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Dockets: IMM-4585-16
IMM-1531-17

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Toronto, Ontario, August 16, 2018

PRESENT: The Honourable Mr. Justice Diner

Docket: IMM-4585-16

BETWEEN:

MO YEUNG CHING

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEE AND CITIZENSHIP

Respondent

Docket: IMM-1531-17

AND BETWEEN:

MO YEUNG CHING

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

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I. Overview

[1] The Applicant, Mo Yeung Ching, a citizen of the People's Republic of China, has brought two applications [Applications] before this Court under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The consolidated Applications challenge decisions issued by the Immigration Appeal Division [IAD] in 2016 and 2017

respectively, in the context of an appeal by the Minister of Public Safety and Emergency Preparedness [MPSEP] under subsection 63(5) of IRPA [Appeal], which remains ongoing.

[2] Mr. Ching's case has a complex procedural history. He became a Canadian permanent resident in 1996. He applied for citizenship in 2001, which was never granted. Rather, as a result of criminal charges laid against him in China, he was convoked for inadmissibility hearings. In 2009, the Immigration Division [ID] of the Immigration and Refugee Board [IRB] concluded that Mr. Ching was not inadmissible for serious criminality, and that some of the evidence against him had been obtained by the torture of his associates in China [Admissibility Decision]. MPSEP appealed to the IAD of the IRB.

[3] In 2011, the IAD agreed with MPSEP, overturning the ID, and finding that Mr. Ching was inadmissible under IRPA's paragraph 36(1)(c) for having entered into an arrangement with business associates in China to fraudulently obtain public funds [Inadmissibility Decision]. However, it did not address the ID's findings on the impugned evidence. Notwithstanding the issuance of the Inadmissibility Decision, the Appeal remains ongoing, because the second stage remains outstanding under IRPA subsection 69(2), which permits Mr. Ching to make submissions on humanitarian and compassionate grounds [H&C].

[4] The member who decided the Inadmissibility Decision scheduled a hearing for the H&C component of the proceeding in April 2012, but shortly before the hearing, received an application for her recusal. The panel member, after a detailed analysis, found no basis for recusal [Recusal Decision]. However, she decided that given the "unusual circumstances in this

case and particularly given the respondent [Mr. Ching] did not testify", the H&C hearing would proceed before a different member of the IAD.

[5] Mr. Ching also filed a refugee claim in April 2012. In relation to the outstanding criminal charges in China for his alleged economic fraud and embezzlement, the Refugee Protection Division [RPD] rejected the claim under section 98 of IRPA [RPD Decision]. Mr. Ching challenged the RPD Decision to the Federal Court, represented by David Matas. Justice Roy, in a strongly worded judgment, sent the RPD Decision back for redetermination, on the basis of insufficient evidence (*Ching v Canada (Citizenship and Immigration)*, 2015 FC 860 [*Ching*]).

[6] On September 11, 2015, Mr. Ching asked the IAD to reconsider its Inadmissibility Decision, based largely on Justice Roy's decision in *Ching*. On October 19, 2016, the IAD refused to determine Mr. Ching's reconsideration application at that time [Refusal to Entertain], because the matter was in abeyance pending the outcome of Mr. Ching's refugee claim. Mr. Ching subsequently sought judicial review of the Refusal to Entertain, which is under review in the first of the two Applications before me today (IMM-4585-16).

[7] In spite of its initial Refusal to Entertain Mr. Ching's reconsideration application, the IAD nonetheless proceeded to hear submissions on Mr. Ching's reconsideration request some four months later. Then, in a decision of March 10, 2017, the IAD refused to reconsider the Inadmissibility Decision [Refusal to Reconsider]. Mr. Ching again sought judicial review (IMM-1511-17). He received leave for both Applications, which were also consolidated. While

Lawrence Wong filed some of the initial materials in these Applications, Rocco Galati provided the supporting written materials, and made oral submissions on behalf of Mr. Ching.

[8] Although Mr. Ching has raised several issues in these Applications, he has only persuaded me on one: that the IAD's Inadmissibility Decision discloses an abuse of process. In my view, the IAD had a duty to deal with and make findings on those portions of the evidence found by the ID to have been obtained through the torture of Mr. Ching's associates. The IAD failed in that duty, leaving doubt as to whether evidence allegedly obtained by torture impacted its decision.

[9] But Mr. Ching has not persuaded me that a stay of the Appeal is warranted. Rather, a lesser remedy can ensure the integrity of the IAD's administrative process, while still allowing the serious allegations against Mr. Ching to be adjudicated. As a result, and for the reasons that follow, I am ordering that the IAD decisions issued thus far in the Appeal be set aside, and that the Appeal be remitted for determination anew before a different member of the IAD.

II. <u>Issues</u>

[10] The issues raised in these two Applications are as follows:

1. Should IMM-4585-16 (which challenges the IAD's Refusal to Entertain) be dismissed for mootness?
2. Should both the Applications be dismissed for prematurity?

3. Does the delay in concluding the Appeal amount to an abuse of process warranting a stay of proceedings?

4. Does the Appeal disclose an abuse of process arising from the ID's findings on evidence obtained by torture, and, if so, what is the appropriate remedy?

5. Should the IAD's Refusal to Reconsider be set aside as either incorrect or unreasonable?

[11] I will address these issues in turn. I would note, however, that the parties' arguments have evolved and were refined considerably as these Applications unfolded. Further, Mr. Ching has had the three highly experienced counsel mentioned (Messrs Wong, Galati and Matas) act for him at various points within the web of proceedings outlined above; his positions have not always been consistent, which may be part and parcel of that reality. As a result, I will endeavour, where necessary, to indicate at what stage of the proceedings arguments were made. Before commencing my analysis, however, I will set out the standard under which each of the five issues will be reviewed.

III. Standard of Review

[12] The question of standard of review does not arise for issues 1 and 2.

[13] Issues 3 and 4 relate to the doctrine of abuse of process, which can be characterized as an aspect of procedural fairness attracting a correctness standard (*Shen v Canada (Citizenship and Immigration)*, 2016 FC 70 at para 29 [*Shen* 2016]; *Canadian Pacific Railway Company v*

Canada (Attorney General), 2018 FCA 69 at para 54 [*Canadian Pacific*]). I note that, in these Applications, the Court is not reviewing the IAD's own analysis of abuse of process (see, for instance, *Shen* 2016 at para 29), but must rather determine at first-instance whether the impugned state conduct in the Appeal amounts to an abuse of process.

[14] With respect to issue 5, insofar as the reasonableness of the IAD's Refusal to Reconsider is challenged, the standard is that set out in *Dunsmuir v New Brunswick*, 2008 SCC 9 (at para 47). Mr. Ching has also raised allegations of bias with respect to the IAD member who issued that decision, which is an issue reviewable on a correctness standard (*Joshi v Canadian Imperial Bank of Commerce*, 2015 FCA 92 at para 6, citing *Mission Institute v Khela*, 2014 SCC 24 at para 79).

IV. <u>Analysis</u>

Issue 1: Is IMM-4585-16 moot?

[15] The first issue before me is whether the first of the two consolidated Applications — namely, file number IMM-4585-16 — should be dismissed for mootness. It will be recalled that, in the Refusal to Entertain (the decision challenged in IMM-4585-16), the IAD refused to entertain Mr. Ching's reconsideration request at that time**.** The Respondent submits that, because Mr. Ching's reconsideration application was ultimately determined by the IAD in the Refusal to Reconsider (under review in IMM-1531-17), IMM-4585-16 no longer raises a live controversy and is therefore moot.

[16] However, for the reasons that follow, I have concluded that not all issues raised in IMM-4585-16 are moot.

(1) Background on mootness

[17] In his September 11, 2015 reconsideration application, Mr. Ching argued that since Justice Roy had found in *Ching* that there had been insufficient evidence before the RPD for its conclusion, the evidence before the IAD in 2011 likewise could not support a finding of inadmissibility. This reconsideration application was opposed by MPSEP on the basis that the Appeal was, at that time, being held in abeyance, and that *Ching* had no bearing on the merits of the IAD's Inadmissibility Decision.

[18] On April 12, 2016, Mr. Ching's counsel applied to the Commission for the Control of INTERPOL's Files [Commission], requesting that Mr. Ching be removed from the list of wanted persons in the INTERPOL database, enclosing the *Ching* decision.

[19] Mr. Ching received a letter from the Commission dated August 26, 2016, stating that:

> After a careful study of all the elements in its possession, the Commission concluded that the data registered in INTERPOL's files concerning Mr Mo Yueng Ching was not compliant with INTERPOL's rules. Consequently, the Commission recommended that INTERPOL delete the data concerned.
>
> Following the Commission's recommendation, this data was deleted from INTERPOL's files on 23 August 2016.

[20] An accompanying letter from INTERPOL's General Secretariat certified that Mr. Ching was not known in INTERPOL's database and was not subject to an INTERPOL Red Notice or

diffusion. This information was relayed to the IAD in connection with Mr. Ching's reconsideration request.

[21] On October 19, 2016, the IAD issued its Refusal to Entertain, stating that it would be "inappropriate" to determine whether or not to reconsider the Inadmissibility Decision at that time. Mr. Ching then commenced IMM-4585-16, the first of the two Applications before me today. Abuse of process was raised in his leave memorandum, and he asked that the Appeal be stayed (although, this was not raised in his notice of application, which was filed by different counsel).

[22] Mr. Ching's reconsideration application was subsequently determined by the IAD in its decision dated March 10, 2017 (which is the Refusal to Reconsider under review in IMM-1531-17) prior to the disposition of IMM-4585-16.

(2) Parties' arguments on mootness

[23] In its further memorandum, the Respondent argued that Mr. Ching's first judicial review application (IMM-4585-16) should be dismissed for mootness because Mr. Ching's reconsideration application had been determined by the IAD. The Respondent submitted that, as a result, the controversy arising from the IAD's Refusal to Entertain was no longer live, relying on *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*].

[24] At the hearing of these Applications, Mr. Ching contended that IMM-4585-16 was not moot, given that the issue of abuse of process it raised was still live, and that the relief sought in

it and its underlying record were “rolled into” file number IMM-1531-17. The Respondent argued that if the remedy sought in IMM-4585-16 had been rolled into IMM-1531-17, then the former should still be dismissed.

(3) Analysis on mootness

[25] An issue is “moot” when, as a result of changed circumstances, its disposition will have no practical effect on the parties (*Borowski* at 353). The two-step *Borowski* test was summarized in *Harvan v Canada (Citizenship and Immigration)*, 2015 FC 1026 (at para 7) as follows: (a) is the matter moot — i.e., would a decision have any practical effect on solving a live controversy between the parties? and (b) if the matter is moot, should the Court nevertheless exercise its discretion to hear the case?

[26] I agree with the Respondent that IMM-4585-16 itself no longer raises a live controversy with respect to certain of the relief sought, because the IAD’s Refusal to Reconsider subsequently disposed of Mr. Ching’s reconsideration application.

[27] However, I also agree with Mr. Ching that the abuse of process arguments and attendant relief sought in IMM-4585-16 were not rendered moot by the issuance of the Refusal to Reconsider, and therefore remain live. As a result, I decline to dismiss IMM-4585-16 for mootness.

[28] Further, although the Applications seek the same primary relief — namely, a declaration of abuse of process and a stay of the Appeal — and are, to some extent, duplicative, the parties

have relied on the consolidated record in arguing the Applications. I will thus simply provide one remedy with respect to both Applications.

Issue 2: Should the Applications be dismissed for prematurity?

[29] The second issue for determination is whether the Applications are premature. The Respondent has argued that the Applications should be dismissed on the basis that the Appeal is still ongoing at the IAD, and may ultimately be decided in Mr. Ching's favour following the IAD's H&C determination.

[30] Although I agree with the Respondent that an applicant may not ordinarily seek judicial review of an interlocutory administrative decision, I nevertheless find that it is necessary for the Court to hear and determine Mr. Ching's abuse of process arguments at this stage of the IAD's proceedings.

(1) Background on prematurity

[31] MPSEP commenced the Appeal by notice of appeal dated June 1, 2009, under subsection 63(5) of IRPA, which provides as follows:

Right of appeal — Minister	Appel du ministre
63(5) The Minister may appeal to the Immigration Appeal Division against a decision of the Immigration Division in an admissibility hearing.	**63(5)** Le ministre peut interjeter appel de la décision de la Section de l'immigration rendue dans le cadre de l'enquête.

[32] The IAD's Inadmissibility Decision was issued on December 21, 2011, finding Mr. Ching to be inadmissible under paragraph 36(1)(c) of IRPA. The IAD also directed its Registrar to schedule a hearing for submissions and evidence with respect to the IAD's jurisdiction under subsection 69(2) of IRPA, which provides as follows:

Minister's Appeal	**Droit d'appel du ministre**
69(2) In the case of an appeal by the Minister respecting a permanent resident or a protected person, other than a person referred to in subsection 64(1), if the Immigration Appeal Division is satisfied that, taking into account the best interests of a child directly affected by the decision, sufficient <u>humanitarian and compassionate considerations</u> warrant special relief in light of all the circumstances of the case, it may make and may stay the applicable removal order, or dismiss the appeal, despite being satisfied of a matter set out in paragraph 67(1)(a) or (b).	**69(2)** L'appel du ministre contre un résident permanent ou une personne protégée non visée par le paragraphe 64(1) peut être rejeté ou la mesure de renvoi applicable, assortie d'un sursis, peut être prise, même si les motifs visés aux alinéas 67(1)a) ou b) sont établis, sur preuve qu'il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs <u>d'ordre humanitaire</u> justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.
[Emphasis added]	[Non souligné dans l'original.]

