Federal Court  Cour fédérale

Date: 20160418

Docket: IMM-2995-15

Citation: 2016 FC 425

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, April 18, 2016

PRESENT: The Honourable Madame Justice Gagné

BETWEEN:

CARLOS MARTINEZ ATHIE

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] Carlos Martinez Athie is applying for judicial review of a decision wherein the Immigration Appeal Division [IAD] reversed the Immigration Division's [ID] decision and concluded that the applicant is inadmissible on grounds of organized criminality, under paragraph 37(1)(*a*) of the *Immigration and Refugee Protection Act*, S.C. 2001 c. 27 [IRPA].

II. Facts

History

[2] The applicant is a Mexican citizen who was 38 years old at the time of his hearing before the IAD. When he was 11 years old, his family immigrated to the United States and established itself in Glendale, a suburb of Los Angeles. Unlike his father, the applicant never obtained permanent resident status in the United States, but he lived there up until he was deported to Mexico at age 27.

[3] While he was in Glendale, the applicant attended *Thomas Jefferson Elementary School* for grades 5 and 6 and he began Grade 7 at *Roosevelt Junior High School*. He said that, during that time, he was the subject of intimidation by his classmates because of his Mexican citizenship and his strong Spanish accent. The applicant changed schools during the year and began to attend *Windsor Middle School*, situated in the neighbouring municipality of Pasadena. He had to take the bus to get to school and says that he continued to be intimidated during the ride.

[4] When he arrived at *Windsor*, he met a young man named Poncho, who quickly became a good friend. Poncho apparently convinced the applicant that if he got a tattoo, he would come across as a tough guy and that, in doing so, he would resolve his intimidation problem. It was in this context that, at age 14, the applicant apparently got 16 tattoos in the space of two months. He said that he simply copied Poncho's tattoos without knowing their meaning. Four of the applicant's 16 tattoos show the letters "*TVR*," which refer to a street gang in the Glendale area known as "*Toonerville*" or "*Toonerville Rifa*," while others are more generally associated with

the street gang culture. The applicant confirmed that because of his tattoos, the *Windsor* students stopped intimidating him.

[5] The applicant insists that he did not know the significance of his tattoos when he had them put on.

[6] At the secondary level, the applicant attended *Hoover High School*. He said *Hoover* was a gang-infested school and that it was then that he learned what the letters *TVR* meant, which he had tattooed on his body. He was beaten up a few times when members of the rival *Westside Locos* gang noticed his tattoos. He added that these gang members called him a "*leva*," which was Spanish for a "*wannabe*."

[7] The applicant only spent a few months at *Hoover*, after which he quit school. However, it was during these few months that the applicant's father apparently noticed his son's tattoos for the first time. He allegedly first noticed a cross on his hand, and a few weeks later, he apparently noticed the tattoos on the applicant's back while he was sleeping. In order to punish him for his bad behaviour at *Hoover* and for getting tattoos, the applicant's father reportedly decided to send him to Mexico for one year.

[8] In Mexico, the applicant worked on his uncle's farm and returned to Glendale in about March 1994.

[9] On the evening of December 2, 1994, the applicant, who did not hold a driver's licence, took his father's car to pick up his younger brother. The applicant said that to get to the gas station to fill up, he had to drive down an alleyway where there were members of the *Westside Locos* street gang. The applicant apparently tried to back his car up towards the car behind him, to gun it forward to disperse the group. He reportedly continued driving down a few streets, without stopping at stop signs and was eventually stopped by the police.

[10] The applicant was charged with assault "*with a deadly weapon other than a firearm*" and detained in a youth detention centre for 19 days. On December 21, 1994, the panel sentenced him to 6 months at the "*Challenger*" camp—a boot camp for young offenders. The applicant apparently only stayed at the *Challenger* camp for three or four months. When he was released, he returned to Glendale but since he did not feel safe there, he left for Philadelphia, where his mother and his brothers were already living.

[11] In 2005, the applicant was deported from the United States to Mexico.

