Federal Court  Cour fédérale

Date: 20171026

Docket: IMM-5238-16

Citation: 2017 FC 950

Ottawa, Ontario, October 26, 2017

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

ABDOULKADER ABDI

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision by a delegate of the Minister of Public Safety and Emergency Preparedness [the Minister's Delegate or the Delegate], dated July 11, 2016, and made pursuant to section 44(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], to refer an inadmissibility report to the Immigration Division [ID] of the Immigration and Refugee Board of Canada for an admissibility hearing.

[2] As explained in greater detail below, this application is allowed because, in considering whether to refer the Applicant to an admissibility hearing, the Minister's Delegate relied impermissibly on information as to charges against the Applicant that had been dismissed or withdrawn, and in particular relied impermissibly on youth charges that had been dismissed or withdrawn. This is contrary to the provisions of the *Youth Criminal Justice Act*, SC 2002, c 1 [YCJA].

II. Background

[3] The Applicant, Mr. Abdoulkader Abdi, was born on September 17, 1993, in Saudi Arabia. He spent his early childhood in Somalia, but he fled that country for Canada at the age of six after a number of his family members were killed. Mr. Abdi, his sister, and their two aunts were accepted as refugees, and he became a permanent resident on August 3, 2000. When he was 7 years old, Mr. Abdi and his sister were apprehended by the Nova Scotia Department of Community Services [Community Services]. He was never adopted, but rather grew up in foster homes and group homes as a ward of the state.

[4] Mr. Abdi lived for 3 to 4 years with a foster family which he alleges was abusive. His sister was removed from this home after making what he describes as a credible allegation of sexual abuse, and Mr. Abdi tried to run away on a number of occasions. He was subsequently removed from the foster family and placed in group homes, following which he started getting into trouble with the law and was ultimately convicted of numerous youth offences. The highest level of education Mr. Abdi has completed is grade six. He has one Canadian-born child, a three

year old daughter. He notes that, during the period in which he was a ward of the state, Community Services did not apply for Canadian citizenship on his behalf.

[5] In July 2014, at the age of 20, Mr. Abdi pleaded guilty to aggravated assault and assaulting a police officer with a weapon, as a result of which he received a custodial sentence of four years and six months for the first offence and a one year concurrent sentence for the second offence. These are the offences that give rise to the admissibility proceedings at issue in this case. The record before the Minister's Delegate identifies that, in the same timeframe, Mr. Abdi was also convicted of theft of a motor vehicle and operation of a motor vehicle in a manner dangerous to the public. In September 2014, he was sentenced to a further four month consecutive sentence for assaulting a peace officer. In December 2015, he was sentenced to a three month consecutive sentence for assaulting another inmate. He has also received a number of citations for violating prison rules. In early 2016, Mr. Abdi was transferred from a maximum security institution to a medium security institution. Since that time he has not been involved in any violent incidents, although he has had further citations for violating prison rules.

[6] In early 2016, a Canada Border Services Agency [CBSA] Inland Enforcement Officer [the Officer] initiated inadmissibility proceedings against Mr. Abdi on the basis of his criminal convictions. Mr. Abdi made written submissions, and the Officer prepared a report under s 44(1) of IRPA which found that there were reasonable grounds to believe Mr. Abdi was inadmissible to Canada for serious criminality pursuant to s 36(1)(a) of IRPA [the Section 44(1) Report]. The Minister's Delegate reviewed the Section 44(1) Report and made a decision under s 44(2) of IRPA to refer the matter to the ID for an admissibility hearing to determine if Mr. Abdi is a

person described in s 36(1)(a). The admissibility hearing has not yet taken place. The decision by the Minister's Delegate, summarized below, is the subject of this application for judicial review.

III. Impugned Decision

[7] The decision by the Minister's Delegate lists the information he reviewed as including: the Section 44(1) Report, proof of Mr. Abdi's permanent resident status, confirmation that Mr. Abdi does not have Canadian citizenship, certificate of conviction for the offences for which Mr. Abdi was found guilty, Mr. Abdi's written submissions, his Criminal Profile Report, and an Assessment for Decision. The Assessment for Decision is a document dated January 1, 2016, prepared by Correctional Service Canada [CSC], which reviewed Mr. Abdi's criminal and correctional history and recommended he be moved from a maximum security institution to a medium security environment.

[8] The Minister's Delegate then provides a general overview of Mr. Abdi's circumstances, noting that he came to Canada as a refugee and was granted permanent residence status, his criminal history, his submissions with respect to his difficult childhood, and his expressions of remorse for his criminal past.

[9] In arriving at his decision, the Minister's Delegate notes factors to Mr. Abdi's credit, being his expressions of remorse and his progress to a medium society environment. However, the Minister's Delegate also notes factors operating against Mr. Abdi, being the fact that he has been convicted of multiple very serious crimes, his lifelong pattern of criminal activity, his criminal behaviour while incarcerated, and being cited by CSC several times for violation of

prison rules. The Delegate also states that Mr. Abdi has no obvious social ties in Canada, other than his daughter who has no apparent relationship with him, and that there are no letters of support for Mr. Abdi in his submissions. Based on these facts, the Delegate recommends that Mr. Abdi be referred to an admissibility hearing under s 44(2) of IRPA.

IV. Issues and Standard of Review

[10] The Applicant frames the issues in this application as follows:

A. Was the scope of the Minister's Delegate's discretion broader given the Applicant's long-term permanent resident status, sociological ties to Canada, and history as a ward of the state?

B. Was the Applicant denied a fair hearing because he did not understand the case he had to meet and was denied an opportunity to retain counsel or because the Respondent's evidentiary record included withdrawn or dismissed charges as well as youth offences?

C. Do the Minister's Delegate's reliance on non-criminal conduct and youth offences, as well as his failure to consider the Applicant's compelling personal circumstances, render the decision unreasonable?

[11] The parties agree on the applicable standards of review, and I concur with their position. The second issue articulated above, being one of procedural fairness, is reviewable on a standard of correctness: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43. The decision itself is reviewable on a reasonableness standard: *Canada (Public Safety and*

Emergency Preparedness) v Tran, 2015 FCA 237 [*Tran*], at paras 22, 31. That standard therefore applies to the first and third issues identified above.

V. Analysis

A. *Was the scope of the Minister's Delegate's discretion broader given the Applicant's long-term permanent resident status, sociological ties to Canada, and history as a ward of the state?*

[12] Mr. Abdi argues that s 44(2) of IRPA confers upon the Minister's Delegate the discretion not to refer an inadmissibility report to the ID for an admissibility hearing. He further submits that the scope of this discretion is unsettled in the applicable case law where, as in the circumstances of this case, the person concerned is a permanent resident of Canada. His position is that the case law, the legislative history of IRPA, applicable ministry guidelines and international law support a broad discretion in circumstances such as his own, where a person has strong sociological ties to Canada and has been raised as a ward of the state, and where the state did not obtain for the person the benefit of Canadian citizenship.