[33] The parties to the Appeal have not yet made H&C submissions to the IAD; thus the Appeal remains ongoing.

(2) Parties' arguments on prematurity

[34] In its memorandum opposing leave, the Respondent argued that IMM-4585-16 was premature because the IAD has not yet rendered a final decision in the Appeal. The Respondent

relied on the Federal Court of Appeal's holdings in various cases, including *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61 at paras 33, 39-46, and 51 [*CB Powell*]. The Respondent submitted that it was still possible for the IAD to rule in Mr. Ching's favour, and that, if the IAD did not do so, it would be open to Mr. Ching to judicially review the IAD's final decision.

[35] Mr. Ching relied on *United States of America v Cobb*, 2001 SCC 19 [*Cobb*], for the proposition that abuse of process must be "nipped in the bud", and thus may be raised prior to the completion of a proceeding. Furthermore, at the hearing, Mr. Galati took issue with the Respondent's position that a positive outcome was still potentially open to Mr. Ching.

(3) Analysis on prematurity

[36] Generally, administrative law shields interlocutory decisions from judicial review. A summary of the relevant principles was recently provided in *Canada (Public Safety and Emergency Preparedness) v Shen*, 2018 FC 636 [*Shen* 2018]:

> [49] As the Federal Court of Appeal has observed, there is a substantial body of case law forbidding this Court from hearing premature matters on judicial review: *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2014 FCA 245, [2015] 4 F.C.R. 75. The Court went on in Forest Ethics to state that Courts "can and almost always should refuse to hear a premature judicial review on its own motion in the public interest – specifically, the interests of sound administration and respect for the jurisdiction of an administrative decision−maker": at para. 22. See also *C.B. Powell*, above at para. 30.
>
> [50] There are a number of reasons why courts are reluctant to intervene in interlocutory rulings made by administrative tribunals, including the potential fragmentation of the administrative process, and the accompanying costs and delays. There is, moreover, always the possibility that the Board may end up modifying its original ruling as the hearing unfolds, or that the issue may

> ultimately be overtaken or become moot if the applicant for judicial review succeeds at the end of the administrative process: *C.B. Powell*, above at para. 32; *Mcdowell v. Automatic Princess Holdings*, LLC, 2017 FCA 126 at para. 26, [2017] F.C.J. No. 621.
>
> [51] Moreover, as the Federal Court of Appeal observed in *C.B. Powell*, it is only at the end of an administrative process that a reviewing court will have all of the administrative decision−maker's findings, conclusions that "may be suffused with expertise, legitimate policy judgments and valuable regulatory experience": above at para. 32. Refusing to intervene prior to there being a final decision in a given case is, moreover, consistent with the concept of judicial respect for administrative decision‐ makers who have decision-making responsibilities to discharge: *C.B. Powell*, above at para. 32, citing *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at para. 48, [2008] 1 S.C.R. 190.

[37] *CB Powell* limited the scope of "exceptional circumstances" such that "concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted" (at para 33).

[38] Also relevant to my analysis is *Omobude v Canada (Citizenship and Immigration)*, 2015 FC 602 [*Omobude*], in which the IAD had, like in this matter, found the applicant to be inadmissible but had yet to make a finding on H&C grounds. On judicial review, the respondent in *Omobude* argued that the application was premature, since the IAD's decision was an interlocutory one.

[39] Justice Bédard agreed with the respondent, holding that interlocutory decisions cannot be submitted for judicial review before all internal remedies have been exhausted, and if the

applicant was dissatisfied with the end result after the H&C, the final IAD decision could be judicially reviewed (at paras 19, 22-24). Justice Bédard's conclusions in *Omobude* echo the Respondent's arguments in this case.

[40] I am satisfied that, at the conclusion of the subsection 69(2) hearing, the IAD may either issue a removal order and stay it, or dismiss the Appeal altogether, even in light of its findings on Mr. Ching's inadmissibility. Thus, I agree that the decisions under review in the Applications (as well as the IAD's Inadmissibility Decision) are interlocutory. This means that, absent exceptional circumstances, Mr. Ching cannot challenge them before this Court.

[41] The distinguishing feature between this case and *Omobude* is that Mr. Ching's Applications are grounded in the doctrine of abuse of process. However, raising abuse of process does not automatically justify judicial review of an interlocutory decision. The Federal Court of Appeal held in *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 [*JP Morgan*] that even when it comes to abuse of process arguments, a party may still have to wait until the end of an administrative process to seek relief in this Court, consistent with *CB Powell*:

> [89] In the tax context, to the extent that the Minister has engaged in reprehensible conduct that is beyond the reach of the Tax Court's powers, adequate and effective recourses may be available by means other than an application for judicial review in the Federal Court. For example, breaches of agreements, careless, malicious or fraudulent actions, inexcusable delay, and abuses of process may be redressed by way of actions for breach of contract, regulatory negligence, negligent misrepresentation, fraud, abuse of process, or misfeasance in public office. Whether these actually constitute adequate, effective recourses depends upon the circumstances of the particular case.
>
> [Citations omitted.]

[42] As noted in *JP Morgan*, whether effective alternative relief is available depends on the circumstances of the particular case. In *Almrei v Canada (Citizenship and Immigration)*, 2014 FC 1002 [*Almrei*], Justice Mosley cited several examples where this Court has allowed parties to raise abuse of process in the immigration context at an early stage:

> [38] In *Tursunbayev*, Justice Russell held that the applicant could bring abuse of process arguments at an early stage of the admissibility process, notwithstanding that a decision had not been made regarding his admissibility or deportation. This was in the context of disclosure issues over what was alleged to be a disguised extradition to accommodate the enforcement interests of a foreign jurisdiction.
>
> [39] In *Kanagaratnam*, Justice Manson granted an interim stay preventing the Delegate from deciding the applicant's application until the judicial review seeking a declaration that the proceedings amounted to an abuse of process was heard. In doing so, Justice Manson rejected the respondents' arguments on prematurity and the availability of judicial review after the Delegate rendered a decision.
>
> [40] Justice Phelan granted a stay of proceedings in the middle of a judicial review hearing in the *John Doe* matter, above, finding that the process may have been abusive. The decision under review was arguably interlocutory, he found, but fundamental to the case.

[43] The issue of adequate alternative remedy was also considered by Justice Fothergill in *Shen* 2016. There, the applicant sought judicial review of an interlocutory RPD decision which had dismissed the applicant's motions for (a) an order excluding evidence from Chinese authorities on the ground that it was obtained by torture, and (b) an order preventing MPSEP from intervening in the applicant's refugee claim, on the ground that it had breached its duty of candour, amounting to an abuse of process.

[44] The respondent in *Shen* 2016 argued that the application was premature. While agreeing with the respondent on certain points (see paras 23-24), Justice Fothergill followed *JP Morgan* in finding that the adequacy of effective recourse depends upon the circumstances of each case, and that the possibility of a judicial review of any final decision was not an effective remedy, concluding as follows:

> [27] The Federal Court of Appeal held in *Canada (Minister of National Revenue) v JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250 at para 89 that even if an abuse of process is present, premature intervention by way of judicial review will be unwarranted so long as an adequate alternative remedy exists. The adequacy of effective recourse depends upon the circumstances of each case. Here, I am not satisfied that the possibility of judicial review of the RPD's final decision provides an effective remedy.
>
> [28] The Supreme Court of Canada held in *Behn v Moulton Contracting Ltd.*, 2013 SCC 26 at para 40, [2013] 2 SCR 227 that the doctrine of abuse of process is characterized by its flexibility and is unencumbered by specific requirements. The doctrine evokes the public interest in a fair and just process and the proper administration of justice. In the unusual circumstances of this case, permitting the proceedings to continue without a proper enquiry into whether the duty of candour was breached or an abuse of process has occurred may harm the integrity of the RPD's proceedings, and may ultimately bring the administration of justice into disrepute.

[45] I turn now to Mr. Ching's reliance on the Supreme Court's holding in *Cobb*, which was a focus of his counsel's submissions. *Cobb* was an appeal from a decision of the Ontario Court of Appeal, which had overturned a judge's decision to stay, as an abuse of process, the extradition proceedings before him. There, the abuse of process arguments were based on certain reprehensible comments made by an American judge and prosecuting attorney, who had suggested that uncooperative fugitives would receive the "absolute maximum jail sentence" and be subject to homosexual rape in prison, respectively.

[46] In *Cobb*, partly at issue was the Ontario Court of Appeal's finding that the extradition judge ought to have waited until "after the executive ha[d] made the decision to surrender the fugitive to the requesting state" ([1999] OJ No 3278 at para 7). The Supreme Court disagreed on appeal, holding that the appellants' abuse of process arguments raised concerns to be properly addressed by the extradition judge, and that the existence of potential remedies from the executive did not oust the extradition judge's jurisdiction to preserve the integrity of court proceedings (*Cobb* at para 48).

[47] *Cobb* is distinguishable for various reasons, including that Mr. Ching's is not an extradition matter. However, I find that the principles articulated in *Cobb* are relevant. In other words, this Court is charged with protecting the integrity of the proceedings to which Mr. Ching is subject. This is, in my view, consistent with the Federal Court's jurisprudence outlined above, including *Almrei* and *Shen* 2016.

[48] I note that, generally, this Court should consider six factors in determining whether to dismiss an application for prematurity: (1) hardship to the applicant, (2) waste, (3) delay, (4) fragmentation, (5) strength of the case, and (6) statutory context (*Air Canada v Lorenz*, [2000] 1 FC 494). I am alive to the reality that waste and delay weigh against determining Mr. Ching's Applications, and favour permitting the Appeal to reach its conclusion (see *Shen* 2018 at para 56). However, it has been argued before me that this Court's intervention is required to remedy an abuse of process by MPSEP and the IAD itself (see *Shen* 2018 at para 58). I am thus satisfied that, as in *Shen* 2016, a proper enquiry into Mr. Ching's abuse of process

arguments is necessary at this stage, such that judicial review at the end of the Appeal would not be an adequate remedy.

[49] In conclusion, I find that Mr. Ching's Applications — insofar as they raise abuse of process — are not premature.

Issue 3: Should the Appeal be stayed for abuse of process arising from delay?

[50] The third issue to be decided is whether the Appeal should be permanently stayed as a result of abuse of process arising from delay. The Appeal was commenced in 2009 and has yet to be concluded. Mr. Ching contends that this delay has been over his objection and that it has caused him prejudice, such that it amounts to an abuse of process. For the reasons that follow, I have concluded that Mr. Ching's arguments are factually unsubstantiated.

(1) Background on delay

[51] Mr. Ching did not swear an affidavit in support of his Applications, which is curious, given the serious issues raised. Instead, he relied on two affidavits of Amina Sherazee, a lawyer in Mr. Galati's office, sworn January 31, 2017 and May 1, 2017 respectively.

[52] In her January 31, 2017 affidavit, Ms. Sherazee deposed that (a) Mr. Ching was born in China in 1969 and became a permanent resident of Canada in 1996, (b) he applied for Canadian citizenship in 2001, abandoned this application, and applied again in 2005, and (c) in 2006, he applied to the Federal Court, in a proceeding bearing the file number T-1508-06, for an order of

mandamus under sections 18 and 18.1 of the *Federal Courts Act*, RSC, 1985, C F-7, requiring his citizenship application to be processed. I have reviewed the order issued in that proceeding, made on consent, which directed the Minister of Citizenship and Immigration [MCI] to make best efforts to complete the processing of Mr. Ching's citizenship application on or before August 1, 2007.

[53] For its part in these Applications, the Respondent relied on three affidavits of Randal Hyland, counsel to MPSEP, affirmed March 6, 2017, May 2, 2017, and December 14, 2017. In summarizing the history of these proceedings, given that the Certified Tribunal Record [CTR] spans over 3,500 pages, I am indebted to the timeline prepared by the Respondent in its materials.

[54] In his first affidavit, Mr. Hyland deposed that, in 1996 and 2001, INTERPOL Red Notices were issued against Mr. Ching, as it was alleged that he was involved in an embezzlement scheme with two associates in China.

[55] What transpired between 2001 and 2008 is the subject of some controversy, and ultimately immaterial to whether the administrative delay in completing the Appeal amounts to an abuse of process. Nevertheless, I will summarize some of what is stated in Ms. Sherazee's January 31, 2017 affidavit.