[12] He came to Canada on December 3, 2008, on a visitor visa and claimed refugee status a few months later. The applicant claims that he feared for his life in Mexico after he witnessed a murder committed by a drug trafficker who belonged to the *Zetas*, in the nightclub where he worked as a manager.

Interview with a Canada Border Services Agency representative

[13] The applicant was summoned for an interview with Officer Cynthia Giguère from the Canada Border Services Agency [CBSA]. During that interview, Officer Giguère had a report prepared by a CBSA colleague, entitled [TRANSLATION] "Tattoo Assessment Report" on the applicant.

[14] At the start of the interview, the officer informed the applicant that she would specifically be questioning him on his run-ins with the American justice system. The following table illustrates all of the information in the Certified Tribunal Record. As regards the incidents that occurred in Glenville [*sic*] when the applicant was a minor, which can be linked to *Toonerville*, at the time of the initial interview, only the events of February 23, 1992, and December 2, 1994, shown in bold below, were known to the officer.

Run-ins with the justice system as a minor			
Date	**Place**	**Charge(s)**	**Decision**
July 26, 1990	Glendale, California	*Theft*	*Counseled and released*
November 1, 1991		*Theft personal property/over/under $400*	*Diverted*
February 23, 1992		***Burglary***	***Released to guardian***, *Diverted*
November 19, 1992		*Vandalism*	*Non-detained petition*
		Vandalism under $1000	*Addl alleg filed by DA*
November 22, 1992		*Malicious mischief/vandalism*	*Non-detained petition*
		Vandalism (under $1000)	*Addl alleg filed by DA*
November 27, 1992		*Malicious mischief/vandalism*	*Non-detained petition*

February 17, 1993		*«°Disturbing the peace at a school and disrupting the school or its people°»*	*«°Non-detained petition»*
		«°Person/sex offender disrupt school act°»	*«°Non-detained petition»*
December 2, 1994		*«°False ID to peace officer°»*	*«°Detained petition»*
		«°Force/assault with a deadly weapon other than a firearm°»	*«°Detained petition»*
		«°602WIC-Warrant»	*«°Detained petition»*
		In relation to one or all of the charges (it is unclear)	***«°Ordered by the Court to the Challenger Camp for 6 months°»***
Run-ins with the justice system as an adult			
Date	**Place**	**Charge(s)**	**Decision**
September 7, 1997	Harlingen, Texas	*«°Immigration violation; oral false claim»*	*«°Other; Expedited removal°»*
April 30, 1998		*«°Immigration violation»*	*«°Other; Prosecution declined ex rem.»*
November 18, 2002	Upper Moreland, Pennsylvania	*«°Burglary (felony)°»*	*«°Unknown; Disposition Unreported°»*
October 17, 2004	Philadelphia, Pennsylvania	*«°Simple assault, recklessly endangering°»*	*«°Unknown; Disposition Unreported°»*
January 26, 2005		*«°Illegal re-entry US°»*	n/a (but it is known that he was deported)

[15] The officer questioned the applicant about the December 2, 1994 incident. He first replied that he could not remember anything, then after a few minutes, he confirmed that [TRANSLATION] "that event was related to when he was arrested by police for continuing to drive a vehicle through several streets and failing to stop despite the stop signs." According to the officer's interview report, the applicant apparently said that a *Westside Locos* gang member recognized him in the alley as someone who associates with the *Toonerville* gang.

[16] The applicant said that following his arrest on December 2, 1994, his parents voluntarily sent him to "*bootcamp*" for three or four months.

[17] The officer questioned him further about his involvement with the *Toonerville* gang. The applicant admitted that he hung out with *Toonerville* members in Glendale and that, as a result, he had problems with the police. The officer noted that the applicant tried to conceal the meaning of his tattoos. He did not directly admit that he was a member of *Toonerville*, but below is an exchange taken from the interview report between the officer (A) and the applicant (S), which led to the applicant's arrest at the end of the interview:

> *A: What are the letters that you have on your chest?*
>
> *S: These are my initials, CMA.*
>
> *A: The letters don't look like CMA at all, it seems to be TVR?*
>
> *S: It could be…*
>
> *A: Yes, it's TVR.*
>
> *S: Yes.*
>
> *A: What does it mean?*
>
> *S: Toonerville Rifa.*
>
> *A: The other tattoo on your arm, it's not JVR it's TVR too?*
>
> *S: Yes.*
>
> *A: So, it seems that you have been a little bit more implicated in the Toonerville gang then [sic] just hanging out with members of this gang.*
>
> *S: Yes, but I wasn't implicated in their criminal activities.*
>
> *A: I supposed that because of the tough neighbourhood in which you grew up you didn't really have the choice to be part of the gang if you wanted to be protected by them?*
>
> *S: Yes. I was young. I did stupid things. I'm ashamed of my tattoos now. It's a shame for all my family.*
>
> *A: Ok, I don't want to talk anymore now because I have to arrest you. I'm arresting you because I have reasonable grounds to believe that you are inadmissible in Canada according to the*

> *article 37 of the [IRPA] related to the fact that you are a member or you have been a member of a criminal organization.*

[18] Immediately following the interview, the officer prepared her report from her handwritten notes. That same day, she prepared a report under subsection 44(1) of the IRPA, to the effect that the applicant was inadmissible under paragraph 37(1)(*a*) of the IRPA. The CBSA then issued a referral for an admissibility hearing.

[19] Prior to the applicant's inadmissibility hearing, Officer Giguère added some information to her interview report that she describes as small details with respect to the applicant's previous addresses and employment history. She also prepared a [TRANSLATION] "Complementary Tattoo Assessment Report" to complete the list and the analysis of the applicant's tattoos, as well as the applicant's comments provided about them during the interview.

ID hearing

[20] The ID hearing lasted several days and several witnesses were heard: the applicant, his spouse, his father and the two CBSA officers. That list also included two expert witnesses: Detective Rafael Quintero with the Glendale Police Service testified for the respondent, and Mr. Alex Alonso, a sociologist who specializes in Los Angeles street gangs, testified for the applicant.

[21] In his testimony before the ID, the applicant denied several facts reported by Officer Giguère. For example, he denied having admitted that he hung around with *Toonerville* members, that the gang had replaced his family to some extent, or that he apparently said "Yes, I

was young. I did stupid things." According to him, Officer Giguère invented many of the facts stated in her interview report. The applicant said that neither the officer's handwritten notes, nor her final report, can be trusted.

[22] Moreover, the respondent introduced into evidence a police information sheet that states that the applicant apparently told the police officer that he was no longer active in the *Toonerville* gang (*"he said he was no longer active"*). The applicant denied the reported statements and affirmed that he had simply said that he was not a *Toonerville* gang member.

[23] Regarding the December 2, 1994 incident and the sentence imposed on him, the applicant was confronted about the contradiction between the version he provided during his interview with Officer Giguère and the evidence submitted before the ID. He said that he believed the Court had consulted his father before issuing the order. The applicant's father confirmed that the Court had spoken to him and that he had agreed, but that it was up to the Court to make a decision.

[24] On April 5, 2011, the ID concluded that the applicant was not inadmissible for organized criminality. It noted that the only factor that would suggest that the applicant was a member of *Toonerville* was the presence of tattoos on his body. Apart from this factor, according to the ID, the evidence did not establish that there were reasonable grounds to believe that the applicant participated in gang activities. It should be noted that the ID did not admit as evidence the record of the applicant's run-ins with the American justice system, except for his stay at the *Challenger* camp.

IAD hearing

[25] The respondent filed an appeal of that decision and a new hearing was scheduled before the IAD. During a pre-trial conference, the parties agreed that no new evidence would be provided before the IAD and that counsel would only make oral representations.

[26] At the start of the hearing, counsel for the respondent indicated that she had prepared written representations, a copy of which she provided to the IAD and to counsel for the applicant. Counsel for the applicant objected but the IAD reassured her by guaranteeing her that it would have no impact on how it would address both parties' representations.