[13] The parties are in agreement that the law in this area is unsettled. The division in the case law was recently described by the Federal Court of Appeal in *Sharma v. Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 319 [*Sharma*] at para 44:

> [44] The scope of the discretion that can be exercised pursuant to section 44 has divided the Federal Court, and the Judge below found as much. One line of cases, exemplified by such decisions as *Correia v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 782, 253 F.T.R. 153; *Leong v. Canada (Solicitor General)*, 2004 FC 1126, 256 F.T.R. 298; and *Richter v. Canada*

> *(Minister of Citizenship and Immigration)*, 2008 FC 806, 73 Imm. L.R. (3d) 131, aff'd by 2009 FCA 73, [2009] F.C.J. No. 309, adopted a narrow interpretation of section 44 and determined that officers have no discretion to consider factors beyond an individual's alleged inadmissibility. Conversely, another series of decisions adopted a broader approach and held that officers have a wide enough discretion to consider the personal circumstances of an individual, in addition to the facts underlying the alleged inadmissibility (see, for example, *Hernandez*, 2005; *Spencer*; and *Faci v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 693, [2011] F.C.J. No. 893).

[14] Shortly before the release of the decision in *Sharma*, in *Melendez v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 1363, Justice Boswell canvassed the conflicting case law and expressed the following conclusions at paragraph 34:

> [34] In view of the foregoing, I arrive at the following conclusions:
>
> 1. There is conflicting case law as to whether an immigration officer has any discretion under subsection 44(1) of the IRPA beyond that of simply ascertaining and reporting the basic facts which underlie an opinion that a permanent resident in Canada is inadmissible.
>
> 2. Nevertheless, the jurisprudence and the Manual do suggest that a Minister's delegate has a limited discretion, when deciding whether to refer a report of inadmissibility to the Immigration Division pursuant to subsection 44(2) or to issue a warning letter, to consider H&C factors, including the best interests of a child, at least in cases where a permanent resident, as opposed to a foreign national, is concerned.
>
> 3. Although the Minister's delegate has discretion to consider such factors, there is no obligation or duty to do so.
>
> 4. However, where H&C factors are presented to a delegate of the Minister, the delegate's consideration of the H&C factors should be reasonable in the circumstances of the case, and in cases where a delegate rejects such factors, the reasons for rejection should be stated, even if only briefly.

> 5. The consideration of H&C factors by the Minister's delegate in respect of a permanent resident need not be, in my view, as extensive as or comparable to an analysis of such factors under subsection 25(1) of the IRPA in order to be reasonable; it need not be so because that would usurp the role and purpose of that subsection.

[15] Consistent with Justice Boswell's conclusions, the Respondent acknowledged at the hearing of this application for judicial review that the case law is leaning toward such a discretion residing in a delegate of the Minister when making a decision under s 44(2) related to a permanent resident. Indeed, as noted at paragraph 46 of *Sharma*, the Immigration Manual which provides guidance on such decisions lists a number of factors to be taken into account in deciding whether to refer a report to the ID. These are the person's age at time of landing; length of residence; location of family support and responsibilities; conditions in home country; degree of establishment; prior convictions and involvement in criminal or organized crime activities; history of noncompliance and current attitude; seriousness of the offence; and sentence imposed and maximum sentence that could have been imposed. The Federal Court of Appeal observed that, while such policy manuals are not binding, they suggest that officers making a report and the Minister's delegate in deciding whether to refer the report to the ID, are not constrained by merely verifying a conviction and/or term of imprisonment.

[16] However, as was the case in *Sharma*, and as this Court has concluded in other matters (see *Brar v. Canada (Public Safety and Emergency Preparedness)*, 2016 FC 1214 [*Brar*] at para 14), it is unnecessary for me to reach a conclusion on whether the Minister's Delegate has such discretion, or the extent of the discretion in the case at hand, as it would have no bearing on the outcome of this application for judicial review. As argued by the Respondent, the Minister's

Delegate clearly considered factors other than convictions and imprisonment terms in arriving at the decision to refer the Section 44(1) Report to the ID. The parties agree that the Officer's analysis underlying the Section 44(1) Report is considered to be part of the Delegate's reasoning (see *Brar* at para 27), and both that analysis and the Delegate's decision itself take into account a variety of factors of the sort described in *Sharma*. The Minister's Delegate therefore clearly considered that he had discretion to exercise in deciding whether or not to refer the matter to the ID. Mr. Abdi therefore received the benefit of the interpretation of s 44(2) of IRPA most favourable to his interests.

[17] I appreciate that Mr. Abdi is encouraging the Court to find that the Delegate had an especially broad discretion, because of Mr. Abdi's particular background and circumstances, having been raised as a ward of the state where the state did not obtain Canadian citizenship for him. However, I agree with the position expressed by the Respondent at the hearing that these arguments relate not to the scope of the Delegate's discretion but rather whether that discretion was exercised in a reasonable manner. Mr. Abdi asserts these same arguments in challenging the reasonableness of the decision under the third issue he has raised, and I address them in my consideration of that issue later in these Reasons.

B. *Was the Applicant denied a fair hearing because he did not understand the case he had to meet and was denied an opportunity to retain counsel or because the Respondent's evidentiary record included withdrawn or dismissed charges as well as youth offences?*

[18] The second issue Mr. Abdi identifies for the Court's consideration raises various arguments related to the procedural fairness of the process leading to the decision under s 44(2) of IRPA. In the above articulation of that issue, Mr. Abdi characterizes the Delegate's reliance on withdrawn or dismissed charges, as well as youth offences, as one of the procedural fairness issues. He argues that similar concerns also affect the reasonableness of the decision. I agree with the Respondent's position that the arguments raised by Mr. Abdi in relation to the Delegate's reliance on his youth record relate to the reasonableness of the decision, not to the fairness of the process he was afforded. Those arguments are therefore addressed in my analysis on reasonableness below.

[19] As explained below in that analysis, my decision is to allow this application for judicial review is based on a finding that the decision by the Minister's Delegate is unreasonable, because he impermissibly relied on information as to charges that had been dismissed or withdrawn and, in particular, dismissed or withdrawn youth charges contrary to the provisions of the YCJA. This will result in the Delegate's decision being set aside and the matter being referred back to another delegate of the Minister for redetermination. I would expect Mr. Abdi to be afforded an opportunity to provide updated submissions before the matter is reconsidered. It is therefore unnecessary for the Court to reach a conclusion on the procedural fairness arguments that Mr. Abdi has raised in connection with the process leading to the decision that is being set aside.

C. *Do the Minister's Delegate's reliance on non-criminal conduct and youth offences, as well as his failure to consider the Applicant's compelling personal circumstances, render the decision unreasonable?*

[20] Mr. Abdi has raised a number of arguments in support of his position that the decision by the Minister's Delegate is unreasonable. This includes the argument that the Officer and the Delegate failed to consider Mr. Abdi's particular background and circumstances, having been raised as a ward of the state where the state did not take the steps necessary to obtain Canadian citizenship for him. He submits that it is unreasonable that neither the Officer nor the Delegate asked the question how it is that a child who has spent almost his entire childhood in the care of the state can lack a basic education, a system of social support, and the protections afforded by citizenship.

[21] The challenge for Mr. Abdi in raising this argument is that his submissions to the Officer do not pose this particular question. In those submissions, Mr. Abdi does explain his background, that he arrived in Canada as a child refugee, was taken from his family by social services, and became a ward of the state. He also referred to being moved from one home to another, experiencing emotional and physical abuse, and getting in trouble as a young teenager in that environment. He explained that he was under the impression that he was a permanent resident all those years, that in 2008 the Children's Aid Society told him they were trying to get him a passport so that he could travel, and that Citizenship Canada advised it would take only 11 to 12 months to process.