[56] Ms. Sherazee deposed that (a) citizenship officials knowingly kept Mr. Ching in the dark about the delay in his citizenship application, (b) China INTERPOL issued a warrant for

Mr. Ching's arrest in 2001, after obtaining information by torture from his associates in China, (c) a "corrupt" Chinese court had, in July 2002, convicted Mr. Ching's associates based on evidence obtained by torture, (d) in August 2002, a Canadian immigration official had given Mr. Ching "immigration clearance" on his first citizenship application, (e) between 2001 and 2004, Chinese police had contacted Canada's RCMP Liaison Office in Beijing, which supplied them with information about Mr. Ching, and (f) in December 2004, the Chinese police requested that the RCMP Liaison Office assist in preventing Mr. Ching from acquiring Canadian nationality, following which his citizenship application was delayed by Canadian immigration officials.

[57] An IRPA subsection 44(1) report was issued in March 2008, reporting that Mr. Ching was inadmissible under IRPA paragraph 36(1)(c) for serious criminality. The ID conducted its admissibility hearing over the course of a number of sittings later that year and in 2009, and then issued its Admissibility Decision on May 5, 2009, determining that Mr. Ching was not inadmissible.

[58] MPSEP filed its notice of appeal to the IAD on June 1, 2009. The IAD held pre-hearing conferences on February 5, 2010 and March 2, 2010 to discuss timelines for the Appeal. Ms. Sherazee deposed in her January 31, 2017 affidavit that Mr. Wong indicated, during the February 5, 2010 conference, his intention to pursue an abuse of process motion on Mr. Ching's behalf before the IAD. According to the evidence in Mr. Hyland's first affidavit, the parties agreed in or around that time that the IAD would first hear and decide the issue of admissibility

and abuse of process, and then hear evidence and submissions on the matter of special relief under IRPA subsection 69(2).

[59] Mr. Ching then applied to have the Appeal continue as a private proceeding on May 26, 2010, which was opposed by MPSEP, but later granted by the IAD during hearings held in June 2010. Mr. Ching then submitted argument on the issue of abuse of process by letter dated July 20, 2010. On July 26, 2010, the IAD asked for further submissions on its jurisdiction to hear Mr. Ching's abuse of process arguments, which Mr. Ching submitted on September 1, 2010.

[60] Further hearing days were held on December 6 and 7, 2010, and on March 16, 2011. On December 21, 2011, the IAD issued its Inadmissibility Decision, finding that (a) it did not have jurisdiction to consider Mr. Ching's abuse of process arguments, and (b) Mr. Ching was inadmissible. The IAD directed its Registrar to schedule the H&C portion of the Appeal. Mr. Ching did not seek judicial review of the Inadmissibility Decision.

[61] On February 21, 2012, the IAD issued a peremptory notice to appear for a resumption of Mr. Ching's hearing for the special relief (H&C) component on April 18, 2012. On April 13, 2012, Mr. Wong requested that the member recuse herself for bias, and, in the alternative, that the H&C portion of the Appeal be heard by a different member.

[62] On April 17, 2012, Mr. Ching commenced an action in the Federal Court (file number T-793-12) against the IAD member, MCI, and the Attorney General of Canada, pleading that,

among other things, the defendants had intentionally “abused process, exceeded authority and jurisdiction, engaged in public misfeasance, [and] conspired against” Mr. Ching (there was a subsequent motion to strike the Statement of Claim, resulting in its amendment on consent).

[63] On April 18, 2012, the IAD heard recusal submissions. Shortly after, Mr. Ching filed a claim for refugee protection to the RPD. Then, on December 24, 2012, the IAD dismissed Mr. Ching’s recusal application. However, in this Recusal Decision, the IAD ordered that the H&C portion of the Appeal be heard by a different member of the IAD, as requested by Mr. Ching in the alternative. Then, in an application bearing the file number IMM-588-13, Mr. Ching sought leave to judicially review the Recusal Decision. Leave, however, was dismissed.

[64] On January 24, 2013, MPSEP made an application to the IAD, requesting that Mr. Wong be ordered to withdraw or recuse himself from the Appeal. Mr. Ching replied in February 2013, and further submissions came from MPSEP in June 2013. By decision dated July 18, 2013, a Case Management Officer of the IAD rejected MPSEP’s request, and advised that the H&C portion of the Appeal would be scheduled.

[65] An IAD “Scheduling Memo” in the CTR indicates that, on July 23, 2013, the IAD contacted Mr. Wong, who advised that he “needed to know when the RPD hearing was going to go ahead”. On July 25, 2013, an IAD Case Management Officer sought directions from the Assistant Deputy Chair [ADC] of the IAD, writing “Cnsl does not want to schedule IAD hearing until he knows when the RPD hearing will be heard. He is under the impression that the RPD hearing has to preceed the IAD one” [*sic*]. On July 26, 2013, the ADC of the IAD ordered that

"[t]he resumption of the IAD hearing should not occur before the completion of the RPD hearing and decision of the RPD".

[66] The RPD hearing was held in four sittings in February and March of 2014. On February 12, 2014, counsel for MPSEP wrote to the IAD, advising that a removal order had not yet been issued in MPSEP's Appeal, and asking that one be issued against Mr. Ching pursuant to the Inadmissibility Decision. The ADC denied this request on February 12, 2014, advising that MPSEP's Appeal would continue to be held in abeyance pending the completion of the RPD proceeding. During subsequent scheduled status reviews of the matter in April and September 2014, the IAD continued to look into the status of the RPD proceeding.

[67] On October 31, 2014, the RPD found Mr. Ching to be excluded under section 98 of IRPA [RPD Decision]. The RPD Decision was received by the IAD on November 4, 2014, and the next day, the ADC ordered that the Appeal be scheduled for resumption. By letter dated November 7, 2014, Mr. Hyland also requested that the Appeal be resumed, in light of the release of the RPD Decision. However, by letter dated November 24, 2014, Mr. Wong advised that Mr. Ching had sought leave to judicially review the RPD Decision, in an application bearing the file number IMM-7849-14, and asked that the Appeal continue to be held in abeyance until the RPD matter was finally decided. By letter submitted the next day, Mr. Hyland argued that the Appeal should be resumed as soon as possible, given that it had been adjourned since April 2012. By letter dated January 30, 2015, a Case Management Officer advised the parties that the Appeal would be scheduled for a hearing.

[68] An IAD "Scheduling Memo" in the CTR indicates that, in February and March 2015, Mr. Wong was not amenable to scheduling a resumption, as he intended to bring an application to "look into the admissibility" of Mr. Ching. Leave was granted in IMM-7849-14 on March 26, 2015. On April 21, 2015, Mr. Wong requested that the IAD postpone the resumption of the Appeal until the final disposition of Mr. Ching's refugee claim and further argued that the H&C portion should only be heard once discoveries were complete in Mr. Ching's civil action (in the alternative, he requested that seven days be set aside for the H&C portion). Further postponement was opposed by MPSEP on April 29, 2015. On June 12, 2015, the IAD ordered that the Appeal would proceed, and a pre-hearing conference was scheduled for September 24, 2015.

[69] However, on July 15, 2015, Justice Roy allowed Mr. Ching's judicial review of the RPD Decision, and ordered that the matter be set aside and remitted for redetermination. As a result, on August 18, 2015, the IAD again ordered that the Appeal would again be held in abeyance.

[70] On September 11, 2015, Mr. Ching applied to the IAD to reconsider the Inadmissibility Decision, which MPSEP opposed. On October 17, 2016, Mr. Ching commenced an application in the Federal Court (IMM-4322-16) seeking an order of *mandamus* compelling the IAD to decide his reconsideration application. This judicial review was discontinued on November 21, 2016. Mr. Ching next commenced IMM-4585-16 by notice of application dated November 2, 2016, seeking leave to judicially review the IAD's Refusal to Entertain (which is the first decision under review today). MPSEP, in response, requested once again that the IAD resume the Appeal.

[71] The IAD held a mid-hearing conference on February 6, 2017, hearing submissions from the parties on reconsideration and resumption. The IAD issued a decision dated March 10, 2017 — the Refusal to Reconsider, the second decision under review today — rejecting Mr. Ching's reconsideration application, but allowing MPSEP's resumption request, stating that there was no indication that the refugee matter would be resolved in the foreseeable future, and that there was a need to move the process forward.

[72] The last steps in the long and complex procedural history of these Applications then took place. Leave was granted in IMM-4585-16 on March 23, 2017. By notice of application dated April 4, 2017, Mr. Ching sought leave to judicially review the Refusal to Reconsider, initiating IMM-1531-17. By order dated September 26, 2017, leave was granted in IMM-1531-17 and the matter was consolidated with IMM-4585-16.

[73] In his affidavit sworn May 2, 2017, Mr. Hyland deposed that the RPD had set a hearing date for June 20, 2017 for the redetermination of Mr. Ching's refugee claim. However, in his affidavit sworn December 14, 2017, Mr. Hyland deposed that the RPD had decided, at Mr. Ching's request, to hold its proceeding in abeyance pending the outcome of the Appeal.

(2) Parties' arguments on delay

[74] Mr. Ching submitted in his leave memoranda that the Appeal should be permanently stayed for delay, given (a) the time he has been in Canada, (b) his status as a permanent resident since 1996, and (c) the fact that the Appeal, commenced in 2009, had still not been completed, "over his objection".

[75] Mr. Ching relied on a number of cases in support of his position, including *Akthar v Canada (MEI)*, [1991] FCJ No 513 (FCA), in which Justice Hugessen referred to a delay of two and half years as a "quite extraordinary length of time". Mr. Ching also referred to *Hernandez v Canada (MEI)*, [1993] FCJ No 345 (FCA), in which it was observed that an argument based in "unreasonable delay" will "rarely, if ever" succeed (see also *Cihal v Canada (MEI)*, [2000] FCJ No 577 (FCA), also citing *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 [*Blencoe*], the leading case in this area.

[76] Mr. Ching submitted that his was a rare and compelling case justifying a remedy, as the Appeal has been ongoing since 2009, citing *Francois v Canada (MEI)*, 14 Imm LR (2d) 157 (IRB) [*Francois*], in which the Adjudicator held that the refugee claimants' rights under section 7 of the *Canadian Charter of Rights and Freedoms* [*Charter*] had been violated since, in waiting almost two years to have their claims heard, they had been deprived of their psychological security of person. Mr. Ching also relied on *R v Rahey*, [1987] 1 SCR 588 (SCC) [*Rahey*], in which charges against the accused were stayed when the trial judge delayed eleven months in rendering a verdict.

[77] Mr. Galati, in oral submissions, conceded that longer periods of administrative delay have been found by this Court not to warrant any remedy, but argued that whether abuse of process arises depends on the facts of each case. He also conceded that Mr. Ching had, more than once, asked for an adjournment of the Appeal. However, he argued that Mr. Ching had not contributed to the delay in the period preceding the Appeal, during which Mr. Ching's citizenship application lagged, causing him prejudice, including high legal costs. When asked

why Mr. Ching had not sworn his own affidavit evidence in these Applications in support of his allegations of prejudice, Mr. Galati submitted that no such evidence was needed, as the delay in this case was in and of itself oppressive, and the prejudice to Mr. Ching apparent on the face of the matter.

[78] The Respondent countered that Mr. Ching had not objected to the IAD's holding the Appeal in abeyance; to the contrary, he had consistently advised the IAD that the Appeal should be heard after the determination of his refugee claim. The Respondent relied on *Blencoe*, in which the Supreme Court held that a party's contribution to or waiver of the delay at issue is a relevant factor to determining whether the delay itself was unacceptable (at paras 121-122). In any event, since the IAD has indicated its readiness to move forward with the H&C portion of the proceeding, the Respondent encouraged the Court not to intervene. Furthermore, the Respondent stressed that the delay in completing the Appeal was not inordinate, given its complexity, and the many applications that had taken place since it began in 2009. In the Respondent's submission, much of this delay was attributable to Mr. Ching, who had also failed to adduce any evidence of prejudice arising from the delay.

(3) Analysis on delay

[79] First, I have not been persuaded by Mr. Ching's argument that his overall length of time in Canada has any bearing on the issue of administrative delay. For delay to qualify as an abuse of process, this Court has held that the delay must be part of an administrative proceeding that is underway (*Torre v Canada (Citizenship and Immigration)*, 2015 FC 591 at para 30, aff'd 2016 FCA 48 [*Torre* FCA]). I see no basis for departing from this reasoning here (see also

Ismaili v Canada (Public Safety and Emergency Preparedness), 2017 FC 427 at paras 29-30). In my view, the relevant period of delay began on June 1, 2009, the date of MPSEP's notice of appeal, and continued to the date Mr. Ching commenced the first of the Applications now before this Court — in other words, we are concerned with a period of approximately seven and a half years.

[80] I also do not agree with Mr. Ching's submission that the period preceding the Appeal speaks to the prejudice suffered by him: the jurisprudence clearly establishes that prejudice is only relevant to the analysis insofar as it was caused by the delay at issue, and his citizenship applications took place before the Appeal in a different process than the one under scrutiny.

[81] As the parties have recognized, the starting point when analyzing abuse of process for delay is *Blencoe*, which instructs that delay does not, on its own, give rise to an abuse of process — otherwise, this would create a judicially-imposed limitation period for administrative proceedings. Rather, an applicant must prove that a "significant prejudice" resulted from the delay (*Blencoe* at para 101).