III. Decision being challenged

[27] The IAD quashed the ID's decision. A significant part of the IAD decision deals with the applicant's tattoos, but the decision also addresses the applicant's history of run-ins with the American justice system, the information on the police information sheets submitted as evidence, and the fact that the applicant apparently concealed the meaning of his tattoos from his spouse, until they caused him problems with the Canadian authorities.

[28] First, the IAD noted that Detective Quintero's testimony should not have been rejected by the ID for the simple fact that he stated that an individual under police arrest automatically has a criminal record. He referred to databases used by police officers, which generally store charges that have been withdrawn and that have resulted in acquittals. The IAD prefers the testimony of

Detective Quintero, who has more direct experience with the *Toonerville* gang than Mr. Alonso, who only has general knowledge of Hispanic gangs in the Los Angeles area.

[29] The IAD also concluded that the ID erred in dismissing the evidence related to the applicant's run-ins with the American justice system. It found this to be a highly relevant piece of evidence in examining the situation of a refugee claimant suspected of being a current or past member of a street gang.

[30] As regards the circumstances surrounding the applicant's decision to get tattoos, and the very nature of these tattoos, the IAD noted that there are several contradictions between the testimonies of the applicant and his father before the ID, the CBSA interview report, and certain other pieces of evidence in the record. It found a general lack of credibility on the part of the applicant and his father. The IAD's key findings can be summarized as follows:

> [TRANSLATION]
>
> - The applicant changed his testimony about the identity of the artist who allegedly applied his tattoos. He initially said that they were done by the father of his friend Alex, a professional tattoo artist. However, after a review of the CBSA report revealed that they were amateur tattoos, the applicant instead said that Poncho had applied several of his tattoos. Confronted with this contradiction, the IAD concluded that the applicant's tattoos were done by *Toonerville* members;
>
> - There are discrepancies between the testimonies of the applicant and his father regarding the time at which he apparently first noticed the tattoos. The applicant said that when his father noticed his tattoos as he was sleeping, he was so angry that he had to flee to an uncle's home. Yet his father said that he had a discussion with his son when he discovered the tattooing on his hand, and that it was not until a month later that the uncle allegedly intervened;

- The IAD did not believe that the father allegedly did not find out about his son's tattoos until a year and a half after the fact;

- The applicant was unable to provide a credible explanation as to how he believed the letters *TVR* that he had tattooed on his body, which he believed at the time stood for "*trolley train*," would protect him from being intimidated by his classmates. The IAD did not believe that the applicant did not know what the tattoos meant when they were applied;

- The IAD did not believe the applicant's alleged reason for getting tattoos. According to Detective Quintero's testimony, a non-gang member of *Toonerville* would not have tattoos of that gang's emblem put on without the risk of being beaten up or killed;

- The applicant and his father affirmed before the ID that Glendale was a beautiful city and that they lived in a quiet, rich neighbourhood. However, during his interview with CBSA, the applicant instead said that there were several street gangs in his neighbourhood and at *Hoover*. Detective Quintero also confirmed that the street on which the applicant's family lived was in *Toonerville* territory;

- The applicant denied several facts reported by Officer Giguère, but the IAD found the information in that report to be reliable and accurate;

- The IAD noted that it was unreasonable for the ID to have excluded the interview report because of Officer Giguère's handwritten notes, which the respondent was also not obligated to produce;

- Based on *Ishaku v. Canada (Citizenship and Immigration)*, 2011 FC 44 [*Ishaku*] in which that Court concluded that a person's first story is usually the most genuine and authentic, the IAD placed considerable weight on the applicant's statements made during the interview with Officer Giguère;

- The IAD reviewed the applicant's run-ins with the American justice system and did not believe that the applicant was in *Westside Locos* territory by chance at the time of the incidents on December 2, 1994. During that period, the applicant was very familiar with the territories of the different street gangs in Glendale and the surrounding area;

- The IAD found that the applicant was probably not sent to Mexico solely because of his tattoos, but rather due to his delinquent behaviour and his run-ins with the law;

- The IAD did not believe that the applicant was detained at the *Challenger* camp solely due to the incident on December 2, 1994, given the fact that this camp was considered a last-resort solution for dealing with young offenders;

- The IAD placed weight on Detective Quintero's testimony on the rationale behind the police information sheets and it did not believe the applicant when he denied that he told the police officer that he was no longer an active member of *Toonerville*;

- Lastly, the IAD found that if the applicant had truly had himself tattooed to protect himself from being harassed at school, it is not reasonable that he did not explain their meaning to his spouse before he ran into problems with the Canadian authorities.