[22] Mr. Abdi then submits that Canadian life is all he knows, that he has no family, friends or means of support in Somalia, and that he will be targeted for his religious beliefs and face certain death if he is deported. He notes the importance of being a role model for his Canadian born daughter and submits that he has learned from his mistakes, referring to the fact that he has

transitioned to a medium security institution, has improved his education and learned social skills while incarcerated, and is asking for a chance to become a productive member of society and the father that his daughter deserves.

[23] Both the Officer's Narrative Report and the Delegate's decision refer to Mr. Abdi having been accepted as a refugee and becoming a permanent resident as a child, and the Delegate notes his submission in which he described his difficult childhood and being subjected to abuse and frequent movement within the foster system. The Delegate refers to Mr. Abdi's expressions of remorse for his actions and his assertion that he has matured and has realized that his criminal behaviour cannot continue, if for no other reason than for his young daughter. In conducting his analysis, the Delegate refers to Mr. Abdi's expressions of remorse and his progression to a medium security environment, but also the multiple very serious crimes of which he has been convicted, his lifelong pattern of criminal activity, and his lack of social ties in Canada other than his daughter. The Delegate then arrives at his decision to refer Mr. Abdi to an admissibility hearing.

[24] Based on the content of the Narrative Report and the Delegate's decision, it cannot be concluded that the decision makers ignored Mr. Abdi's background as a long-term permanent resident of Canada, who arrived as a child refugee and was raised as a ward of the state. While Mr. Abdi's submissions explain this background, including a reference to the Children's Aid Society trying to get him a passport, the position he was advancing in his submissions was not that the state had failed him. Rather, he was arguing that he will face significant hardship and risk if returned to Somalia and that he has learned from his mistakes and has embarked on a more

constructive path in the interests of being a better example for his daughter. The Delegate's analysis focused on this position, and I cannot conclude that failure to consider the question that Mr. Abdi now raises in this judicial review, i.e. how a ward of the state lacks a basic education and citizenship, constitutes a reviewable error.

[25] However, notwithstanding that I have not found that particular argument compelling, I am persuaded by Mr. Abdi's arguments surrounding the Minister's Delegate's reliance on certain aspects of his criminal history and in particular his youth record.

[26] Turning first to offences of which Mr. Abdi was found guilty as a youth, I should note that I have no difficult concluding that the Delegate relied on these offences in arriving at the decision to refer the Section 44(1) Report to the ID. The Officer's Narrative Report, which identifies the information considered by the Officer and provides the recommendation and rationale underlying the Section 44(1) Report, refers to Mr. Abdi's extensive youth record since age 14. The Minister's Delegate in turn refers to Mr. Abdi having a lifelong pattern of criminal activity. As Mr. Abdi was 22 years old when the Delegate made his decision, this can only be interpreted as a reference to criminality that extended into Mr. Abdi's youth. I do not understand the Respondent to be contesting this.

[27] This raises for the Court's consideration the question whether this reliance on Mr. Abdi's youth criminality represents a reviewable error on the part of the Minister's Delegate. The analysis of this question requires recourse to Part 6 of the YCJA, entitled "Publication, Records and Information," which governs the use that can be made of information related to the fact that

a young person has been dealt with under that statute. Provisions of this Part that are referenced in these Reasons are set out in Annex A to this decision. The provision that is perhaps most relevant to the issues in this case is s 119, which identifies in s 119(1) the categories of persons who are entitled to access records governed by other provisions of Part 6. Assuming that the Officer or the Delegate falls within any of these categories (a point which was not particularly explored by the parties), the effect of s 119(1) is that such persons' access to these records applies only until the end of an access period. Section 119(2) prescribes the applicable access period, which depends on the nature and outcome of the offence involved.

[28] Sections 119(2)(g) to (j) prescribe the access periods that apply in various circumstances where a young person is found guilty of an offence and a youth sentence is imposed. However, these sections are all expressed to be subject to s 119(9), which provides for various consequences if, during the access period applicable to a record under any of sections 119(2)(g) to (j), the young person is convicted of an offence committed when he or she is an adult. Those consequences include Part 6 no longer applying to the record such that the record shall be dealt with as a record of an adult.

[29] It appears to be common ground between the parties that Mr. Abdi was convicted of offences, committed after he became an adult, within the access period applicable to his youth offences. His counsel confirmed at the hearing that records of these offences were therefore accessible and became adult records by operation of s 119(9). However, he nevertheless argued that these offences should play no role in reporting or referral decisions under s 44 of IRPA or, in

the alternative, that there is an obligation to distinguish between youth offences and adult offences in accordance with the principle of diminished moral blameworthiness for the former.

[30] In support of these positions, Mr. Abdi notes that s 36(3)(e)(iii) of IRPA provides that inadmissibility under s 36(1) of IRPA (which applies to serious criminality) may not be based on an offence for which the permanent resident received a youth sentence under the YCJA. He argues that, as a youth offence cannot be the basis for a finding of criminal inadmissibility, it would be inconsistent with the scheme of IRPA for the Minister's Delegate to be entitled to rely on a youth offence in exercising the discretion applicable under s 44(2). Mr. Abdi also relies on the decision of the Supreme Court of Canada in *R v DB,* 2008 SCC 25 [*DB*], which held that it is a principle of fundamental justice that young people are entitled to a presumption of diminished moral culpability.

[31] In relation to the youth offences themselves (as distinct from withdrawn or dismissed charges which I address later in these Reasons), I find no error on the part of the Delegate in taking this information into account in arriving at his decision. This issue has previously been addressed by the Court in *Brace v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 582 [*Brace*], in which Justice Harrington considered a similar argument in reviewing a decision of the Immigration Appeal Division [IAD]. The IAD had dismissed an appeal from a deportation order issued based on inadmissibility due to serious criminality and, in considering humanitarian and compassionate [H&C] factors, took into account the applicant's previous convictions including a youth conviction. Justice Harrington held at paragraphs 6-8 that, while s 36(3)(e) of IRPA provides that inadmissibility may not be based on an offence for which a

permanent resident was found guilty under the YCJA, it was not only proper but essential for the IAD, when considering H&C factors, to consider all of the applicant's criminal activity while in Canada. Justice Harrington also noted that, during the applicable access period under s 119(2) of the YCJA, the applicant had been convicted of an offence committed while an adult, such that his youth records were deemed to be adult records and Part 6 of the YCJA no longer applied.

[32] Mr. Abdi argues that *Brace* was incorrectly decided, because Justice Harrington did not consider the effect of the Supreme Court's decision in *DB*. I find little merit to that submission. *DB* addressed the question whether provisions of the YCJA, which presumed an adult sentence to apply to certain so-called "presumptive offences", were contrary to s 7 of the *Canadian Charter of Rights and Freedoms*. The Supreme Court relied on the principle that young persons are entitled to a presumption of diminished moral culpability in concluding that it was inconsistent with the *Charter* to impose on young persons the burden to demonstrate that an adult sentence is not justified. *DB* accordingly has no direct application to the issue in *Brace* or in the case at hand. I do not consider the presumption of diminished moral culpability for youth offences to undermine Justice Harrington's conclusion that the entirety of a person's criminal activity should be taken into account in conducting an H&C analysis, particularly where the relevant youth offences were accessible under the provisions of the YCJA as a result of adult convictions. Nor does DB support a conclusion that the Delegate erred by failing to expressly distinguish between adult and youth offences in considering Mr. Abdi's overall criminal history. It is clear from the record before the Delegate that a significant component of Mr. Abdi criminal history occurred while he was a youth, and I find no basis to conclude from the decision that this fact was somehow misunderstood or overlooked.