[82] Prejudice may exist in the form of compromised hearing fairness, such as where memories have faded, or essential witnesses have died (see *Blencoe* at para 102; *Chabanov v Canada (Citizenship and Immigration)*, 2017 FC 73 at para 45 [*Chabanov*]). However, where the fairness of the hearing has not been impacted by the delay, an applicant may also prove other forms of prejudice. In *Blencoe*, the Supreme Court held that such other forms prejudice can include, for instance, significant psychological or reputational harm. Either way, "few lengthy

delays" will meet the abuse of process threshold; rather, the delay must be unacceptable to the point of being so oppressive as to taint the proceedings (*Blencoe* at paras 115, 121).

[83] On whether the delay meets the high threshold, the Supreme Court held in *Blencoe*:

> 122 The determination of whether a delay has become inordinate depends on the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay or waived the delay, and other circumstances of the case. As previously mentioned, the determination of whether a delay is inordinate is not based on the length of the delay alone, but on contextual factors, including the nature of the various rights at stake in the proceedings, in the attempt to determine whether the community's sense of fairness would be offended by the delay.

[84] Justice LeBel, who dissented in part in *Blencoe*, provided three factors to balance in assessing the "reasonableness" of administrative delay: (1) the time taken compared to the inherent time requirements; (2) the causes of delay beyond the inherent time requirements of the matter; and (3) the impact of the delay (at para 160).

[85] The Federal Court has had many opportunities to consider and apply *Blencoe* in determining whether delay amounts to abuse of process. Some Federal Court decisions have focused on the *Blencoe* majority's analysis (see, for instance, *Valdez v Canada (Citizenship and Immigration)*, 2016 FC 377 at paras 36-37; *Canada (Citizenship and Immigration) v Modaresi*, 2016 FC 185 at paras 62 [*Modaresi*]; *Fabbiano v Canada (Citizenship and Immigration)*, 2014 FC 1219 at paras 8-10), while others are structured around the framework set out by Justice LeBel (see, for instance, *Canada (Minister of Citizenship and Immigration) v Parekh*, 2010 FC 692 at paras 28-29; *Chabanov* at paras 47-48; *Hassouna v Canada (Citizenship and

Immigration), 2017 FC 473 at para 53). In my view, either approach is appropriate, since both involve a contextual analysis of all the circumstances relevant to the delay at issue (see *Paul v Canadian Broadcasting Corp*, 2001 FCA 93 at para 60).

[86] Turning to the facts of this case, I find that there are two reasons why Mr. Ching's arguments on delay cannot succeed. First, Mr. Ching has not provided any evidence of prejudice caused to him by the delay. This is fatal to his position (see *Canada (Public Safety and Emergency Preparedness) v Prue*, 2012 FCA 108 at para 14). Second, having regard to two of the contextual factors set out in *Blencoe* — namely, the complexity of Mr. Ching's immigration proceedings and his own contribution to the delay — I have not been persuaded that the delay in this case is "inordinate" in the sense of offending the community's sense of fairness.

[87] First, on the lack of evidence of prejudice, I agree with the Respondent that Ms. Sherazee's affidavit — in which she deposed that she had been "advised" and "verily believed", without stating the source of her knowledge, that the Appeal had caused "psychological damage" to Mr. Ching and his family — does not establish that Mr. Ching has suffered psychological harm from the delay. I note that under the *Federal Courts Rules*, SOR/98-106, affidavits must be confined to facts within the deponent's personal knowledge (Rule 81(1)), and an adverse inference may be drawn from the failure of a party to provide evidence from someone with personal knowledge (Rule 81(2)).

[88] Mr. Ching relied on *François* in his written materials for the proposition that MPSEP's Appeal has harmed his psychological security by being what it is — a lengthy and stressful

immigration proceeding that may end in a removal order being issued against him. Similarly, his counsel stated at the hearing that the prejudice to Mr. Ching was evident on the face of his immigration history.

[89] *François* is a dated, split administrative decision, which appears to never have been cited by any court or administrative tribunal, and I am not prepared to hold based on it alone — or on Mr. Ching's immigration record — that he meets the degree of psychological harm required by *Blencoe*. Rather, I look to *Torre* FCA, which unlike *François*, is often cited and followed, and in which the Federal Court of Appeal held that the appellant had to do more than "make vague allegations that the delay endangered his physical and psychological integrity" (at para 5).

[90] Further, I find that this Court's decision in *Chabanov* is on all fours with the issue before me. In that case, authorities delayed some eleven years after receiving information from the police regarding the applicant's use of fraudulent documents before commencing a revocation of citizenship. While the delay was found to be "excessive and largely unexplained", it nonetheless did not reach the threshold of abuse of process because the applicant had failed to provide sufficient proof of significant prejudice resulting directly from the delay (at para 65). It is not for the Court to speculate on the prejudice to an applicant (*Montoya v Canada (Attorney General)*, 2016 FC 827 at para 44).

[91] I note that Mr. Ching raised several other forms of alleged prejudice in these Applications. At the hearing, Mr. Galati argued that Mr. Ching had been severely prejudiced by the IAD's finding of inadmissibility and the deprivation of his citizenship, as alleged in his civil

action. He further submitted that, if Mr. Ching were required to return to China, he himself may face the prospect of torture there. However, these forms of prejudice — to the extent that they are supported by any evidence — were not caused by the delay in the Appeal itself, which is the administrative process in question in today's judicial reviews. Those prospective possibilities are therefore irrelevant to the issue of whether that delay amounts to an abuse of process (see *Chabanov* at paras 62, 64).

[92] *Blencoe*'s contextual factors further support my conclusion that the delay in this case does not amount to abuse of process. First, as is evident from my above summary of the procedural background to the Appeal (see section (1) above entitled "Background on delay"), Mr. Ching's immigration proceedings have been legally, factually, and procedurally complex.

[93] Second, notwithstanding Mr. Ching's assertion that the delay in this case has been "over his objection", the record is clear that Mr. Ching contributed to that delay with his various requests for abeyance pending his parallel immigration proceedings, and his various judicial reviews. Nor does the record substantiate the affirmation from Ms. Sherazee that the Appeal was never resumed despite "repeated requests" from Mr. Ching's counsel. For instance, Ms. Sherazee indicated in her affidavit that Mr. Ching had requested on April 21, 2015 that the Appeal continue. The CTR contains a letter from Mr. Wong of that date, which was not attached as an exhibit to Ms. Sherazee's affidavit, but it asks that the Appeal be postponed until the final disposition of the refugee proceedings, and only in the alternative — if such a postponement request was denied — that the H&C hearing be set down for a minimum of seven days.

[94] The most that can be said is that Mr. Ching sought to have his reconsideration application determined by the IAD, meaning that he challenged the Inadmissibility Decision but did not otherwise seek to move the Appeal forward. Indeed, Mr. Hyland deposed in his Affidavit on behalf of MPSEP that, to the best of his knowledge, Mr. Ching has never objected to the Appeal being held in abeyance pending a final RPD determination. The evidence before me supports that view.

[95] In conclusion, given (a) the legal and factual complexity of the proceedings, (b) Mr. Ching's contribution to the delay, and (c) the lack of evidence of prejudice before me, I find no abuse of process due to delay. However, there remains the related issue of abuse of process due to evidence that the ID found was obtained by torture. That comes next.

Issue 4: Does MPSEP's Appeal disclose an abuse of process as a result of the ID's findings on evidence obtained by torture, and, if so, what is the appropriate remedy?

[96] The fourth issue relates again to abuse of process. Mr. Ching has argued that the evidence against him was obtained by torture. In Mr. Ching's submission, (a) MPSEP was abusive in convening an admissibility hearing before the ID, and then appealing the ID's Admissibility Decision to the IAD, and (b) the IAD was abusive in issuing its Inadmissibility Decision without adequately dealing with the evidence found by the ID to have been tainted. He seeks a permanent stay, or, in the alternative, that the Appeal be set aside and remitted for determination anew.

[97] For the following reasons, I have been persuaded by Mr. Ching's second submission — namely, that the Inadmissibility Decision discloses an abuse of process in respect of the IAD's treatment of the evidence found by the ID to have been obtained by torture. However, a permanent stay is not the appropriate remedy. Rather, I will order the alternative, lesser relief sought by Mr. Ching, and remit the Appeal for redetermination, including on the subject of his admissibility.

(1) Background on evidence allegedly obtained by torture

(a) *The ID's Admissibility Decision*

[98] MPSEP argued before the ID that Mr. Ching was inadmissible to Canada under paragraph 36(1)(c) of IRPA for serious criminality:

Serious criminality	**Grande criminalité**
36 (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	**36 (1)** Emportent interdiction de territoire pour grande criminalité les faits suivants :
[…]	[…]
(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.	**c)** commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.
[…]	[…]
(3) The following provisions	**(3)** Les dispositions suivantes régissent l'application des paragraphes (1) et (2) :

govern subsections (1) and (2):	
[…]	[…]
(d) a determination of whether a permanent resident has committed an act described in paragraph (1)(c) must be based on a balance of probabilities…	**d)** la preuve du fait visé à l'alinéa (1)c) est, s'agissant du résident permanent, fondée sur la prépondérance des probabilités…

[99] MPSEP alleged that Mr. Ching had colluded with his associates in China, Fuyou Wang and Guoben Su, to jointly commit the crime of embezzlement, and that in Canada such an act would constitute the offences of conspiracy and fraud under paragraphs 465(1)(c) and 380(1)(a) of the *Criminal Code*, RSC 1985, c C-46. As it was uncontested that Mr. Ching was a permanent resident of Canada, the hearing before the ID turned on whether MPSEP had shown, on a balance of probabilities, that Mr. Ching had committed the acts alleged (see IRPA, above, at para 36(3)(d)).

[100] MPSEP relied on (a) an INTERPOL Red Notice indicating that Mr. Ching was wanted for prosecution in China, (b) translated documents from the People's Procuratorate of the province of Hebei, which identified Mr. Ching as a criminal suspect, wanted for arrest in China for offences under Articles 381 and 312 of the *Criminal Code of the Peoples' Republic of China*, (c) a translated decision of the Intermediate People's Court of Shijiazhuang of Hebei Province, dated August 29, 2002, convicting Mr. Wang and Mr. Su, (d) a translated decision of the Superior People's Court of Hebei Province, dated September 24, 2002, upholding the decision of the Intermediate People's Court, and (e) the oral testimony of Procurator Li Jun Zhang, the lead prosecutor at the trial of Mr. Wang and Mr. Su.

[101] According to the ID's summary of the Chinese courts' decisions:

1. Mr. Wang was a government official (namely, the Director of the Hebei Provincial Government's Office in Beijing), while Mr. Su was the Manager of Hong De Li, a corporation;
2. Mr. Wang was responsible for finding a suitable location for the construction of a government building in Beijing;
3. In 1996, Mr. Ching and Mr. Su recommended a vacant lot to Mr. Wang, falsely claiming that the Hong De Li company had the assignment right over the property;
4. Mr. Wang knew that Hong De Li did not have the assignment right, but nevertheless entered into an agreement on behalf of the Hebei provincial government to purchase the lot at ¥2,850/m^2, a price which included compensation for Hong De Li;
5. Mr. Wang later learned Hong Kong Macau Ltd., the company that actually held the assignment right, had priced the property at ¥2,600/m^2, a difference of approximately two million Canadian dollars;
6. Instead of reporting the price difference, Mr. Wang negotiated with Mr. Ching and Mr. Su on how to "legally" obtain the price difference and split the funds;
7. After the Hebei provincial government learned of the price difference, there was a formal arbitration in which the government was found to be in breach of its contract with Hong De Li and ordered to pay the balance owing;
8. Mr. Wang was removed from his position, and the Hebei provincial government settled with Hong De Li; and

9. Mr. Su and Mr. Ching had shared "illicit money" as a result of the arrangement, with Mr. Ching receiving the larger share.

[102] According to the decision of the Intermediate People's Court, both Mr. Wang and Mr. Su were represented by counsel at trial. The translation of this trial decision reads:

> … the People's Procuratorates of Shijiazhuang, Hebei Province, formally charged Mr. Wang Fuyou for embezzlement, misappropriation of public funds and acceptance of bribes, and charged Mr. Su Guoben for embezzlement. On May 27, 2002, the said indictments were brought to this court. This court set up a collegial panel composed of three judges as required by law and conducted a public trial. The People's Procuratorates of Shijiazhuang, Hebei Province, assigned procurators Mr. Zhang Lijun and Mr. Li Jianxin to pursue the prosecution, with assistance from assistant procurators Ms. Wu Wenjuan and Ms. Sun Yunying. The defendants Mr. Wang Fuyou and Mr. Su Guoben, along with their counsels Ms. Hou Fengmei, Mr. Zhang Qingjiang, Mr. Yang Chengwei and Mr. Li Guishan, were all present in court for the proceedings…

[103] The evidence before the Intermediate People's Court included the confessions of Mr. Wang and Mr. Su:

> …The Procuratorates presented to this court original documents, witness testimonies <u>and the confessions by the defendants</u> as evidence of the crimes committed by the defendants with the conclusion that Mr. Wang Youfu's actions constituted felonies of acceptance of bribes, misappropriation of public funds and embezzlement, and that Mr. Su Guoben's actions constituted the felony of embezzlement.
>
> [Emphasis added.]