[31] The IAD therefore found that, as a whole, the ID erred in fact and in law and that the respondent discharged his burden of proof to demonstrate that there were reasonable grounds to believe that the applicant had been a member of a criminal organization, *Toonerville*, beginning in 1991.

IV. Issues in dispute and standards of review

[32] This application for judicial review raises the following issues:

A. *Did the IAD comply with its duty of procedural fairness in not granting the applicant an opportunity to be heard?*

B. *Did the IAD comply with the principles of procedural fairness in accepting the written arguments from counsel for the respondent, when the parties had agreed to make oral representations only?*

C. *Did the IAD err in concluding that there were reasonable grounds to believe that the applicant was a "member" of the* Toonerville *street gang?*

[33] It is well-known that the first two issues brought forward by this application must be reviewed by applying the standard of correctness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, at paragraph 50 [*Dunsmuir*]; *Canada (Citizenship and Immigration) v. Khosa)*, 2009 SCC 12, at paragraph 43).

[34] As regards the third issue, the applicant maintains that the test for membership in an organized criminal group is an issue of law that should also be reviewed by this Court by applying the standard of correctness (*Mendoza v. Canada (Public Safety and Emergency Preparedness)*, 2007 FC 934, at paragraph 13 [*Mendoza*]).

[35] First, the *Mendoza* decision preceded *Dunsmuir*, which, at paragraph 54, teaches us that an administrative tribunal's interpretation of its enabling legislation must be reviewed on the standard of reasonableness. This was confirmed in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, at paragraph 34. Moreover, in *Mendoza*, the Court applied the standard of correctness in the test for membership in an organized criminal group. However, it applied the standard of reasonableness on the issue of mixed fact and law, i.e. whether the IAD had erred in concluding that there was sufficient evidence of that membership; this is the issue that concerns us here.

[36] I am therefore of the opinion that the standard of review that applies to the conclusion whereby a person is a member of an organization described under paragraph 37(1)(*a*) of the

IRPA is one of reasonableness (*Lennon Sr v. Canada (Public Safety and Emergency Preparedness)*, 2012 FC 1122, at paragraphs 13-14; *Talavera Morales v. Canada (Public Safety and Emergency Preparedness)*, 2010 FC 768, at paragraph 7 [*Talavera*]; *He v. Canada (Public Safety and Emergency Preparedness)*, 2010 FC 391, at paragraph 24).

V. Analysis

A. *Did the IAD comply with its duty of procedural fairness in not granting the applicant an opportunity to be heard?*

[37] The applicant argues that the IAD should have given him the chance to testify before it or to respond to its concerns about his and his father's credibility. The applicant relies on the decision by this Court in *Castellon Viera v. Canada (Citizenship and Immigration)*, 2012 FC 1086, at paragraph 32 [*Castellon Viera*] to affirm that by failing to do so, the IAD breached his procedural fairness rights.

[38] However, the facts in *Castellon Viera* are distinguishable from those before me because in this case, the parties had agreed that the appeal would only address questions of law. In spite of that agreement, the IAD re-examined the applicant's credibility and it is in this context that the Court found that it had breached the principles of procedural fairness. In this case, the respondent's Notice of Appeal raised both questions of law and questions of fact, particularly the fact that the ID had placed inappropriate weight on the testimonies of the applicant and his father. The applicant knew that his credibility would be questioned before the IAD and he was not caught by surprise.