[33] Mr. Abdi also argues that *Brace* was wrongly decided, because Justice Harrington did not take into account the effect of s 82 of the YCJA, which provides that if a young person is found guilty of an offence and the youth sentence has ceased to have effect, the young person is deemed not to have been found guilty or convicted of the offence. Again, I find little merit to this submission. Where s 119(9) is engaged, because during the applicable access period for a record the young person is convicted of an offence committed when he or she is an adult, that section expressly provides that s 82 does not apply to the young person in respect of the offence for which the record is kept.

[34] As such, my conclusion is that the Minister's Delegate committed no error in his consideration of the crimes of which Mr. Abdi was found guilty as a youth. However, I have reached a different conclusion in connection with the charges that were brought against him and subsequently withdrawn or dismissed, in particular such charges that form part of his youth record.

[35] In reliance on a document entitled Justice Enterprise Information Network [JEIN] Offender Summary prepared by provincial authorities in Nova Scotia, which provides information on Mr. Abdi's criminal history including dismissed and withdrawn charges, his counsel identifies that there are 97 such charges, 37 of which were adult charges and 60 of which were youth charges. This document does not form part of the Certified Tribunal Record, and the Respondent submits that it was not considered by the Officer or the Minister's Delegate, although the Respondent does acknowledge that it was in the CBSA's larger file on Mr. Abdi. I do not understand Mr. Abdi to be arguing that the JEIN Offender Summary was considered by

the Officer or the Delegate. Rather, he relies on it to demonstrate that the majority of the withdrawn or dismissed charges, constituting the approximately 100 charges identified in the Officer's Narrative Report, were youth charges.

[36] I should note that Mr. Abdi argues that the Delegate erred in relying on any of the withdrawn or dismissed charges, regardless of whether they were laid against Mr. Abdi as a child or as an adult. Whether the Delegate's decision can be impugned based on consideration of the adult charges depends on the purpose for which the Delegate relied on those charges. As the Respondent points out, the Federal Court of Appeal held in *Sittampalam v Canada (Citizenship and Immigration)*, 2006 FCA 326 [*Sittampalam*] at para 50, that evidence surrounding withdrawn or dismissed charges can be taken into consideration at an immigration hearing, provided they are not used in and of themselves as evidence of an individual's criminality. In that case, the charges were not relied upon as evidence of the appellant's wrongdoing, but rather to establish there were reasonable grounds to believe that a gang of which the appellant was a member engaged in activity proscribed by IRPA.

[37] Similarly, in *Kharrat v Canada (Citizenship and Immigration)*, 2007 FC 842 at paras 20-21, this Court relied on *Sittampalam* to conclude that the Immigration Appeal Division had not erred in relying on charges as part of an H&C analysis, in considering the Applicant's behaviour relating to spousal abuse, rather than as evidence of the applicant's criminality. More recently, in *Tran* at paras 89-93, the Federal Court of Appeal held that it was acceptable for a Minister's delegate to rely on arrests and charges to assess the respondent's assertion that his behaviour had been without incident for a long period. For instance, the Court noted that the police record

contained credible information as to the respondent's consumption of alcohol and its impact upon his behaviour. The Court's conclusion was that the delegate was well aware of the distinction between arrests, stayed charges and criminal convictions, and that the delegate had not relied on the arrests and charges as evidence of criminal conduct.

[38] My conclusion is that these authorities do not assist the Respondent in the circumstances of the case at hand, as the Respondent has not identified any permissible purpose, i.e. other than evidence of Mr. Abdi's criminality, for reliance on Mr. Abdi's withdrawn and dismissed charges. Rather, the Respondent argues that there is no evidence on the record that the Delegate's decision was based at all on withdrawn or dismissed charges. The Respondent's position is that the Delegate's decision to refer the admissibility report to the ID was based on the seriousness of Mr. Abdi's offences, which outweighed the factors in his favour. I agree that the seriousness of the crimes was a significant factor underlying the Delegate's decision. However, the Delegate also refers to Mr. Abdi having a lifelong pattern of criminal activity, and I read the decision as also having been significantly influenced by this factor. I recognize that the Delegate's decision does not expressly reference charges that were withdrawn or dismissed. However, the Officer's Narrative Report does expressly refer to these charges. In the relatively brief Recommendation and Rationale section at the conclusion of the Narrative Report, the Officer states the following to be the factors operating against Mr. Abdi:

> PC has an extensive youth record (since age 14 yr) and escalating to being convicted of serious criminality; currently serving 5yr, 3months in a federal institution. Police information notes he has over 100 charges, 180 incidents. PC has a history of violence, assaults, weapons, beatings and stabbings; including peace officer assaults. During his incarceration he has been cited for incidents at the institution including a metal shank found in his cell x 2. [Emphasis added.]

[39] The information that Mr. Abdi has over 100 charges appears to have been taken from the Assessment for Decision document prepared by CSC in connection with Mr. Abdi's request for transfer to a medium security environment. As previously explained, it is appropriate to consider the Officer's analysis as part of the Minister's Delegate's reasoning. Given the express reference to charges in the Officer's analysis, and in particular the identification of the large number of charges, it is difficult to avoid the conclusion that this information formed at least part of the basis for the Delegate's characterization of Mr. Abdi as having a lifelong pattern of criminal activity.

[40] It is not possible for the Court to determine whether the Delegate would have characterized Mr. Abdi's history in the same manner, and arrived at the decision to refer him to an admissibility hearing, if he had not taken into account the 100 charges identified by the Officer. Therefore, if it was an error for the Delegate to take this information into account, it must result in a conclusion that the decision is unreasonable. As noted above, the Respondent has offered no alternative explanation for the role this information played in the decision-maker's analysis, i.e. other than as evidence of Mr. Abdi's criminality, and my view is that the record favours the conclusion that this information formed part of the basis for the conclusion that he demonstrated a lifelong pattern of criminal activity. As such, even though that criminality was not being considered as an index offence under s 36(1)(a) of IRPA, but rather as one of the factors in the exercise of the Delegate's discretion, my conclusion is that the charges were relied upon for an impermissible purpose.

[41] I further conclude that a reviewable error arises from the fact that, as demonstrated by the JEIN Offender Summary, the majority of the approximately 100 charges were youth charges. As Mr. Abdi submits, s 119(9) of the YCJA, which removes youth records from the protections of Part 6 of the statute when an adult conviction occurs during the access period, applies only to records of youth offences for which a young person is found guilty and sentenced. Section 119(9) has no application to records of charges against the young person that are dismissed or withdrawn. Such records are governed by s 119(2)(c) of the YCJA, under which the access period for such records is very brief, ending two months after the dismissal or withdrawal. Given Mr. Abdi's age at the time of the inadmissibility proceedings, the access period applicable to any of these records must necessarily have expired.