[104] According to the ID, Procurator Zhang gave evidence before it that the trial lasted only one day, and that Mr. Wang and Mr. Su were convicted primarily on the basis of witness

evidence taken prior to the trial, including their confessions. Apparently, only one witness actually attended the trial.

[105] Mr. Ching argued before the ID that Mr. Wang and Mr. Su's confessions had been obtained by torture. Mr. Ching's evidence on this point came from the following five sources: (a) the testimony of Procurator Zhang, (b) the testimony of Mr. Wang's wife, (c) petitions by Mr. Su, and Mr. Wang's wife, following the trial, (d) testimony from Mr. Ching's expert witness, Clive Ansley, and (e) documentary evidence.

[106] Procurator Zhang testified by telephone through an interpreter. He gave evidence to the ID that, during the course of the trial, both Mr. Wang and Mr. Su had raised the issue of "forced confession". However, he testified that neither Mr. Wang nor Mr. Su had complained of forced confession during Procurator Zhang's pre-trial investigation, despite a specific inquiry on this point, as required by Chinese law. Procurator Zhang also testified before the ID that, at trial, Mr. Wang and Mr. Su were allowed to fully advance their arguments on forced confession, but that the Intermediate People's Court had concluded that there was insufficient evidence on this point.

[107] The ID's Admissibility Decision expressed concerns that Procurator Zhang had refused to make himself available for the conclusion of his cross-examination by Mr. Ching's counsel, who had planned to question Procurator Zhang on his evidence relating to the forced confessions. The ID was also troubled that neither of the two Chinese court decisions referenced Mr. Wang's and Mr. Su's allegations regarding torture.

[108] Mr. Wang's wife also testified from China by telephone through an interpreter. Her evidence was that she herself had been detained for a month in connection with the allegations against her husband, during which period she was not permitted to contact her family, was subject to interrogation, and made to stand for long periods of time.

[109] Mr. Wang's wife also gave evidence with respect to what her husband had experienced during his detention from June 23, 2000 until his trial in 2002. She testified that her husband had slept on a cement floor for four months, had his hands and feet shackled for one month, been interrogated for long hours, been slapped repeatedly, been cuffed to a chair leg with a bag over his head for three days, and been hung by handcuffs over heating pipes. She further testified that she had attended the trial, and had heard her husband speak about his mistreatment, but that the Intermediate People's Court had "changed the talking subject" when the issue was raised.

[110] Mr. Ching also relied on a petition allegedly made by Mr. Wang's wife (it is unclear to which government body the petition was made), that included a document entitled "Notes on Coerced Criminal Interrogations". The ID observed that the petition was hearsay, as it contained information purportedly told by Mr. Wang to his wife. The ID, however, still included lengthy excerpts from these "Notes" in its Admissibility Decision, which further detailed Mr. Wang's alleged torture.

[111] The ID also had before it a petition from Mr. Su for the reversal of his guilty verdict, which stated that he too had been tortured and had made a false confession only in order to "seek survival".

[112] The ID found that it was “ludicrous” to imagine that Mr. Wang or Mr. Su would have told Procurator Zhang of their mistreatment, when he would have appeared to them as the torturer, and that Procurator Zhang’s testimony conflicted with that of Mr. Wang’s wife, who had testified that the Intermediate People’s Court had not allowed Mr. Wang to fully raise the issue of torture. The ID found that Mr. Wang’s wife’s evidence was more credible, as Procurator Zhang had not made himself available for cross-examination on the issue.

[113] The ID concluded that it was “more likely than not that Wang’s and Su’s confessions were obtained by torture”, finding that the balance between the evidence of Procurator Zhang and Mr. Wang’s wife was “tipped” by Mr. Ching’s documentary and expert evidence on the use of torture to obtain confessions in China. As a result, the ID found that Mr. Ching was not inadmissible to Canada under IRPA:

> I am not willing to say that the Chinese court decisions are inadmissible evidence at this hearing. However it has been established that it is more probable than not that the underpinnings of the findings of those courts are flawed, that they are founded on confessions obtained by torture and supported by untested witness statements. This makes the decisions unreliable evidence in respect of an act that Mr. Ching is alleged to have committed. At the very least, the decisions of the Chinese courts do not meet the critical requirement, for the purposes of this hearing, that the evidence be credible or trustworthy. I give the findings of the courts no weight. Therefore there is no credible and trustworthy evidence that Mr. Ching committed an act that is an offence in China.

(b) ***The IAD’s Inadmissibility Decision***

[114] In its Inadmissibility Decision, the IAD’s analysis on the issue of evidence obtained by torture is contained in the following excerpt:

> There was a considerable volume of evidence both at the ID hearing and at this hearing related to the criminal trials in China of the respondent's co-accused, the Chinese criminal justice system and torture. However, given my assessment of other evidence in the appeal, it is not necessary for me to rely on the evidence or submissions related to those issues.

[115] The IAD summarized the reasons for its paragraph 36(1)(c) inadmissibility finding, concluding:

> While the individual pieces of evidence and reasonable inferences that can be drawn in relation to the respondent, such as: his connections and dealings with Wang, a government official, and Su, his friend; his business experience; the nature of the property scheme with its complicated web of agreements and civil decisions and nature and extent of potential compensation; his ongoing presence in China until Wang was arrested; the Interpol Red Notice and arrest warrant issued against the respondent; and <u>the charges and proceedings against Wang and Su in China</u>, are not in and of themselves sufficient to find the respondent inadmissible, however, when the evidence and reasonable inferences are considered as a whole, in my view and on a balance of probabilities, they are sufficient to establish that the respondent has committed acts in China that are an offence in China and if committed in Canada would constitute an offence in Canada as set out in paragraph 36(1)(c) of the Act. Therefore, I find the respondent is inadmissible pursuant to paragraph 36(l)(c) of the Act.
>
> [Emphasis added]

(2) Analysis on evidence allegedly obtained by torture

(a) *As a preliminary issue, is this Court precluded from examining alleged deficiencies in the 2011 IAD Inadmissibility Decision?*

(i) Parties' arguments on preliminary issue

[116] At the hearing, Respondent's counsel vigorously challenged this Court's ability to consider the alleged deficiencies in the IAD's Inadmissibility Decision, because that decision, decided in 2011, is not under review in either of the Applications before the Court today. In the Respondent's view, the Inadmissibility Decision should have been challenged by Mr. Ching when it was issued, and he cannot now revisit it under the guise of challenging the IAD's "process".

[117] The Respondent argued that allowing Mr. Ching to do so would violate the principle of finality, and permit an improper attack on a decision that Mr. Ching is out of time to judicially review. The Respondent argued that Mr. Ching's two notices of application only challenged the IAD's Refusal to Entertain and subsequent Refusal to Reconsider, and that only those two decisions are properly before this Court. Thus, the Respondent submitted that this Court could only order a remedy in respect of the process underlying the decisions actually under review, and not the entire process of the Appeal.

[118] At the hearing, Mr. Galati argued that the IAD's Refusal to Reconsider stemmed from, adopted, and incorporated its Inadmissibility Decision of 2011. He also submitted that the Applications challenged the IAD's process and that leave had been granted for the Applications as framed. Finally, he relied on *Rahey*, arguing that this Court was the forum in which Mr. Ching should have his relief, as the IAD was unwilling to deal with Mr. Ching's abuse of process arguments.

[119] Following the hearing, as I was of the view that the parties had not thoroughly canvassed this preliminary issue in the materials before me, I invited further submissions on this Court's ability to make a finding on abuse of process and order a remedy in respect of deficiencies arising from a decision not the subject of the judicial review before it.

[120] In his post-hearing submissions, Mr. Ching argued, through his counsel, that this Court and the Respondent had a "rudimentary non-grasp" of abuse of process. He submitted, without citing any authorities, that the doctrine of abuse of process relates to "the process" and that it speaks primarily to the parties' or a tribunal's conduct. Mr. Ching further argued that the Respondent was "misfocusing", because the primary relief sought by him was declaratory relief under sections 18 and 18.1 of the *Federal Courts Act*, which was "not circumscribed by reference to a decision".

[121] In its post-hearing submissions, the Respondent conceded that "if the conduct that has triggered the abuse of process is the result of a decision in the proceedings that is not the subject of the judicial review, the Court has jurisdiction to order a remedy in respect of the deficiencies arising in that decision".

(ii) Analysis on preliminary issue

[122] Given the Respondent's change of tack in its post-hearing submissions, this Court's jurisdiction to examine the Inadmissibility Decision in the context of an abuse of process analysis is no longer disputed. However, as neither party has put any authority before the Court

that is squarely on point, I will consider whether the parties' late-stage agreement on this issue is misguided.

[123] At the outset, I reject Mr. Ching's suggestion that because one of the decisions under review is a refusal to reconsider the IAD's Inadmissibility Decision, this somehow permits the Court to itself now examine the latter. First, when a reconsideration decision is under review, the Court cannot fully review or set aside the decision that was reconsidered (see *Blount v Canada (Attorney General)*, 2017 FC 647 at para 27). Second, the Refusal to Reconsider was not a reconsideration of the Inadmissibility Decision — it was a refusal to do so.

[124] I turn to Mr. Ching's chief argument, which is that the doctrine of abuse of process permits him to challenge deficiencies in the IAD's proceeding, even if those deficiencies are bound up in the IAD's Inadmissibility Decision issued several years ago, and never itself judicially reviewed.

[125] First, although Mr. Galati posited that this Court has only a "rudimentary non-grasp" of the relevant doctrine, I find that, to the contrary, the Federal Court has significantly developed the jurisprudence in this area. However, the specific issue being argued — namely, whether an interlocutory decision may be examined through the lens of abuse of process on judicial review of another decision made years later — has not yet arisen before this Court.

[126] The doctrine of abuse of process is used in a variety of legal contexts (*Toronto (City) v CUPE, Local* 79, 2003 SCC 63 at para 36). In these Applications, the Court is concerned with

the doctrine as it relates to state conduct touching on the fairness of the Appeal, and "the integrity of the judicial system" (*R v O'Connor*, [1995] 4 SCR 411 at para 73 [*O'Connor*]; see also *Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157 [*Mahjoub* 2017] at para 207).

[127] I am satisfied that, generally speaking, the doctrine of abuse of process permits applicants in the Federal Court to challenge state conduct beyond the four corners of the decision under judicial review. The clearest example of this is when administrative delay is said to give rise to abuse of process. In such cases, the Court is not limited to examining only the decision under review, but rather the underlying administrative process and its effect on the applicant. Indeed, this Court is routinely asked to consider whether the process leading to a final administrative decision breached the applicant's right to procedural fairness. This may require the Court to examine the effect and substance of administrative decisions rendered prior to the decision under review.

[128] Even though the IAD's Inadmissibility Decision substantively determined Mr. Ching's inadmissibility, I accept that it was an interlocutory decision made within an administrative proceeding that is not yet complete (*Omobude* at para 22), and that, although it would not ordinarily be thought of as such, this decision would qualify as "state conduct" that could be examined when abuse of process is raised.

[129] As a result, I am satisfied that, in determining whether the Appeal discloses an abuse of process, this Court is not precluded from examining the Inadmissibility Decision for the

deficiencies Mr. Ching alleges. In my view, Mr. Ching's delay in pursuing his abuse of process arguments before this Court does not preclude him from raising them now, but rather speaks to the lack of prejudice suffered by him in the interim, as well as his perception of the gravity of the abuse of process alleged, as I will explain.

(b) *Is section 7 of the* **Charter** *engaged?*

(i) Parties' arguments on section 7

[130] Mr. Ching has maintained throughout the course of these Applications that his rights under section 7 of the *Charter* are engaged by the Appeal. In his leave memorandum, he argued that section 7 protects not only physical security, but also psychological security, relying on *Mills v The Queen*, [1986] 1 SCR 863 (SCC) and *R v Morgentaler*, [1988] 1 SCR 30 (SCC). He further argued, relying on *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177 (SCC), that simply the "threat" of possible physical punishment or suffering was enough to engage section 7.

[131] In its further memorandum, the Respondent disputed that section 7 of the *Charter* was engaged in these proceedings. Relying on *Carter v Canada (Attorney General)*, 2015 SCC 5, the Respondent argued that section 7 protects against state interference with one's bodily integrity and serious state-imposed psychological stress, and that Mr. Ching had not provided any evidence of the deprivation of his security of person.

