegedly supporting his position, the Minister refers to this Court’s decision in *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157, [2018] 2 F.C.R. 344, for the proposition that *mens rea* is an irrelevant consideration for the purpose of inadmissibility. In *Mahjoub*, at paragraph 93, the Court rejected the contention that there must be evidence of an intention to participate or contribute to an organization in order to satisfy a claim of membership under paragraph 34(1)(f) of the Act, stating that that provision was “merely set[ting] out the status of membership, nothing more”.

[106] *Mahjoub*, where the Federal Court had found that Mr. Mahjoub had “an institutional link” with the terrorist organization concerned and had “knowingly participated in that organization”, is not a case of coerced membership [at paragraph 93]. There was no allegation of that nature in Mr. Mahjoub’s challenge to the Federal

Court's finding of membership; it was all about the alleged nature and degree of his participation in the organization, which needs to be distinguished from coerced membership and participation.

[107] Again, as I indicated above, Parliament did not intend membership under subsections 34(1)(f) or 37(1)(a) to extend to those who are forcibly recruited and act in the name of the organization while under duress. *Mahjoub* does not address this particular type of situation and is of no assistance, as a result, to the Minister.

[108] Finally, *Stables*, *Saleh* and *Gazi* are all cases where membership was admitted and where no issues of coercion were raised. None of them assists the Minister. In *Gazi*, the issue was the reasonableness of the Board's conclusion that it had serious grounds to believe that the organization of which the applicant had admitted being a member was an organization engaged in terrorism. The Federal Court found no reason to interfere with the Board's conclusion. In an incidental remark, the Court, noting that the Board had found that the applicant had not been engaged in violence on behalf of the organization, mentioned that this was not the end of the matter for him as he was entitled to apply for ministerial relief under section 42.1. In *Saleh*, the issue was whether a finding of inadmissibility could flow from mere membership. There is no reference to section 42.1 or its predecessors in that decision.

[109] Finally, *Stables* is a case where the applicant, who had been found inadmissible on the basis of his membership in the Hells Angels, a fact he admitted, challenged the constitutional validity of subsection 37(1) of the Act. He claimed that this provision violated his Charter-protected freedom of expression and freedom of association because of the practical unavailability of ministerial relief given the long delays, the low number of claims processed, and the low success rate of processed applications. The effect of this was to leave without protection those caught by the broad definition of "member", but who did not threaten the national interest.

[110] In finding for the purposes of its Charter analysis that section 37 of the Act was "sufficiently circumscribed to ensure that so-called 'innocent' members of criminal organizations are not inadmissible", the Federal Court referred to the role of ministerial relief in ensuring that such members would not be caught by subsection 37(1). Relying on *Agraira*, the Federal Court indicated that ministerial relief might, for example, also benefit those who can persuade the Minister that their participation in a criminal organization was coerced (*Stables*, at paragraph 35).

[111] As indicated previously, *Agraira* did not rule out the possibility of duress being raised at inadmissibility hearings nor did it overrule *Poshteh* or *Poshteh No. 2*. *Stables* must therefore be read accordingly.

[112] A final remark before concluding on the jurisdictional issue. The Minister contends that, if allowed to stand, the Judgment could give rise to the requirement that visa officers tasked with making admissibility decisions consider the defence of duress, even though Parliament vested such authority in him exclusively. There is however no merit to that contention, as evidenced by the following cases where duress was considered by visa officers without any objection on the part of the Minister: *Damir v. Canada (Citizenship and Immigration)*, 2018 FC 48, [2018] 4 F.C.R. D-2, 2018 CarswellNat 69 (WL Can.); *Gacho v. Canada (Citizenship and Immigration)*, 2016 FC 794, 2016 CarswellNat 3039 (WL Can.); *Mohamed v. Canada (Citizenship and*

Immigration), 2015 FC 622, 481 F.T.R. 1; *Ghaffari v. Canada (Citizenship and Immigration)*, 2013 FC 674, 434 F.T.R. 274; *Kanapathy v. Canada (Public Safety and Emergency Preparedness)*, 2012 FC 459, 2012 CarswellNat 1937 (WL Can.)).

[113] For all these reasons, I conclude that in determining admissibility under paragraph 37(1)(a) of the Act, the Board is entitled to consider whether membership was the result of duress or coercion. I am satisfied that this interpretation of the Board's jurisdiction in such matters not only falls within a range of possible, acceptable outcomes, but is correct.

[114] I would therefore answer the certified question in the affirmative.