[42] Mr. Abdi therefore submits that s 128 of the YCJA applies, under which these records cannot be used for any purpose that would identify the person to whom the record relates as a young person dealt with under that statute, and various provisions for the disposal and purging of such records should apply. At the hearing of this application, the Respondent took no particular issue with Mr. Abdi's submissions on the operation of the provisions of the YCJA in connection with the records of withdrawn or dismissed youth charges. Rather, the Respondent submits that, consistent with Justice Harrington's reasoning in *Brace*, it is reasonable for the Delegate to have looked at the whole picture of Mr. Abdi's past, particularly as Mr. Abdi was relying on his troubled childhood as part of his argument for a favourable exercise of the Delegate's discretion.

[43] My conclusion is that these arguments do not assist the Respondent on this particular issue. The fact that Mr. Abdi's submissions in the admissibility proceedings refer to getting in

trouble as a young teenager cannot represent a basis for the Officer or Delegate to rely on youth records contrary to the protections afforded by the YCJA. Nor does the decision in *Brace* support such reliance. That case dealt only with convictions, to which access was available by operation of s 119(9) of the YCJA, not with withdrawn or dismissed charges. I also note that Justice Harrington offered an additional reason for this conclusion in that case, which was that, of the 12 offences which led to the applicant's deportation order, only one was a youth offence. Justice Harrington therefore expressed the view that assessing only 11 offences instead of 12 could not have significantly affected the impugned decision. Such an analysis cannot assist the Respondent in the present case, where the evidence is that the majority of the withdrawn or dismissed charges occurred during Mr. Abdi's youth.

[44] As noted above, it is not possible for the Court to determine whether the Delegate would have characterized Mr. Abdi's history in the same manner, and arrived at the decision to refer him to an admissibility hearing, without taking into account the 100 charges identified by the Officer. Therefore, having found that the Delegate erred in taking this information into account, the decision is unreasonable and must be set aside, with the matter to be returned to another delegate of the Minister of Public Safety and Emergency Preparedness for redetermination.

[45] Having reached this conclusion, it is not necessary for the Court to consider the various other arguments raised by Mr. Abdi in support of his position that the Delegate's decision is unreasonable.

VI. Certified Questions

[46] Mr. Abdi proposes that the Court certify the following questions for appeal:

A. Is there a greater duty of fairness required of immigration officers in preparing a subsection 44(1) report and the Minister in referring the report when dealing with long term permanent residents who were previously permanent wards of the state?

B. Are immigration officers preparing a subsection 44(1) report and the Minister in referring the report permitted to reference youth police incidents, withdrawn/dismissed charges, and findings of guilt? If so, must these incidents, charges or findings of guilt be distinguished from and treated differently than adult conduct?

C. Is the Minister in referring a subsection 44(1) report required to explicitly consider binding international human rights law, including directly related decisions of the United Nation's Human Rights Committee, regardless of whether that law has been brought to the Minister's attention?

D. Are immigration officers preparing a subsection 44(1) report and the Minister in referring the report required to be alive, alert and sensitive to the fact that the person concerned was previously a permanent ward of the state, and denied, because of that status, the opportunity to apply for citizenship?

[47] The Respondent opposes certification of any of these questions.

[48] Questions are not appropriate for certification if they would not be determinative of an appeal. Questions A, C and D above would not be determinative of an appeal, as they are unrelated to the basis on which I have identified a reviewable error on the part of the Minister's Delegate. Question B does bear a relationship to that error, as it relates in part to reliance on withdrawn or dismissed youth charges. However, I do not find that component of the question to be one of general importance. As noted earlier in these Reasons, the Respondent took no particular issue with the Applicant's arguments on the operation of the provisions of the YCJA relevant to that particular issue. My decision on that issue turns on the application of those provisions to the particular facts of that case.

[49] I therefore agree with the Respondent that none of the proposed question should be certified for appeal.

JUDGMENT IN IMM-5238-16

THIS COURT'S JUDGMENT is that this application for judicial review is allowed, and the matter is returned to a different delegate of Minister of Public Safety and Emergency Preparedness for redetermination in accordance with the above Reasons. No question is certified for appeal.

"Richard F. Southcott"
Judge

ANNEX A

Youth Criminal Justice Act, SC 2002, c 1

Effect of absolute discharge or termination of youth sentence	**Effet d'une absolution inconditionnelle ou de l'expiration de la période d'application des peines**
82 (1) Subject to section 12 (examination as to previous convictions) of the Canada Evidence Act, if a young person is found guilty of an offence, and a youth justice court directs under paragraph 42(2)(b) that the young person be discharged absolutely, or the youth sentence, or any disposition made under the Young Offenders Act, chapter Y-1 of the Revised Statutes of Canada, 1985, has ceased to have effect, other than an order under section 51 (mandatory prohibition order) of this Act or section 20.1 (mandatory prohibition order) of the Young Offenders Act, the young person is deemed not to have been found guilty or convicted of the offence except that	82 (1) Sous réserve de l'article 12 (interrogatoire sur condamnations antérieures) de la Loi sur la preuve au Canada, la déclaration de culpabilité visant un adolescent est réputée n'avoir jamais existé dans le cas où soit le tribunal pour adolescents a ordonné l'absolution inconditionnelle de l'adolescent en vertu de l'alinéa 42(2)b), soit la peine spécifique imposée sous le régime de la présente loi, ainsi que toute décision rendue sous le régime de la Loi sur les jeunes contrevenants, chapitre Y-1 des Lois révisées du Canada (1985), à l'égard de l'infraction, à l'exception de l'ordonnance d'interdiction visée à l'article 51 (ordonnance d'interdiction obligatoire) de la présente loi ou à l'article 20.1 (ordonnance d'interdiction obligatoire) de la Loi sur les jeunes contrevenants, ont cessé de produire leurs effets. Toutefois il demeure entendu que :
(a) the young person may plead autrefois convict in respect of any subsequent charge relating to the offence;	a) l'adolescent peut invoquer la défense d'autrefois convict à l'occasion de toute accusation subséquente se rapportant à l'infraction;

(b) a youth justice court may consider the finding of guilt in considering an application under subsection 64(1) (application for adult sentence);

b) le tribunal pour adolescents peut tenir compte de la déclaration de culpabilité lorsqu'il examine la demande visée au paragraphe 64(1) (demande d'assujettissement à la peine applicable aux adultes);

(c) any court or justice may consider the finding of guilt in considering an application for judicial interim release or in considering what sentence to impose for any offence; and

c) tout tribunal ou juge de paix peut tenir compte de la déclaration de culpabilité dans le cadre d'une demande de mise en liberté provisoire par voie judiciaire ou lorsqu'il doit prononcer une peine à l'égard d'une infraction;

(d) the Parole Board of Canada or any provincial parole board may consider the finding of guilt in considering an application for conditional release or for a record suspension under the Criminal Records Act.

d) la Commission des libérations conditionnelles du Canada ou une commission provinciale des libérations conditionnelles peut tenir compte de la déclaration de culpabilité dans le cadre d'une demande de libération conditionnelle ou d'une demande de suspension du casier faite au titre de la Loi sur le casier judiciaire.