[132] At the hearing of these Applications, Mr. Galati referred the Court to *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 [*Charkaoui*]. In his post-hearing submissions, Mr. Ching reiterated that the "clear" holding of *Charkaoui* is that the *Charter* "applies to all procedures which could ultimately lead to a removal being sought or issued" (emphasis in original), excerpting from that decision as follows:

> 16 The individual interests at stake suggest that s. 7 of the *Charter*, the purpose of which is to protect the life, liberty and security of the person, is engaged, and this leads directly to the question whether the IRPA's impingement on these interests conforms to the principles of fundamental justice. The government argues, relying on *Medovarski v. Canada (Minister of Citizenship & Immigration)*, [2005] 2 S.C.R. 539, 2005 SCC 51 (S.C.C.) that s. 7 does not apply because this is an immigration matter. The comment from that case on which the government relies was made in response to a claim that to deport a non-citizen violates s. 7 of the *Charter*. In considering this claim, the Court, per McLachlin C.J., noted, at para. 46, citing *Chiarelli v. Canada (Minister of Employment & Immigration)*, [1992] 1 S.C.R. 711 (S.C.C.), at p. 733, that "[t]he most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in Canada". The Court added: "Thus the deportation of a non-citizen in itself cannot implicate the liberty and security interests protected by s. 7" (*Medovarski*, at para. 46 (emphasis added)).
>
> 17 *Medovarski* thus does not stand for the proposition that proceedings related to deportation in the immigration context are immune from s. 7 scrutiny. While the deportation of a non-citizen in the immigration context may not in itself engage s. 7 of the *Charter*, some features associated with deportation, such as detention in the course of the certificate process or the prospect of deportation to torture, may do so.
>
> 18 In determining whether s. 7 applies, we must look at the interests at stake rather than the legal label attached to the impugned legislation. As Professor Hamish Stewart writes:
>
>> Many of the principles of fundamental justice were developed in criminal cases, but their application is not restricted to criminal cases: they apply whenever one of the three protected interests is engaged. Put another way, the principles of

> fundamental justice apply in *criminal* proceedings, not because they are criminal proceedings, but because the liberty interest is always engaged in criminal proceedings. [Emphasis in original.]
>
> (J.H. Stewart, "Is Indefinite Detention of Terrorist Suspects Really Constitutional?" (2005), 54 U.N.B.L.J. 235, at p. 242)

> I conclude that the appellants' challenges to the fairness of the process leading to possible deportation and the loss of liberty associated with detention raise important issues of liberty and security, and that s. 7 of the Charter is engaged.
>
> [Emphasis added by counsel]

(ii) Analysis on section 7

[133] *Torre* FCA made very clear that a "finding of inadmissibility alone does not suffice to infringe upon the rights granted by section 7. Only when a deportation order is implemented is it appropriate to determine whether an individual's right to liberty, security or even life will be put at risk by deporting him to his country of origin" (at para 4; see also *Revell v Canada (Citizenship and Immigration)*, 2017 FC 905 at paras 83-114; *Brar v Canada (Public Safety and Emergency Preparednes)*, 2016 FC 1214 at para 21).

[134] In his post-hearing written submissions, Mr. Ching argued that, were I to find that section 7 was not engaged, such a result would fly "at jet speed" in the face of the ruling in *Charkaoui*. However, to the extent that *Charkaoui* stands for the proposition Mr. Ching alleges, it significantly predates *B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58, where the Supreme Court held:

> [75] …s. 7 of the *Charter* is not engaged at the stage of determining admissibility to Canada under s. 37(1). This Court

> recently held in *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68, [2014] 3 S.C.R. 431, that a determination of exclusion from refugee protection under the IRPA did not engage s. 7, because "even if excluded from refugee protection, the appellant is able to apply for a stay of removal to a place if he would face death, torture or cruel and unusual treatment or punishment if removed to that place" (para. 67). It is at this subsequent pre-removal risk assessment stage of the IRPA's refugee protection process that s. 7 is typically engaged. The rationale from *Febles*, which concerned determinations of "exclusion" from refugee status, applies equally to determinations of "inadmissibility" to refugee status under the IRPA.

[135] As a result, I find that section 7 of the *Charter* is not engaged by the mere fact that Mr. Ching is the subject of an immigration proceeding in which he has been found inadmissible and which may, at its conclusion, result in a removal order being issued against him — even taking into account Mr. Ching's submissions that he may face the prospect of torture in China.

[136] Having so concluded, I am doubtful that this finding is of much consequence in these proceedings, as both parties agree that the test for abuse of process is identical under common law and the *Charter* (see *Cobb* at para 36, and *O'Connor* at para 70).

(c) *Does MPSEP's Appeal give rise to an abuse of process, as a result of the ID's findings that certain evidence was obtained by torture?*

(i) Parties' arguments on abuse of process

[137] In his application for leave and judicial review challenging the IAD Refusal to Reconsider, Mr. Ching sought a declaration that the Appeal "constitutes an abuse of process at common law, and s. 7 of the Charter, in its eight (8) years duration and genesis, based on evidence conceded to be obtained by torture in China".

[138] In his attendant leave memorandum, Mr. Ching argued that the IAD Appeal ought to be stayed, given that the allegations on which it was based were rejected by the ID and found to have been grounded in evidence obtained by torture. These submissions relied largely on *Cobb*, which, as described above, related to an extradition proceeding. Mr. Ching further relied on *R v Keyowski*, [1988] 1 SCR 657 (SCC), in which the Supreme Court held that one need not establish state misconduct or improper motive to succeed on abuse of process; those are only two of many factors to be taken into account (at para 3).

[139] In his further memorandum, Mr. Ching refined his arguments, submitting that the IAD had, in rendering the Inadmissibility Decision, ignored and failed to deal with the ID's findings in respect of evidence obtained by torture. He also argued that, although the IAD had stated that its Inadmissibility Decision did not rely on the challenged evidence, it in fact relied on circumstances and inferences intrinsically linked to the convictions and evidence against Mr. Wang and Mr. Su, and that in doing so, the IAD had implicitly accepted and admitted evidence obtained by torture.

[140] Mr. Ching also relied on *Canada (Justice) v Khadr*, 2008 SCC 28, *Canada (Prime Minister) v Khadr*, 2010 SCC 3, and *United States of America v Khadr*, 2011 ONCA 358 [*Khadr* 2011], arguing that Canada cannot participate, directly or indirectly, in processes contrary to its human rights obligations. Mr. Ching submitted that the case against him was based on evidence obtained by torture, and that unspecified "Canadian officials" had acted, and were continuing to act, in reliance on that evidence. He also alleged that Canadian and Chinese officials had colluded to delay his citizenship application, knowingly acting upon evidence

obtained by torture, which is inadmissible under subsection 82(1.1) of IRPA in the context of security certificate proceedings, as confirmed in *Mahjoub (Re)*, 2010 FC 787 [*Mahjoub* 2010], as follows:

> [66] The objects of [subsection 82(1.1)] are well-known and are reflected in the following three propositions: first, information obtained as a result of the use of torture is inherently unreliable; second, the exclusion of such information in court proceedings, effectively discourages the use of torture and; third, the admission of such evidence is antithetical to and damages the integrity of the judicial proceeding.

[141] In Mr. Ching's submission, the obligation to consider whether information has been obtained by torture flows from Canada's obligations under international law, contained in paragraph 3(3)(f) of IRPA, which requires that the legislation be construed in compliance with international human rights instruments to which Canada is signatory (see also *De Guzman v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436 at para 87). Canada is a signatory to the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, which provides as follows:

> **Article 12**
>
> Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.
>
> […]
>
> **Article 15**
>
> Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

[142] On this note, Mr. Ching relied on *R v Hape*, 2007 SCC 26, for the proposition that the *Charter* should "generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified" (at para 55, excerpting from *Reference re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 at 349). Thus, in Mr. Ching's submission, he has a constitutional right not to have evidence obtained by torture used against him.

[143] Finally, in his post-hearing submissions, Mr. Ching crystallized his abuse of process argument, submitting that an abuse lay in "the use of tortured evidence by [MPSEP] in convening the inadmissibility hearing before the ID, and then pursuing the appeal to the IAD", and in "the IAD member in overturning the ID on inadmissibility, based on the use, and ignoring the fact, that evidence obtained by torture was used".

[144] The Respondent, on the other hand, argued that the IAD simply did not rely on any tainted evidence in issuing its Inadmissibility Decision. In the Respondent's submission, the IAD specifically excluded the evidence deemed to be problematic, and only considered evidence that would not have emanated from any alleged torture of Mr. Wang or Mr. Su. Thus, in the Respondent's view, the case law cited by Mr. Ching is irrelevant to the Court's analysis today. In its post-hearing submissions, the Respondent further cautioned against conducting a disguised judicial review of the Inadmissibility Decision. It argued that the issue before the Court is not whether the information expressly relied on by the IAD was reasonably sufficient to ground its Inadmissibility Decision.

(ii) Analysis on abuse of process

[145] In *Mahjoub (Re)*, 2012 FC 669 [*Mahjoub* 2012], Justice Blanchard summarized the test for abuse of process as follows:

> [67] The abuse of process doctrine has largely been subsumed into section 7 and amounts to "conducting a prosecution in a manner that contravenes the community's basic sense of decency and fair play and thereby calls into question the integrity of the system [which] is also an affront of constitutional magnitude to the rights of the individual accused" (*R. v. O'Connor*, [1995] 4 S.C.R. 411 at para. 63, 130 D.L.R. (4th) 235 [*O'Connor*]).
>
> [68] […] The propriety of the conduct and intention "are not necessarily relevant to whether or not the accused's right to a fair trial is infringed" (*O'Connor*, above at para. 74). There is also a small residual category of conduct within the abuse of process analysis caught by section 7 of the *Charter* in which the individual's rights to a fair trial are not implicated. This residual category "addresses the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process" (*O'Connor*, above at para. 73; *R. v. Regan*, 2002 SCC 12 at para. 55, [2002] 1 S.C.R. 297 [*Regan*]; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391 at para. 89, 151 D.L.R. (4th) 119 [*Tobiass*]).

[146] Thus, the doctrine captures (a) abuses affecting the fairness of the proceeding, and (b) abuses falling into the "residual" category, where "the fairness of the [proceeding] is not in question, but rather where the act of going forward would put the administration of justice into disrepute" (see *Mahjoub* 2012 at para 78).

[147] As summarized above, Mr. Ching has made a two-pronged abuse of process argument. First, he contends that MPSEP was abusive in convening the inadmissibility hearing before the

ID, and in appealing the Admissibility Decision to the IAD. Second, Mr. Ching claims that the IAD was abusive in finding Mr. Ching inadmissible, after ignoring and/or implicitly accepting evidence found by the ID to have been obtained by torture.

[148] With respect to the first prong of Mr. Ching's argument, he has, throughout his submissions, asserted that torture in this case has been "conceded". However, this is not an accurate portrayal of the government's position, since MPSEP disputed before the ID <u>and</u> the IAD that any evidence against Mr. Ching had been obtained by torture. MPSEP challenged the reliability of Mr. Ching's evidence on torture, and adduced its own evidence to the contrary. Further, in these Applications, the Respondent has not conceded anything relating to the torture of Mr. Su or Mr. Wang.

[149] When Mr. Ching argues that torture in this case is "conceded", he may be referring to the fact that Mr. Wang's wife was found by the ID to be a credible witness and did not have her evidence on torture challenged on cross-examination. In his oral submissions, Mr. Galati argued that there was "completely uncontroverted evidence" that the confessions were obtained by torture. But I disagree, as MPSEP relied on the testimony of Procurator Zhang, and argued before the ID, and again before the IAD, that Mr. Ching had not provided credible, trustworthy, or verifiable evidence that his co-accused were tortured.

[150] The fact that Mr. Ching has alleged that the case against him is grounded in tainted evidence, does not transform his inadmissibility proceedings into an abuse of process. Rather, it was the task of the ID, and then the IAD, to determine what information, if any, was admissible

under IRPA, in light of the parties' arguments and evidence. As a result, I dismiss the first prong of Mr. Ching's abuse of process argument.

[151] As for the second prong, it is clear that the parties completely disagree on whether the IAD, in its 2011 Inadmissibility Decision, relied either expressly or implicitly on evidence found by the ID to have been obtained by torture: while Mr. Ching points to the Inadmissibility Decision and asserts that the IAD obviously relied on tainted evidence, the Respondent counters that the contrary position is equally clear. Yet neither party has proposed any analytical framework for the Court to resolve this dispute. Given the parties' fundamental disagreement on the interpretation of the IAD's treatment of the evidence in 2011, I will consider tools that have been used by the Courts to resolve comparable evidentiary disputes in other contexts.

[152] The closest precedent appears in the context of security certificate proceedings. Under the test upheld in *Mahjoub* 2017 by the Federal Court of Appeal, a person must first demonstrate a "plausible connection" between the use of torture and the information to be used against him or her, following which the burden shifts to the Minister to show that the evidence is admissible (see paras 291-295). Further, in *Jaballah (Re)*, 2012 FC 21, Justice Hansen followed a "but for" test developed by Justice Blanchard for determining the admissibility of evidence alleged to have been indirectly obtained by torture (see paras 9 and 49).

[153] At the hearing of the Applications, I asked the parties how this Court should determine whether the IAD had or had not relied on evidence obtained by torture, given the parties'

disagreement on this central issue. Both parties submitted that it was properly the domain of the trier of fact, and not this Court, to weigh the evidence before it and determine its admissibility.

[154] In my view, two things can be said about the IAD's Inadmissibility Decision without this Court stepping into a fact-finding role. First, the IAD clearly declined to determine the correctness of the ID's findings on whether Mr. Wang's and Mr. Su's confessions were obtained by torture, despite a substantial volume of evidence and submissions before it on this issue. That is to say, the IAD did not overturn the ID's findings on torture that led to its Admissibility Decision in 2009.