B. *The IAD's finding of admissibility is reasonable*

[115] The Minister claims that the IAD, in finding that the respondent had been under duress, failed to follow or distinguish authoritative jurisprudence governing when drug addiction may excuse a person from not exercising an objectively available safe avenue of escape. Before the IAD, the Minister argued that the respondent had the mental capacity to formulate a plan of escape and the physical capacity and opportunity to carry out that plan because he was not under the Cartel's control or under the influence of drugs 24/7, and was clear-headed enough to be entrusted with the delivery of "bribe money" to the police. He submitted that considered cumulatively, this information should have led the IAD to find that the respondent had a safe avenue of escape and did not, therefore, meet all the elements of the defence of duress.

[116] The IAD dismissed the Minister's contention, being of the view that the ID had "considered all of [the respondent]'s circumstances when considering the element of avenue of escape", and that it was "a combination of these factors, including the repeated beatings and death threats, that limited [the respondent]'s assessment regarding a safe avenue of escape." According to the IAD, these findings were supported by the psychological report the respondent had filed before the ID. It was also significant, in the eyes of the IAD, that the lack of a safe avenue of escape was reinforced by the fact that when the respondent tried to extricate himself from the grip of the Cartel, he was returned to it by the police (2018 Decision, appeal book, Vol. 1, at pages 41–42, at paragraphs 16–17).

[117] The Judge noted that the respondent was found credible, and of all the constituent elements of the defence of duress considered by the IAD, only the existence of a "safe avenue of escape" was being challenged on judicial review. He further noted that the IAD placed considerable weight on the fact that the Cartel was a powerful organization often using violence to achieve its goals as well as on the fact that when the respondent attempted to extricate himself from the situation of duress, the police simply returned him to the Cartel.

[118] In the end, the Judge concluded that the Minister was merely inviting him to reconsider the evidence. I agree. This is what the Minister is asking this Court to do as well. However, it is not the role of a reviewing court to reassess the evidence that was before the administrative decision maker and come up with its own conclusions (see *Vavilov*, at paragraphs 83 and 125).

[119] I am satisfied that the IAD applied the correct legal test in relation to the “safe avenue of escape” criterion and that it reasonably applied that test to the facts before it. Its conclusion that a reasonable similarly situated person could not have extricated themselves from the situation of duress bears, in my view, the hallmarks of a reasonable decision: it is internally coherent, stems from a rational chain of analysis, and is justified in relation to the facts and law that constrained the Board (*Vavilov*, at paragraph 85).

[120] Therefore, I see no reason to interfere with it.

VI. Disposition

[121] I would answer the certified question in the affirmative and dismiss the appeal.

[122] The respondent seeks costs on appeal. He claims to be in the same position he was in before the Federal Court. The Judge, being critical of the Minister for having taken inconsistent positions in the Federal Court “between 2012 and today, costing the Respondent in terms of both delay and financial resources”, awarded costs to the respondent in the amount of $5,000 (Judgment, at paragraphs 54–56).

[123] According to rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, costs are awarded in matters brought under the Act only if there are special reasons to do so.

[124] I agree with the Minister that no special reasons arise from the fact that he exercised his appeal right following certification of a question found by the Judge to be one of general importance requiring clarification from this Court.

[125] I would therefore abide by the principle set out in rule 22 and award no costs in respect of this appeal.

NEAR J.A.: I agree.

GLEASON J.A.: I agree.

ANNEX

Immigration and Refugee Protection Act, S.C. 2001, c. 27

Designation of officers

6 (1) The Minister may designate any persons or class of persons as officers to carry out any purpose of any provision of this Act, and shall specify the powers and duties of the officers so designated.

Delegation of powers

(2) Anything that may be done by the Minister under this Act may be done by a person that the Minister authorizes in writing, without proof of the authenticity of the authorization.

Exception

(3) Despite subsection (2), the Minister may not delegate the power conferred by subsection 20.1(1), section 22.1 or subsection 42.1(1) or (2) or 77(1).

…

Rules of interpretation

33 The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.

Security

34 (1) A permanent resident or a foreign national is inadmissible on security grounds for

(a) engaging in an act of espionage that is against Canada or that is contrary to Canada's interests;

(b) engaging in or instigating the subversion by force of any government;

(b.1) engaging in an act of subversion against a democratic government, institution or process as they are understood in Canada;

(c) engaging in terrorism;

(d) being a danger to the security of Canada;

(e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or

(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), (b.1) or (c).

(2) [Repealed, 2013, c. 16, s. 13]

Human or international rights violations

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

(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*;

(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*;

(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;

(d) being a person, other than a permanent resident, who is currently the subject of an order or regulation made under section 4 of the *Special Economic Measures Act* on the grounds that any of the circumstances described in paragraph 4(1.1)(c) or (d) of that Act has occurred; or

(e) being a person, other than a permanent resident, who is currently the subject of an

order or regulation made under section 4 of the *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)*.