[39] That said, the IAD was not required to confront the applicant about his own contradictions. I restate here what was said by my colleague Justice Noël in *D'Amico v. Canada (Citizenship and Immigration)*, 2013 FC 470:

> [51] . . . It must be presumed that during successive testimony, the same factual answers will be given. An applicant, whose obligation is to be truthful in his answers, does not have to be confronted with his own inconsistencies [citations omitted].
>
> . . .
>
> [53] The principles of natural justice, applicable in appeal proceedings like this one, do not require that the applicant be confronted with his contradictions from two testimonies given under oath during the same proceeding in connection with all the documentary evidence submitted by the parties. . . .

[40] The parties had agreed not to submit new evidence. The applicant thereby allowed the IAD to re-examine the entire file, including his testimony. It was therefore open to the IAD to take into account the applicant's successive testimonies and their resulting contradictions, as well as the documentary evidence on file. Moreover, it did so in compliance with the principles of procedural fairness.

B. *Did the IAD comply with the principles of procedural fairness in accepting the written arguments from counsel for the respondent, when the parties had agreed to make oral representations only?*

[41] The applicant argues that in accepting the written arguments made by counsel for the respondent, the IAD ignored the agreement between the parties, which constitutes a second breach of the principles of procedural fairness (*Castellon Viera*, above, at paragraphs 29-30).

[42] I do not agree with the applicant because at the very beginning of the hearing the IAD acknowledged the parties' position and outlined the issue before it:

> … I did listen to the CD of the preliminary conference that was done by my former colleague … I've also noted that following the preliminary conference there was an understanding between you two that you would be doing … oral submissions only and … you are not presenting or redoing the … hearing of the ID.

[43] When counsel for the respondent said that she planned to follow her written submissions and that she offered a copy of them to the IAD and to counsel for the applicant, the latter objected. The IAD accepted a copy of the written submissions, while reassuring the parties that it would consider them in the same way as oral representations:

> ... [Me Cohen's written submissions] will be used as a guide by myself, but it's the same thing as if after the hearing I re-listen to the CD of the submissions. It's exactly the same thing. So I don't mind in which form you give me the submissions. I will consider them and if [Me] Cohen wants to give them to me … in writing, and you yourself as well I'll accept them, but whether I hear them orally or I read them I writing, for me it … makes no difference, okay? So I just want that to be clear.

[44] Insofar as the respondent's oral representations essentially reproduced his counsel's written submissions and insofar as the IAD indiscriminately took into account both parties' submissions, I do not see how the IAD allegedly failed to comply with any principle of procedural fairness.

C. *Did the IAD err in concluding that there were reasonable grounds to believe that the applicant was a "member" of the Toonerville street gang?*

[45] The applicant raised several errors committed by the IAD: (i) it did not analyze the applicant's knowledge of *Toonerville* criminal activities when he got his tattoos; (ii) it determined that he was a member of the *Toonerville* gang based solely on his testimony and his tattoos; (iii) its decision is based on evidence that is not credible and unreliable; (iv) it excluded

important evidence, such as Mr. Alonso's testimony; and, (v) it did not assess the evidence relating to coercion.

[46] To conclude that there are "reasonable grounds to believe" that the acts attributed to the applicant have occurred, are occurring or may occur, within the meaning of section 33 of the IRPA, more than a mere suspicion must exist, but less than proof on a balance of probabilities. There must be an objective basis for the belief which is based on compelling and credible information (*Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100, at paragraph 114; *Talavera*, above, at paragraph 11).

[47] That said, I cannot conclude as the applicant asked me to do, that the IAD did not consider the applicant's testimony to the effect that he was not aware of the meaning of his tattoos, or of *Toonerville* criminal activities, when he got his tattoos. The IAD instead concluded that it did not believe the applicant. It reached that conclusion after having analyzed the applicant's tattoos and the circumstances surrounding his decision to have himself tattooed, on 31 pages of its decision. That said, even if the applicant did not know the meaning of his tattoos when he had them applied, he acknowledged that as soon as he began attending *Hoover* High School, he discovered their meaning. From that time on, he also had "personal knowledge of the criminal activities of other members of the gang, acting on behalf of the gang" (*Amaya v. Canada (Public Safety and Emergency Preparedness)*, 2007 FC 549, at paragraph 27).