[155] Second, the IAD referred to and relied on the INTERPOL Red Notice and "the charges and proceedings" against Mr. Wang and Mr. Su in determining Mr. Ching's inadmissibility. I accept that some or all of the evidence arising out of those proceedings could be inadmissible by virtue of its relationship to the forced confessions alleged, as could the INTERPOL Red Notice, dated after the start of Mr. Wang's detention. I stress that I make no findings on this point and have been asked by the parties not to do so.

[156] The bottom line, however, is that there is doubt as to whether the IAD's 2011 Inadmissibility Decision factored in evidence found by the ID to have been obtained by torture. The question, then, is whether this amounts to an abuse of process.

[157] First, I must determine which "abuse of process" category is engaged. As explained above, *Mahjoub* 2012 summarizes those categories as abuses affecting (a) the fairness of the

proceeding, and (b) where the act of going forward would put the administration of justice into disrepute. Here, the focus was on (b), the residual category, and I agree that is where the focus should be.

[158] In *R v Nixon*, 2011 SCC 34 [*Nixon*], the Supreme Court held that prejudice under the "residual" category of abuse of process, can be "conceptualized as an act tending to undermine society's expectations of fairness in the administration of justice" (at para 41). In the spirit of *Nixon*, and adopting the terminology used in *Mahjoub* 2012, the key issue before me today is whether the uncertainty about the IAD's reliance on evidence obtained by torture undermines society's expectations of fairness in the administration of justice to the point that allowing the Appeal to move forward would offend society's sense of justice (see *Mahjoub* 2012 at para 141, citing *Tobiass* at para 91).

[159] I find that it does. As held by Justice Blanchard in *Mahjoub* 2010, the use of evidence obtained by torture is "is antithetical to and damages the integrity of" a proceeding (at para 66). Accordingly, there must be no doubt on whether evidence alleged to have been obtained by torture impacted a decision-maker's findings. Considered in light of Canada's international obligations, I am satisfied that it is offensive to society's sense of justice for the IAD, when charged with determining whether evidence has been obtained by torture, to leave uncertainty as to the role and effect of that evidence in an inadmissibility decision made under IRPA.

[160] I stress that, in making my conclusions on abuse of process, there is no suggestion before me that the IAD issued its Inadmissibility Decision in bad faith. To the contrary, it is clear from

the IAD's reasons that it believed it could deal with the matter of Mr. Ching's admissibility without making findings on whether any of the evidence before it was obtained by torture, and that it attempted to exclude the impugned evidence from its analysis. However, in the circumstances of this case, I have concluded that an abuse of process resulted. Thus, the remaining question is what remedy should follow.

(d) *If so, what is the appropriate remedy?*

(i) Parties' arguments on remedy

[161] Mr. Ching submitted that the appropriate remedy in this case would be a stay of proceedings, relying chiefly on the Ontario Court of Appeal's analysis in *Khadr* 2011. When pressed on this point at the hearing, Mr. Galati conceded that an abuse of process need not necessarily be remedied by a stay. He argued that whether a stay is appropriate depends on the severity of the abuse at issue. In Mr. Galati's submission, a stay would be warranted here because there is "clear" evidence that the case against Mr. Ching is founded on confessions obtained by torture, and there is little else on which to base a finding of inadmissibility. However, Mr. Galati also suggested at the hearing that a lesser, alternative remedy would be to set aside the Appeal in its entirety and order that the matter be redetermined.

[162] The Respondent, in its written materials, strongly opposed a stay arguing that in applying the three-part test set out in *Canada (Minister of Citizenship and Immigration) v Tobiass*, [1997] 3 SCR 391 (SCC), Mr. Ching had not established that a stay was the appropriate remedy because (a) allowing the Appeal to proceed would not perpetuate the abuse alleged,

(b) Mr. Ching had an adequate alternative remedy, in the form of judicial review at the completion of the Appeal, and (c) there was a compelling societal interest in allowing the IAD to complete its process, having regard to the gravity of the allegations against Mr. Ching.

[163] At the hearing, Respondent's counsel also disputed this Court's jurisdiction to order the lesser, alternative remedy suggested by the Applicant. However, the Respondent conceded in its post-hearing submissions that this could be a potential remedy.

(ii) Analysis on remedy

[164] In *Mahjoub* 2017, the Federal Court of Appeal confirmed that a permanent stay is only one potential remedy for abuse of process:

> [208] […] there is no single remedy for abuse of process. In fact, there are many possible remedies available to redress instances of misconduct, violations of legal rights and Charter breaches. In *O'Connor*, above at paragraph 69, the Supreme Court spoke of a range of tools existing under the Charter and the common law ranging from a scalpel to an axe that could be used to "fashion, more carefully than ever, solutions taking into account the sometimes complementary and sometimes opposing concerns of fairness to the individual, societal interests, and the integrity of the judicial system."
>
> [209] The most drastic remedy—perhaps the sledgehammer in the judicial workshop—is the permanent stay of proceedings. It is warranted only in the "clearest of cases": *O'Connor* at para. 68; *Jewitt* at p. 137; *Nixon* at para. 37; *R. v. Power*, [1994] 1 S.C.R. 601, 89 C.C.C. (3d) 1 at p. 616 S.C.R.

[165] The Supreme Court of Canada set out the following three-step test for a stay in *R v Babos*, 2014 SCC 16 [*Babos*], citing *R v Regan*, 2002 SCC 12:

> [32] The test used to determine whether a stay of proceedings is warranted is the same for both categories and consists of three requirements:
>
> > (1) There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome" (*Regan*, at para. 54);
> >
> > (2) There must be no alternative remedy capable of redressing the prejudice; and
> >
> > (3) Where there is still uncertainty over whether a stay is warranted after steps (1) and (2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits" (*ibid*., at para. 57).

[166] However, some conduct may be so egregious that merely going forward in light of it is offensive, in which case a party need not prove that the prejudice will be perpetuated or aggravated (*Mahjoub* 2017 at para 218). The Federal Court of Appeal in *Mahjoub* 2017, at paragraphs 219-220, offered the following articulation of the test, which I have modified to apply to the factual considerations at hand:

> Step 1: Did the IAD engage in conduct that violated Mr. Ching's right to a fair proceeding or undermined society's expectations of fairness in the administration of justice?
>
> Step 2: Will the prejudice to Mr. Ching or to the administration of justice caused by the violation or abuse in question be manifested, perpetuated or aggravated through the conduct of the proceeding or by its outcome? Or is this an exceptional case where the past conduct is so egregious that the mere fact of going forward in the light of it will be offensive?
>
> Step 3: Is this the clearest of cases in which no other remedy is reasonably capable of removing that prejudice? In other words, if it is not obvious that this is the clearest of cases, is the public and

> individual interest in a permanent stay of proceedings disproportionately greater than the public interest in a decision on the merits?

[167] As to Step 1, I have found that the IAD's conduct undermined society's expectations of fairness in the administration of justice. With respect to Step 2, the Supreme Court offered the following guidance in *Babos*:

> [35] […] when the residual category is invoked, the question is whether the state has engaged in conduct that is offensive to societal notions of fair play and decency and whether proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system. To put it in simpler terms, there are limits on the type of conduct society will tolerate in the prosecution of offences. At times, state conduct will be so troublesome that having a trial — even a fair one — will leave the impression that the justice system condones conduct that offends society's sense of fair play and decency. This harms the integrity of the justice system…
>
> […]
>
> [38] […] in a residual category case, regardless of the type of conduct complained of, the question to be answered [is] whether proceeding in light of the impugned conduct would do further harm to the integrity of the justice system. While I do not question the distinction between ongoing and past misconduct, it does not completely resolve the question of whether carrying on with a trial occasions further harm to the justice system. The court must still consider whether proceeding would lend judicial condonation to the impugned conduct.

[168] On the issue of whether any remedy short of a stay is appropriate, *Babos* held:

> [39] […] the question is whether any other remedy short of a stay is capable of redressing the prejudice. Different remedies may apply depending on whether the prejudice relates to the accused's right to a fair trial (the main category) or whether it relates to the integrity of the justice system (the residual category). […] Where the residual category is invoked, however, and the prejudice complained of is prejudice to the integrity of the justice system,

> remedies must be directed towards that harm. It must be remembered that for those cases which fall solely within the residual category, the goal is not to provide redress to an accused for a wrong that has been done to him or her in the past. Instead, the focus is on whether an alternate remedy short of a stay of proceedings will adequately dissociate the justice system from the impugned state conduct going forward.

[169] On the availability of a lesser remedy, Justice Blanchard's decision in *Mahjoub, Re*, 2012 FC 669 is also instructive. In that case, Justice Blanchard found that the inadvertent co-mingling of privileged documents had given rise to an abuse of process under the residual category. However, he declined to issue a stay, finding that the prejudice could be remedied by removing certain lawyers from the file:

> [156] In my view, permanently removing these members of the Mahjoub team constitutes a lesser remedy that is reasonably capable of removing the prejudice found to arise by reason of the abuse of process in the residual category. A person reasonably informed of the totality of the circumstances would be satisfied that the proceedings could continue without a loss of confidence in the integrity of the administration of justice.

[170] I am satisfied that proceeding in light of the abuse of process found would lend it judicial condonation. However, a lesser remedy than a stay is available in the form of the alternative relief requested by Mr. Ching — namely setting aside all interlocutory decisions made thus far by the IAD in the Appeal, and ordering that the Appeal be determined anew. I find that a person reasonably informed of the circumstances would have his or her confidence in the integrity of the administration of justice restored if the proceeding were to be recommenced in light of the guidance of this Court.

[171] Put another way, I am not satisfied that a stay is the only remedy capable of appropriately dissociating the justice system from the abuse of process found in this case. As mentioned above, Mr. Ching has relied heavily on *Khadr* 2011. There, the Court of Appeal upheld the extradition judge's determination that a remedy short of a stay was not appropriate, because it was necessary to disassociate the justice system from the human rights abuses perpetuated against the applicant, which had been referred to by the extradition judge as "gross misconduct" (see paras 65-66). As the Supreme Court held in *Babos*, the more egregious the state conduct at issue, the greater the need for the court to dissociate itself from it (at para 41).

[172] Despite Mr. Ching's submissions to the contrary, I find that the matter before me is markedly different from *Khadr* 2011. Most significantly, the facts in Mr. Ching's case are not settled. The extradition judge's factual findings were not disputed on appeal in *Khadr* 2011. In this case, MPSEP disputed before both the ID and the IAD (and the Respondent continues to deny in these Applications) that any evidence against Mr. Ching was obtained by torture. The IAD did not adopt and act on the ID's findings. Rather, it failed to resolve the issue.

[173] Furthermore, I agree with the Respondent's argument that Mr. Ching's delay in seeking to remedy the abuse of process disclosed in the IAD's Inadmissibility Decision — issued in 2011 — sheds light on his perception of the seriousness of the abuse (see *Babos* at 65) which, in turn, has relevance to my analysis on remedy. In other words, this Court need not disassociate itself from undisputed human rights abuses, but rather from a defective administrative decision, in respect of which Mr. Ching sought no judicial review, that left doubt on the role played by evidence alleged to have been obtained by torture.

[174] I must also consider whether the public and individual interest in a permanent stay is disproportionately greater than the public interest in a decision on the merits (*Mahjoub* 2017 at paras 217-220; *Babos* at para 41). I find that it is not. In *Babos*, the Supreme Court wrote that a stay is "the most drastic remedy" a court can order, as it "permanently halts the prosecution of an accused", frustrating the truth-seeking function of a trial and depriving the public of the opportunity to see justice done on the merits (at para 30). Here, I agree with the Respondent's submission that there is a significant public interest in adjudicating the allegations against Mr. Ching. The balance does not favour a stay.

[175] Finally, for the sake of completeness, I will address the Respondent's argument that this Court does not have the jurisdiction to set aside all the decisions rendered thus far in the Appeal, notwithstanding that the Respondent later retracted this position.

[176] Mr. Ching's remedial arguments focused on subsection 24(1) of the *Charter*, which has no application given my earlier conclusion that section 7 is not engaged on the facts of this case. Further, as the remedy sought will impact a proceeding before the IAD (as opposed to one before this Court), I would be hesitant to ground my remedial jurisdiction solely in the Court's plenary powers to control its <u>own</u> processes (see *Mahjoub* 2017 at para 206).

[177] Nevertheless, I am satisfied that this Court's authority to order the requested relief is found in paragraph 18.1(3)(b) of the *Federal Courts Act*, which reads as follows:

Application for judicial review	**Demande de contrôle judiciaire**
18.1 (1) An application for judicial review may be made	**18.1 (1)** Une demande de contrôle judiciaire peut être

by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.	présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.
[…]	[…]
Powers of Federal Court	**Pouvoirs de la Cour fédérale**
(3) On an application for judicial review, the Federal Court may	**(3)** Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :
[…]	[…]
(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.	**b)** déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

[178] I have determined that the IAD's Inadmissibility Decision gives rise to an abuse of process. Thus the IAD acted in a way that was "contrary to law", a ground of review under paragraph 18.1(4)(f) of the *Federal Courts Act*. Under paragraph 18.1(3)(b), I may set aside and refer back for determination an administrative "proceeding". The parties agree that the Appeal is an ongoing proceeding, and that all decisions made within it, including the IAD Inadmissibility Decision in 2011, were interlocutory. In other words, the Appeal has been unfolding since its inception in 2009, and would only have concluded when a decision was made under the H&C discretion contained in IRPA's subsection 69(2).