Clarification

(2) For greater certainty, despite section 33, a person who ceases being the subject of an order or regulation referred to in paragraph (1)(d) or (e) is no longer inadmissible under that paragraph.

Serious criminality

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

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

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

(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

Criminality

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

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

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

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

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

Application

(3) The following provisions govern subsections (1) and (2):

(a) an offence that may be prosecuted either summarily or by way of indictment is deemed to be an indictable offence, even if it has been prosecuted summarily;

(b) inadmissibility under subsections (1) and (2) may not be based on a conviction in respect of which a record suspension has been ordered and has not been revoked or ceased to have effect under the *Criminal Records Act*, or in respect of which there has been a final determination of an acquittal;

(c) the matters referred to in paragraphs (1)(b) and (c) and (2)(b) and (c) do not constitute inadmissibility in respect of a permanent resident or foreign national who, after the prescribed period, satisfies the Minister that they have been rehabilitated or who is a member of a prescribed class that is deemed to have been rehabilitated;

(d) a determination of whether a permanent resident has committed an act described in paragraph (1)(c) must be based on a balance of probabilities; and

(e) inadmissibility under subsections (1) and (2) may not be based on an offence

(i) designated as a contravention under the *Contraventions Act*,

(ii) for which the permanent resident or foreign national is found guilty under the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985, or

(iii) for which the permanent resident or foreign national received a youth sentence under the *Youth Criminal Justice Act*.

…

Preparation of report

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

Referral or removal order

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

…

Admissibility Hearing by the Immigration Division

Decision

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

(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;

(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;

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

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

resident is inadmissible.

…

Exclusion — Refugee Convention

98 A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.

…

Sole and exclusive jurisdiction

162 (1) Each Division of the Board has, in respect of proceedings brought before it under this Act, sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction.

United Nations Convention Relating to the Status of Refugees, July 28, 1951, [1969] Can. T.S. No. 6.

ARTICLE 1

Definition of the term "Refugee"

…

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

Criminal Code, R.S.C., 1985, c. C-46

Trafficking in persons

279.01 (1) Every person who recruits, transports, transfers, receives, holds, conceals or harbours a person, or exercises control, direction or influence over the movements of a person, for the purpose of exploiting them or facilitating their exploitation is guilty of an indictable offence and liable

(a) to imprisonment for life and to a minimum punishment of imprisonment for a term of five years if they kidnap, commit an aggravated assault or aggravated sexual assault against, or cause death to, the victim during the commission of the offence; or

(b) to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of four years in any other case.

…

Laundering proceeds of crime

462.31 (1) Every one commits an offence who uses, transfers the possession of, sends or delivers to any person or place, transports, transmits, alters, disposes of or otherwise deals with, in any manner and by any means, any property or any proceeds of any property with intent to conceal or convert that property or those proceeds, knowing or believing that, or being reckless as to whether, all or a part of that property or of those proceeds was obtained or derived directly or indirectly as a result of

(a) the commission in Canada of a designated offence; or

(b) an act or omission anywhere that, if it had occurred in Canada, would have constituted a designated offence.

…

Definitions

467.1 (1) The following definitions apply in this Act.

criminal organization means a group, however organized, that

(a) is composed of three or more persons in or outside Canada; and

(b) has as one of its main purposes or main activities the facilitation or commission of one or more serious offences that, if committed, would likely result in the direct or indirect receipt of a material benefit, including a financial benefit, by the group or by any of the persons who constitute the group.

It does not include a group of persons that forms randomly for the immediate commission of a single offence. (*organisation criminelle*)

…

Participation in activities of criminal organization

467.11 (1) Every person who, for the purpose of enhancing the ability of a criminal organization to facilitate or commit an indictable offence under this or any other Act of Parliament, knowingly, by act or omission, participates in or contributes to any activity of the criminal organization is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than five years; or

(b) an offence punishable on summary conviction.

Immigration and Refugee Protection Regulations, SOR/2002-227

Application of paragraph 35(1)(b) of the Act

16 For the purposes of paragraph 35(1)(b) of the Act, a prescribed senior official is a person who, by virtue of the position they hold or held, is or was able to exert significant influence on the exercise of government power or is or was able to benefit from their position, and includes

(a) heads of state or government;

(b) members of the cabinet or governing council;

(c) senior advisors to persons described in paragraph (a) or (b);

(d) senior members of the public service;

(e) senior members of the military and of the intelligence and internal security services;

(f) ambassadors and senior diplomatic officials; and

(g) members of the judiciary.

Federal Courts Citizenship, Immigration and Refugee Protection Rules, SOR/93-22

Costs

22 No costs shall be awarded to or payable by any party in respect of an application for leave, an application for judicial review or an appeal under these Rules unless the Court, for special reasons, so orders.