Disqualifications removed

(2) For greater certainty and without restricting the generality of subsection (1), an absolute discharge under paragraph 42(2)(b) or the termination of the youth

Fin de l'incapacité

(2) Il est en outre précisé, sans qu'il soit porté atteinte à la portée générale du paragraphe (1), que l'absolution inconditionnelle visée à l'alinéa 42(2)b) ou la cessation

sentence or disposition in respect of an offence for which a young person is found guilty removes any disqualification in respect of the offence to which the young person is subject under any Act of Parliament by reason of a finding of guilt.

des effets de la peine spécifique ou de la décision prononcée à l'égard de l'infraction dont l'adolescent a été reconnu coupable met fin à toute incapacité dont ce dernier, en raison de cette culpabilité, était frappé en application d'une loi fédérale.

Applications for employment

(3) No application form for or relating to the following shall contain any question that by its terms requires the applicant to disclose that he or she has been charged with or found guilty of an offence in respect of which he or she has, under this Act or the Young Offenders Act, chapter Y-1 of the Revised Statutes of Canada, 1985, been discharged absolutely, or has completed the youth sentence under this Act or the disposition under the Young Offenders Act:

Demande d'emploi

(3) Aucune question dont le libellé exige du postulant la révélation d'une accusation ou d'une déclaration de culpabilité concernant une infraction pour laquelle il a, sous le régime de la présente loi ou de la Loi sur les jeunes contrevenants, chapitre Y-1 des Lois révisées du Canada (1985), obtenu une absolution inconditionnelle, purgé une peine spécifique imposée sous le régime de la présente loi ou fait l'objet d'une décision sous le régime de la Loi sur les jeunes contrevenants ne peut figurer dans les formulaires de:

(a) employment in any department, as defined in section 2 of the Financial Administration Act;

a) demande d'emploi à tout ministère au sens de l'article 2 de la Loi sur la gestion des finances publiques;

(b) employment by any Crown corporation, as defined in section 83 of the Financial Administration Act;

b) demande d'emploi à toute société d'État au sens de l'article 83 de la Loi sur la gestion des finances publiques;

(c) enrolment in the Canadian Forces; or

c) demande d'enrôlement dans les Forces canadiennes;

(d) employment on or in connection with the operation of any work, undertaking or business that is within the legislative authority of Parliament.

d) demande d'emploi ou de demande visant l'exploitation de tout ouvrage, entreprise ou affaire relevant de la compétence du Parlement.

Finding of guilt not a previous conviction

(4) A finding of guilt under this Act is not a previous conviction for the purposes of any offence under any Act of Parliament for which a greater punishment is prescribed by reason of previous convictions, except for

Inexistence de la matière de récidive

(4) En cas de perpétration d'une infraction à une loi fédérale pour laquelle il est prévu une peine plus sévère en cas de récidive, il n'est pas tenu compte de la déclaration de culpabilité intervenue sous le régime de la présente loi, sauf s'il s'agit :

(a) [Repealed, 2012, c. 1, s. 188]

a) [Abrogé, 2012, ch. 1, art. 188]

(b) the purpose of determining the adult sentence to be imposed.

b) de déterminer la peine applicable aux adultes à imposer.

[…]

[…]

Persons having access to records

119 (1) Subject to subsections (4) to (6), from the date that a record is created until the end of the applicable period set out in subsection (2), the following persons, on request, shall be given access to a record kept under section 114, and may be given access to a record kept under sections 115 and 116:

Personnes ayant accès aux dossiers

119 (1) Sous réserve des paragraphes (4) à (6), lorsqu'elles en font la demande, les personnes ci-après, à compter de la création du dossier jusqu'à l'expiration de la période applicable visée au paragraphe (2), ont accès aux dossiers tenus en application de l'article 114 et peuvent avoir accès aux dossiers tenus en application des articles 115 et 116 :

(a) the young person to whom the record relates;

a) l'adolescent qui fait l'objet du dossier;

(b) the young person's counsel, or any representative of that counsel;

b) l'avocat de l'adolescent ou son représentant;

(c) the Attorney General;

c) le procureur général;

(d) the victim of the offence or alleged offence to which the record relates;

d) la victime de l'infraction visée par le dossier;

(e) the parents of the young person, during the course of any proceedings relating to the offence or alleged offence to which the record relates or during the term of any youth sentence made in respect of the offence;

e) les père et mère de l'adolescent, pendant les procédures relatives à l'infraction visée par le dossier ou pendant la durée d'application de toute peine spécifique imposée en l'espèce;

(f) any adult assisting the young person under subsection 25(7), during the course of any proceedings relating to the offence or alleged offence to which the record relates or during the term of any youth sentence made in respect of the offence;

f) l'adulte qui assiste l'adolescent en application du paragraphe 25(7), pendant les procédures relatives à l'infraction visée par le dossier ou pendant la durée d'application de toute peine spécifique imposée en l'espèce;

(g) any peace officer for

g) tout agent de la paix, soit pour l'application de la loi, soit à des fins liées au traitement de l'affaire visée par le dossier pendant l'instance concernant l'adolescent ou la durée d'application

de toute peine spécifique;

(i) law enforcement purposes, or

(ii) any purpose related to the administration of the case to which the record relates, during the course of proceedings against the young person or the term of the youth sentence;

(h) a judge, court or review board, for any purpose relating to proceedings against the young person, or proceedings against the person after he or she becomes an adult, in respect of offences committed or alleged to have been committed by that person;

h) tout juge, tout tribunal ou toute commission d'examen, relativement à des poursuites intentées contre l'adolescent, ou à des poursuites relatives à des infractions commises par celui-ci après qu'il a atteint l'âge adulte ou qui lui sont imputées;

(i) the provincial director, or the director of the provincial correctional facility for adults or the penitentiary at which the young person is serving a sentence;

i) le directeur provincial ou le directeur de l'établissement correctionnel provincial pour adultes ou du pénitencier où l'adolescent purge une peine;

(j) a person participating in a conference or in the administration of extrajudicial measures, if required for the administration of the case to which the record relates;

j) tout membre d'un groupe consultatif ou toute personne appliquant une mesure extrajudiciaire, lorsque l'accès s'avère nécessaire pour traiter du cas visé par le dossier;

(k) a person acting as ombudsman, privacy commissioner or information commissioner, whatever his or her official designation might be, who in the course of his or her duties under an Act of Parliament or the legislature of a province is investigating a complaint to which the record relates;

k) toute personne occupant les fonctions d'ombudsman, de commissaire à la vie privée ou de commissaire à l'information, quelle que soit sa désignation officielle, en vue d'exercer les attributions qui lui sont confiées en vertu d'une loi fédérale ou provinciale dans le cadre d'une enquête portant sur une plainte relative au dossier;

(l) a coroner or a person acting as a child advocate, whatever his or her official designation might be, who is acting in the course of his or her duties under an Act of Parliament or the legislature of a province;

l) tout coroner ou toute personne occupant les fonctions de conseiller à l'enfance, quelle que soit sa désignation officielle, en vue d'exercer les attributions qui lui sont confiées en vertu d'une loi fédérale ou provinciale;

(m) a person acting under the Firearms Act;

m) toute personne, pour l'application de la Loi sur les armes à feu;

(n) a member of a department or agency of a government in Canada, or of an organization that is an agent of, or under contract with, the department or agency, who is

n) tout membre du personnel ou mandataire d'un ministère ou d'un organisme public canadien ou tout membre du personnel d'une organisation avec qui un tel ministère ou organisme a conclu une entente, en vue, selon le cas :