[48] I also do not believe that the IAD only relied on the applicant's tattoos in determining that he was a member of *Toonerville*. First, the IAD must be presumed to have considered all of

the evidence in the record (*Florea v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 598 (FCA) (QL); *Herrera Andrade v. Canada (Citizenship and Immigration)*, 2012 FC 1490, at paragraph 11). Moreover, its decision demonstrates that it took into account all of the evidence. The IAD discussed the applicant's tattoos, his testimony and that of his father, the testimony of Officer Giguère and the two expert witnesses extensively. It analyzed Officer Giguère's interview report and her written notes, the police information sheets, and the record of the applicant's run-ins with the American justice system. Lastly, it considered the fact that the applicant concealed the meaning of his tattoos from his spouse up until the CBSA questioned him in this regard. Contrary to the applicant's claims, the IAD analyzed that evidence cumulatively.

[49] It was open to the IAD to consider Officer Giguère's interview report as credible and reliable. The officer's interview notes hold significant probative value and she had no interest in recording false information (*Muthui v. Canada (Citizenship and Immigration)*, 2014 FC 105, at paragraphs 49-50). It is also true that a person's first story is usually the most genuine (*Ishaku*, above, at paragraph 53). It was reasonable for the IAD to conclude that the information in that report is accurate and consistent with the documentary evidence, despite the fact that the applicant subsequently denied having made most of the statements recorded in the report. The IAD properly noted that the applicant denied the most prejudicial information against him. The IAD was also able to conclude that the fact that Officer Giguère's handwritten notes were not reproduced *verbatim* in her interview report was not sufficient grounds to simply exclude that evidence.

[50] The IAD also took into account the fact that, in cross-examination, Officer Giguère admitted that contrary to what was stated in her report, the applicant never acknowledged being a member of *Toonerville*. However, she was able to conclude that this was not a determining factor with respect to the question whether there were "reasonable grounds to believe" that the applicant had been a member of *Toonerville*. In this context, the term "member" must be interpreted in an unrestricted and broad sense (*Chiau v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 297 (FCA), at paragraph 25 [*Chiau*]; *Poshteh v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85, at paragraphs 27, 29 [*Poshteh*]) and there was other evidence before the IAD that supported its conclusion.

[51] For example, the IAD accorded considerable weight to Detective Quintero's testimony. Contrary to the applicant's argument, the IAD explained why it accorded more weight to the testimony of Detective Quintero than that of Mr. Alonso. The IAD clearly explained that Detective Quintero had extensive experience with the *Toonerville* gang, whereas Mr. Alonso had little, and he was not familiar with the *Westside Locos* gang, one of the rival gangs of *Toonerville*.

[52] The IAD also accepted Detective Quintero's testimony on the content and objective of the police information sheets. One of the sheets states that the applicant said he was no longer active in the *Toonerville* gang, clearly suggesting that at one point he had been an active member. The IAD "considered the police source evidence credible and trustworthy . . . and such a decision is entirely within its discretion" (*Sittampalam v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 326, at paragraph 53 [*Sittampalam*]).

[53] As regards the applicant's testimony concerning the incident on December 2, 1994, the IAD did not believe that the applicant simply took the wrong road and that he ended up in the *Westside Locos* alley by accident. This conclusion is reasonable in light of the version the applicant gave Officer Giguère, to the effect that he passed by the *Westside Locos* territory that evening. Moreover, he admitted that once he was at *Hoover*, he was very familiar with the various Glendale gangs.

[54] The IAD took into account the applicant's run-ins with the American justice system, both as a minor and as an adult. It was open to the IAD to take into account the charges that were withdrawn or which did not result in a guilty verdict in order to determine whether the applicant had discharged his burden of proof (*Magtibay v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 397, at paragraphs 12, 17). Clearly, a charge that has been withdrawn or which did not result in a conviction could not alone support the finding for membership in an organized criminal group (*Sittampalam*, above, at paragraph 50). However, in this case, the IAD considered the totality of the evidence and it is the cumulative effect of all these elements that supports its finding (*Thaneswaran v. Canada (Citizenship and Immigration)*, 2007 FC 189, at paragraph 46).