(i) acting in the exercise of his or her duties

(i) d'exercer ses attributions sous le régime de la présente

under this Act,

loi,

(ii) engaged in the supervision or care of the young person, whether as a young person or an adult, or in an investigation related to the young person under an Act of the legislature of a province respecting child welfare,

(ii) de surveiller l'adolescent ou de s'en occuper même devenu adulte, ou de mener une enquête à son égard en vertu d'une loi provinciale sur la protection de la jeunesse,

(iii) considering an application for conditional release, or for a record suspension under the Criminal Records Act, made by the young person, whether as a young person or an adult,

(iii) d'examiner une demande de libération sous condition ou une demande de suspension du casier faite au titre de la Loi sur le casier judiciaire présentée par l'adolescent même devenu adulte,

(iv) administering a prohibition order made under an Act of Parliament or the legislature of a province, or

(iv) de veiller à l'observation d'une ordonnance d'interdiction rendue sous le régime d'une loi fédérale ou provinciale,

(v) administering a youth sentence, if the young person has been committed to custody and is serving the custody in a provincial correctional facility for adults or a penitentiary;

(v) d'appliquer une peine spécifique purgée sous garde dans un établissement correctionnel provincial pour adultes ou un pénitencier;

(o) a person, for the purpose of carrying out a criminal record check required by the Government of Canada or the government of a province or a municipality for purposes of employment or the performance of services, with or without remuneration;

o) toute personne, pour vérifier l'existence d'un casier judiciaire dans le cas où la vérification est exigée par le gouvernement du Canada ou d'une province ou par une municipalité en matière de recrutement de personnel ou de bénévoles ou de fourniture de services;

(p) an employee or agent of the Government of Canada, for statistical purposes under the Statistics Act;

p) tout employé ou mandataire du gouvernement fédéral, à des fins statistiques prévues par la Loi sur la statistique;

(q) an accused or his or her counsel who swears an affidavit to the effect that access to the record is necessary to make a full answer and defence;

q) tout accusé ou avocat de celui-ci, sur dépôt d'une déclaration sous serment attestant la nécessité d'avoir accès au dossier pour pouvoir présenter une défense pleine et entière;

(r) a person or a member of a class of persons designated by order of the Governor in Council, or the lieutenant governor in council of the appropriate province, for a purpose and to the extent specified in the order; and

r) toute personne désignée — à titre individuel ou au titre de son appartenance à une catégorie déterminée — par le gouverneur en conseil ou le lieutenant-gouverneur en conseil d'une province à une fin précisée et dans la mesure autorisée par l'un ou l'autre, selon le cas;

(s) any person or member of a class of persons that a youth justice court

s) toute autre personne — à titre individuel ou au titre de son appartenance

judge considers has a valid interest in the record, to the extent directed by the judge, if the judge is satisfied that access to the record is

à une catégorie déterminée — que le juge du tribunal pour adolescents estime avoir un intérêt légitime dans le dossier, dans la mesure qu'il autorise, s'il est convaincu qu'il est souhaitable d'y donner accès :

(i) desirable in the public interest for research or statistical purposes, or

(i) soit dans l'intérêt public, à des fins de recherche ou de statistiques,

(ii) desirable in the interest of the proper administration of justice.

(ii) soit dans l'intérêt de la bonne administration de la justice.

Period of access

(2) The period of access referred to in subsection (1) is

Période d'accès

(2) La période d'accès mentionnée au paragraphe (1) est :

(a) if an extrajudicial sanction is used to deal with the young person, the period ending two years after the young person consents to be subject to the sanction in accordance with paragraph 10(2)(c);

a) si l'adolescent a fait l'objet d'une sanction extrajudiciaire, de deux ans à compter du moment où celui-ci consent à collaborer à sa mise en oeuvre conformément à l'alinéa 10(2)c);

(b) if the young person is acquitted of the offence otherwise than by reason of a verdict of not criminally responsible on account of mental disorder, the period ending two months after the expiry of the time allowed for

b) s'il est acquitté de l'infraction visée par le dossier, pour une raison autre qu'un verdict de non-responsabilité criminelle pour cause de troubles mentaux, de deux mois à compter de l'expiration du délai d'appel ou de trois mois

the taking of an appeal or, if an appeal is taken, the period ending three months after all proceedings in respect of the appeal have been completed;

à compter de l'issue de toutes les procédures d'appel;

(c) if the charge against the young person is dismissed for any reason other than acquittal, the charge is withdrawn, or the young person is found guilty of the offence and a reprimand is given, the period ending two months after the dismissal, withdrawal, or finding of guilt;

c) si l'accusation est rejetée autrement que par acquittement ou est retirée, ou que l'adolescent est déclaré coupable de l'infraction et fait l'objet d'une réprimande, de deux mois à compter du rejet, du retrait ou de la déclaration de culpabilité;

(d) if the charge against the young person is stayed, with no proceedings being taken against the young person for a period of one year, at the end of that period;

d) si l'accusation est suspendue, sans qu'aucune procédure ne soit prise contre l'adolescent pendant un an, d'un an à compter de la suspension;

(e) if the young person is found guilty of the offence and the youth sentence is an absolute discharge, the period ending one year after the young person is found guilty;

e) si l'adolescent est déclaré coupable de l'infraction et fait l'objet d'une absolution inconditionnelle, d'un an à compter de la déclaration de culpabilité;

(f) if the young person is found guilty of the offence and the youth sentence is a conditional discharge, the period ending three years after the young person is

f) si l'adolescent est déclaré coupable de l'infraction et fait l'objet d'une absolution sous conditions, de trois ans à compter de la déclaration de

found guilty;

(g) subject to paragraphs (i) and (j) and subsection (9), if the young person is found guilty of the offence and it is a summary conviction offence, the period ending three years after the youth sentence imposed in respect of the offence has been completed;

(h) subject to paragraphs (i) and (j) and subsection (9), if the young person is found guilty of the offence and it is an indictable offence, the period ending five years after the youth sentence imposed in respect of the offence has been completed;

(i) subject to subsection (9), if, during the period calculated in accordance with paragraph (g) or (h), the young person is found guilty of an offence punishable on summary conviction committed when he or she was a young person, the latest of

(i) the period calculated in accordance with paragraph (g) or (h), as the case may be, and

(ii) the period ending three years after the

culpabilité;

g) sous réserve des alinéas i) et j) et du paragraphe (9), si l'adolescent est déclaré coupable d'une infraction punissable sur déclaration de culpabilité par procédure sommaire, de trois ans à compter de l'exécution complète de la peine spécifique relative à cette infraction;

h) sous réserve des alinéas i) et j) et du paragraphe (9), si l'adolescent est déclaré coupable d'un acte criminel, de cinq ans à compter de l'exécution complète de la peine spécifique relative à cet acte criminel;

i) sous réserve du paragraphe (9), si, au cours de la période visée aux alinéas g) ou h), l'adolescent est déclaré coupable d'une infraction punissable sur déclaration sommaire de culpabilité, celle des périodes suivantes qui expire la dernière :

(i) la période visée aux alinéas g) ou h), selon le cas,

(ii) trois ans à compter de l'exécution

youth sentence imposed for that offence has been completed; and

complète de la peine spécifique relative à cette infraction;

(j) subject to subsection (9), if, during the period calculated in accordance with paragraph (g) or (h), the young person is found guilty of an indictable offence committed when he or she was a young person, the period ending five years after the sentence imposed for that indictable offence has been completed.

j) sous réserve du paragraphe (9), si, au cours de la période visée aux alinéas g) ou h), l'adolescent est déclaré coupable d'un acte criminel, de cinq ans à compter de l'exécution complète de la peine relative à cet acte criminel.