[55] Lastly, I reject the applicant's argument to the effect that the IAD should have examined the issue of coercion and concluded that he was forced to get tattooed to stop the intimidation he was a victim of at the time. That argument was not raised before the ID, nor before the IAD, and I have difficulty in seeing how the applicant could expect it to be examined. I would add to this that the test of the applicant's membership in *Toonerville* does not end when he got his tattoos;

rather, it covers the entire period when the applicant was living in Glendale. The applicant did not submit any evidence to show that once he was in high school, he was forced to hang out with *Toonerville* members.

VI. Question for certification

[56] The applicant is asking me to certify the same question of general importance as the one certified by Justice Martineau in *Castelly v. Canada (Citizenship and Immigration)*, 2008 FC 788, at paragraph 42 [*Castelly*], as follows:

> For the purposes of paragraph 37(1)(*a*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, what is the general definition of "member", and what test must one apply to determine whether a person is or was a "member" of an "organization" described in that paragraph?

[57] The applicant opposed this and referred me to the Federal Court of Appeal decisions in *Chiau*, above, at paragraphs 25 and 57, and *Poshteh*, above, at paragraphs 27 to 29, in which the Court refused to establish precise and exhaustive criteria, stating only that this term must be interpreted in a broad, unrestricted sense.

[58] First, I note that the decisions to which the applicant referred me do not bar Martineau J. from certifying the same question in *Castelly*. And since that decision was not subject to an appeal, I find that the situation described by Martineau J. still exists:

> [42] I note that the Act does not define the term "member" and that the courts have not established a precise definition of the term or a test for "belonging to" an organization described in paragraph 37(1)(*a*) of the Act. In the last few years at least, case law of the Federal Court and Federal Court of Appeal has not been consistent on the issue of a test relevant to determining whether

> someone is a member of a criminal organization. For example, should the panel refer to the specific criteria recently restated in *Sinnaiah* (and cited with approval in *Amaya*) or is it sufficient for it to base its decision on the more general statements found in *Chiau*, which is older? How should "institutional link" be interpreted, and is this concept relevant to the operation of paragraph 37(1)(*a*) of the Act (which I seriously doubt for the reasons stated above)? If applicable, should that test be applied alternatively or subsidiarily to that of "personal knowledge" of the group's criminal activity?

[59] I would add to this reflection that, despite the fact that the issue before me did not address this point, I am left with some sense of unease about the fact that the essential, if not all, facts attributed to the applicant occurred when he was a minor. There is no evidence that the applicant participated in any organized criminality as an adult and given that the *Toonerville* gang is a gang situated in Glendale, it cannot be presumed that he maintained any contact whatsoever with them when he left for Pennsylvania at the age of 17. I find that in a democratic society such as Canada, where the treatment of young offenders is very different than that reserved for adult criminality, it might be appropriate to take into consideration the age of a refugee claimant when he was a member of a criminal group and the particular circumstances of that membership—for example, considering whether the evidence does not show that the applicant continued that membership as an adult before finding him inadmissible on grounds of organized criminality.

[60] In other words, I find that the facts of this case lend themselves more to an analysis of that issue than *Castelly*, in which the applicant was an adult at the time of the facts warranting her inadmissibility on grounds of organized criminality and in which these facts were contemporary to the inadmissibility decision. I am also of the opinion that this question could very well be determinative on an appeal in this case.

VII. Conclusion

[61] For all these reasons, this application for judicial review is dismissed but the following question is certified:

> For the purposes of paragraph 37(1)(*a*) of the IRPA, what is the general definition of "member", and what test must one apply to determine whether a person is or was a "member" of an "organization" described in that paragraph?

JUDGMENT

THE COURT ORDERS that:

1. The applicant's application for judicial review is dismissed;

2. The following question is certified:

   For the purposes of paragraph 37(1)(*a*) of the *Immigration and Refugee Protection Act*, what is the general definition of "member" and what test must one apply to determine whether a person is or was a "member" of an "organization" described in that paragraph?

"Jocelyne Gagné"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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