[…]

[…]

Application of usual rules

Application des règles générales

(9) If, during the period of access to a record under any of paragraphs (2)(g) to (j), the young person is convicted of an offence committed when he or she is an adult,

(9) Si, au cours de la période visée aux alinéas (2)g) à j), l'adolescent devenu adulte est déclaré coupable d'une infraction :

(a) section 82 (effect of absolute discharge or termination of youth sentence) does not apply to the young person in respect of the offence for which the record is kept under sections 114 to 116;

a) l'article 82 (effet d'une absolution inconditionnelle ou de l'expiration de la période d'application des peines) ne s'applique pas à lui à l'égard de l'infraction visée par le dossier tenu en application des articles 114 à 116;

(b) this Part no longer applies to the record and the record shall be

b) la présente partie ne s'applique plus au dossier et celui-ci est

dealt with as a record of an adult; and

(c) for the purposes of the Criminal Records Act, the finding of guilt in respect of the offence for which the record is kept is deemed to be a conviction.

[…]

Effect of end of access periods

128 (1) Subject to sections 123, 124 and 126, after the end of the applicable period set out in section 119 or 120 no record kept under sections 114 to 116 may be used for any purpose that would identify the young person to whom the record relates as a young person dealt with under this Act or the Young Offenders Act, chapter Y-1 of the Revised Statutes of Canada, 1985.

Disposal of records

(2) Subject to paragraph 125(7)(c), any record kept under sections 114 to 116, other than a record kept under subsection 115(3), may, in the discretion of the person or body keeping the record, be destroyed or transmitted to the Librarian and Archivist of Canada or the archivist for any province, at any time before or after the end of the applicable

traité comme s'il était un dossier d'adulte;

c) pour l'application de la Loi sur le casier judiciaire, la déclaration de culpabilité à l'égard de l'infraction visée par le dossier est réputée être une condamnation.

[…]

Interdiction d'utilisation

128 (1) Sous réserve des articles 123, 124 et 126, dès l'expiration de la période applicable prévue aux articles 119 ou 120, il ne peut être fait aucune utilisation du dossier tenu en application des articles 114 à 116 pouvant permettre de constater que l'adolescent visé par le dossier a fait l'objet de procédures prévues par la présente loi ou la Loi sur les jeunes contrevenants, chapitre Y-1 des Lois révisées du Canada (1985).

Destruction des dossiers

(2) Sous réserve de l'alinéa 125(7)c), les dossiers tenus en application des articles 114 à 116, à l'exception des dossiers tenus en application du paragraphe 115(3), peuvent à tout moment, à la discrétion de la personne ou de l'organisme qui les tient, être détruits ou transmis au bibliothécaire et archiviste du Canada ou à un archiviste provincial, même avant l'expiration de la période

period set out in section 119.

Disposal of R.C.M.P. records

(3) All records kept under subsection 115(3) shall be destroyed or, if the Librarian and Archivist of Canada requires it, transmitted to the Librarian and Archivist, at the end of the applicable period set out in section 119 or 120.

Purging CPIC

(4) The Commissioner of the Royal Canadian Mounted Police shall remove a record from the automated criminal conviction records retrieval system maintained by the Royal Canadian Mounted Police at the end of the applicable period referred to in section 119; however, information relating to a prohibition order made under an Act of Parliament or the legislature of a province shall be removed only at the end of the period for which the order is in force.

Exception

(5) Despite subsections (1), (2) and (4), an entry that is contained in a system maintained by the Royal Canadian Mounted Police to match crime scene information and that relates to an offence committed or alleged to have

applicable prévue à l'article 119.

Destruction des dossiers de la Gendarmerie royale du Canada

(3) Les dossiers tenus en application du paragraphe 115(3) sont détruits ou transmis au bibliothécaire et archiviste du Canada, sur demande en ce sens par celui-ci, à l'expiration de la période applicable prévue aux articles 119 ou 120.

Retrait des dossiers

(4) Le commissaire de la Gendarmerie royale du Canada retire le dossier du fichier automatisé des relevés de condamnations criminelles géré par la Gendarmerie royale du Canada à l'expiration de la période applicable visée à l'article 119; toutefois, les éléments d'information relatifs à une ordonnance d'interdiction rendue sous le régime d'une loi fédérale ou provinciale ne sont retirés du fichier qu'après que l'ordonnance a cessé d'être en vigueur.

Exception

(5) Par dérogation aux paragraphes (1), (2) et (4), les renseignements relatifs à une infraction commise ou alléguée avoir été commise par un adolescent et qui figurent dans une banque de données maintenue par la Gendarmerie

been committed by a young person shall be dealt with in the same manner as information that relates to an offence committed by an adult for which a record suspension ordered under the Criminal Records Act is in effect.

royale du Canada en vue d'établir des liens entre des renseignements recueillis sur les lieux d'une autre infraction sont traités de la façon dont le sont les renseignements relatifs aux infractions commises par des adultes et à l'égard desquelles une suspension du casier ordonnée en vertu de la Loi sur le casier judiciaire est en vigueur.

Authority to inspect

(6) The Librarian and Archivist of Canada may, at any time, inspect records kept under sections 114 to 116 that are under the control of a government institution as defined in section 2 of the Library and Archives of Canada Act, and the archivist for a province may at any time inspect any records kept under those sections that the archivist is authorized to inspect under any Act of the legislature of the province.

Examen des dossiers

(6) Le bibliothécaire et archiviste du Canada peut à tout moment examiner les dossiers tenus en application des articles 114 à 116 par une institution fédérale au sens de l'article 2 de la Loi sur la Bibliothèque et les Archives du Canada et l'archiviste provincial peut à tout moment examiner ceux des dossiers tenus en application de ces articles qu'il a par ailleurs le droit d'examiner en vertu d'une loi provinciale.

Definition of destroy

(7) For the purposes of subsections (2) and (3), destroy, in respect of a record, means

Définition de destruction

(7) Pour l'application des paragraphes (2) et (3), destruction s'entend :

(a) to shred, burn or otherwise physically destroy the record, in the case of a record other than a record in electronic form; and

a) dans le cas des dossiers qui ne sont pas sur support électronique, de leur déchiquetage, de leur brûlage ou de tout autre mode de destruction matérielle;

(b) to delete, write over or

b) dans le cas des dossiers

otherwise render the record inaccessible, in the case of a record in electronic form.

qui sont sur support électronique, de leur élimination, y compris par effacement pour substitution, ou de tout autre moyen empêchant d’y avoir accès.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5238-16
STYLE OF CAUSE:	ABDOULKADER ABDI v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	HALIFAX, NOVA SCOTIA
DATE OF HEARING:	SEPTEMBER 13, 2017
JUDGMENT AND REASONS:	SOUTHCOTT, J.
DATED:	OCTOBER 26, 2017

APPEARANCES:

Benjamin Perryman	FOR THE APPLICANT
Melissa A. Grant	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Benjamin Perryman Barrister & Solicitor Halifax, Nova Scotia	FOR THE APPLICANT
Attorney General of Canada Halifax, Nova Scotia	FOR THE RESPONDENT