[179] I will accordingly set aside the Appeal in its entirety and remit the matter back for determination anew by a different member of the IAD.

Issue 5: Should the IAD's Refusal to Reconsider be set aside as either incorrect or unreasonable?

[180] Finally, I turn to Mr. Ching's challenge to the correctness and reasonableness of the IAD's Refusal to Reconsider. Mr. Ching has submitted that this decision should be set aside because (a) the IAD exceeded its jurisdiction in ordering that the Appeal continue as a "split" proceeding, (b) the IAD exhibited a reasonable apprehension of bias, and (c) it is overall unreasonable.

[181] As a result of my findings above, it is not necessary for me to determine whether the IAD's Refusal to Reconsider is incorrect or unreasonable for the reasons Mr. Ching has put forward in (c). Nevertheless, I wish to comment on Mr. Ching's arguments with respect to items (a) and (b) above, and note my confidence that, on redetermination of the Appeal, the IAD will consider both Justice Roy's findings in *Ching*, as well as the revocation of the INTERPOL Red Notice.

(1) "Splitting" the Appeal

[182] Mr. Ching has requested that, should the decisions issued thus far in the Appeal be set aside for abuse of process, this Court order that the Appeal be determined by a single member of the IAD. Accordingly, I will consider the strength of his underlying argument with respect to the IAD's decision to "split" the hearing of the Appeal between two different members.

[183] The background to this issue is that in April 2012, Mr. Ching applied to the IAD for the recusal of the member who issued the IAD's Inadmissibility Decision, and a setting aside of that decision, on the basis of reasonable apprehension of bias. As alternative relief, however, Mr. Ching asked that the H&C portion of MPSEP's Appeal be considered by a different member of the IAD. On this point, the relevant excerpt of the transcript of the proceedings before the IAD on April 18, 2012, during which Mr. Ching was represented by Mr. Wong, reads as follows:

> MR. WONG: We cannot undo the [2011] decision unless we go to judicial review. So the decision will be there whether the ultimate case is successful or not, we'll deal with that decision. The recuse request [sic] that we are making is that either we set aside the entire decision, or as an alternative, the H & C decision be made by a different Member.
>
> [Emphasis added.]

[184] The IAD's Recusal Decision found no reasonable apprehension of bias, but granted his alternative request as follows:

> [27] In the alternative, counsel for the respondent submitted that the panel's decision dated December 21, 2011 remain, subject to judicial review, but the issue of humanitarian and compassionate considerations be considered by a different panel. Given the unusual circumstances in this case and particularly given the respondent did not testify at the IAD hearing, the panel directs the Registrar to schedule a hearing with a different panel, for the parties to provide evidence and submissions with respect to the IAD's discretionary jurisdiction pursuant to subsection 69(2) of the Act.

[185] Mr. Ching subsequently sought leave to judicially review the IAD's Recusal Decision (in IMM-588-13). Through Mr. Galati, his counsel at that time, Mr. Ching argued that the IAD was without jurisdiction to "split" an appeal between two different panel members; however, leave was denied.

[186] In these Applications, Mr. Ching submitted that the IAD's Refusal to Reconsider ought to be set aside because it ordered the Appeal to resume, meaning that, as a consequence, the H&C portion of the Appeal would be heard by a different member than the one who ruled on Mr. Ching's inadmissibility in 2011. Specifically, Mr. Ching argued that the member who issued the Refusal to Reconsider "lost, and exceeded jurisdiction" in "splitting" the Appeal between two different members, and that doing so is "unheard of" and breaches the "s/he who hears must decide" principle of natural justice, which he further argued was elevated to a principle of fundamental justice in the circumstances of his case. Finally, Mr. Ching submitted that this issue was one of jurisdiction and consequently reviewable on a standard of correctness, relying on *Housen v Nikolaisen*, 2002 SCC 33 and *Magder v Ford*, 2013 ONSC 263.

[187] I do not agree with Mr. Ching's submission that this issue raises a true question of jurisdiction, such that it would be reviewable on a correctness standard. In the recent case *Canadian Copyright Licensing Agency (Access Copyright) v Canada*, 2018 FCA 58, the Federal Court of Appeal explained the development of the law in this area as follows:

> [57] For the moment, let's define a so-called "jurisdictional question" as one requiring an assessment as to whether the administrator has done something that its legislation does not permit it to do. But to answer this question, we must interpret the legislation to define the limits of what the administrator can do. Thus, a "jurisdictional question" is really a question of legislative interpretation, one calling for reasonableness review on the basis of all of the above authorities.
>
> [58] Put another way, the issue whether an administrative tribunal is inside or outside the "jurisdictional" fences set up by Parliament is really an issue of where those fences are — in other words, an interpretation of what the legislation says about what the administrative decision-maker can or cannot do.
>
> [59] This Court has repeatedly concurred with this idea. It has held that "jurisdictional questions" defined in that way are really

> questions of legislative interpretation on which reasonableness is presumed to be the standard of review. They are not "true questions of jurisdiction" as that phrase is understood in *Dunsmuir*. See *Canadian Federal Pilots Assn. v. Canada (Treasury Board)*, 2009 FCA 223, [2010] 3 F.C.R. 219 (F.C.A.): *C.B. Powell Ltd. v. Canada (Border Services Agency)*, 2011 FCA 137, 418 N.R. 33 (F.C.A.) at paras. 20-22; *Globalive Wireless*, above at para. 34; *Canada (Treasury Board) v. P.I.P.S.C.*, 2011 FCA 20, 414 N.R. 256 (F.C.A.); *Wheatland (County) v. Shaw Cablesystems Ltd.*, 2009 FCA 291, 394 N.R. 323 (F.C.A.) at paras. 38-41; *P.S.A.C. v. Canada (Treasury Board)*, 2011 FCA 257, 343 D.L.R. (4th) 156 (F.C.A.); *Canada (Procureur général) c. Access Information Agency Inc.*, 2018 FCA 18 (F.C.A.) at paras. 16-20.
>
> [60] These authorities bind us and preclude us from accepting Access Copyright's submission that we are dealing with an issue of "jurisdiction." And for good reason. The courts have been down the road of correctness for so-called jurisdictional questions and have seen its flaws.

[188] Further, the Supreme Court of Canada recently expressed doubt on whether "true" questions of jurisdiction even exist (*Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at paras 31-41).

[189] In my view, the question of whether the IAD may "split" an appeal between different members, depending on factors such as the procedural needs of the case before it, the inability of a single member to hear the entire appeal, and the consent of the parties, is a matter of legislative interpretation, not jurisdiction. After all, Rule 57 of the *Immigration Appeal Division Rules*, SOR/2002-230 states that "in the absence of a provision in these Rules dealing with a matter raised during an appeal, the Division may do whatever is necessary to deal with the matter". Subject to principles of procedural fairness, the IAD is the master of its own procedure (*Yiu v Canada (Minister of Public Safety and Emergency Preparedness)*, 2017 FC 480 at para 18).

[190] Further, I cannot agree with Mr. Galati's submission, made during the hearing of the Applications, that Mr. Ching "always wanted" a single member of the IAD to decide both the issue of his inadmissibility and the matter of H&C relief. Rather, Mr. Ching himself requested that another tribunal member hear the H&C component of the Appeal. As a result, Mr. Ching cannot now assert a breach of any right he may have had to have the matter decided by a single member (see *Canadian Pacific* at para 90).

[191] I will not order that the Appeal proceed in full before a single member of the IAD on redetermination. It will be Mr. Ching's onus to object to a "split" appeal, should such a circumstance arise.

(2) Reasonable Apprehension of Bias

[192] Mr. Ching has a variety of ongoing administrative and civil proceedings, which overlap in many respects. His litigation history also includes allegations of bias against the member who decided the IAD's Inadmissibility Decision. As a result, I will comment on his allegations of bias made in these Applications, with respect to the member who issued the IAD's Refusal to Reconsider, for Mr. Ching's future benefit.

[193] Mr. Ching's Amended Statement of Claim in his civil action impugns certain acts and omissions of the RCMP Liaison Office in China, and pleads that it conspired with the People's Republic of China's Ministry of Public Security in an attempt to deliver Mr. Ching to torture and unlawful imprisonment. On February 6, 2017, during the reconsideration hearing, the IAD

member disclosed to the parties that he was a former member of the RCMP. The relevant excerpt of the transcript is as follows:

> PRESIDING MEMBER: So as both of you've said, this has been a lengthy process, dating back to 2009 since it came before the IAD, and obviously some time prior to that, so any further delays, we want to avoid.
>
> As I said, I'm not seized of this matter. I haven't, obviously, heard any evidence.
>
> Mr. Wong, I suspect you know my background. I was in the RCMP for 32 years before coming to the Board. Much of that was in white collar crime investigations. I don't see any reason why that would influence or cause a problem in me hearing the case, if the ADC decides to appoint me. But if you believe that is something that you'd be bringing a bias application on, I'd encourage you to submit some correspondence to the ADC now, before I get seized of the matter, and she can take that under advisement and choose whether she appoints me or not and perhaps a bias application, if that's something you have in the back of your mind. So I just wanted to raise that now, in case I do get assigned the file, I don't want to have another lengthy delay while we decide that procedural matter.
>
> MR. WONG: Okay. But this is for the purpose of if there is going to be a hearing or this is for the purpose of determining –
>
> PRESIDING MEMBER: No. For this – I hope you wouldn't see any reason why I'd be biased in these preliminary applications. But as far as being assigned the actual hearing.
>
> MR. WONG: Okay. I appreciate this very much.
>
> PRESIDING MEMBER: And obviously, Mr. Hyland, the same would apply to you, if you have concerns with my background improperly influencing my decision in any way.
>
> MR. HYLAND: I just rise. I'll appreciate, sir – if my friend decides to provide any submissions to the Board with regards to who should be the member, I will appreciate being copied on them. Thank you.
>
> PRESIDING MEMBER: Thank you. Well, obviously, any correspondence should be copied and I assume it wouldn't be a question of trying to pick someone else, but just if you have

> concerns about me, pointing those out to the Assistant Deputy Chair so she can take – keep that in mind when she's assigning the hearing.

[194] Mr. Ching did not, through Mr. Wong, his counsel at the time, raise the issue of reasonable apprehension of bias at the IAD hearing or prior to the issuance of the IAD's Refusal to Reconsider. However, in his written materials filed in IMM-1531-17, prepared by Mr. Galati, Mr. Ching submitted that the IAD's Refusal to Reconsider ought to be set aside for giving rise to an "indelible reasonable apprehension of bias", on the basis that the IAD member was a former RCMP member and the RCMP had been named as "defendants" in Mr. Ching's action.

[195] Mr. Ching argued that the test set out in *Committee for Justice and Liberty et al v National Energy Board et al*, [1978] 1 SCR 369 [*Committee for Justice*] was met, namely that "an informed person, viewing the matter realistically and practically — and having thought the matter through", would conclude it "more likely than not that [the member], whether consciously or unconsciously, would not decide fairly" (at 394). Mr. Ching also submitted that actual bias need not be established, only a reasonable apprehension of bias, relying on *R v S (RD)*, [1997] 3 SCR 484 (at para 109) [*RDS*].

[196] Mr. Ching's position is untenable. I remind him that allegations of bias must not be undertaken lightly and that the threshold for a finding of bias is high (*RDS* at para 113). The member's former membership in the RCMP, on its own, does not raise a reasonable apprehension of bias with respect to the IAD's Refusal to Reconsider. Further, Mr. Ching did not raise his bias concerns at the earliest reasonable opportunity, as required by the jurisprudence (see *AB v Canada (Citizenship and Immigration)*, 2016 FC 1385 at para 139).

V. <u>Costs</u>

[197] Although Mr. Ching requested costs in his written materials, he confirmed at the hearing of the Applications that no costs were sought. I agree that these Applications do not give rise to any special circumstances warranting costs, given the strong arguments on both sides, and given that the Respondent persuaded me on some of the issues raised.

[198] On that note, I wish to thank counsel for the Respondent, Negar Hashemi and Eleanor Elstub, for their able defence of their client's position at all stages of these Applications. They are to be commended for their professionalism and excellent advocacy, particularly in light of the complex factual and procedural history underlying these Applications, which has spanned the last decade.

VI. <u>Certified Questions</u>

[199] In the recent case *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 [*Lunyamila*], the Federal Court of Appeal revisited the criteria for a properly certified question — the question must be a serious and dispositive one, which transcends the interests of the parties and raises an issue of broad significance or general importance (at para 46, citing *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 36). It must also arise from the case itself, rather than the way in which this Court disposed of the application(s) (*Lunyamila* at para 46).

[200] In these Applications, the parties addressed the matter of certified questions in post-hearing submissions. First, Mr. Ching proposed the following three questions:

> Question 1: Does the ID or IAD have jurisdiction to render an inadmissibility finding based on evidence obtained by torture?
>
> Question 2: If jurisdiction exists, is it an abuse of process, contrary to section 7 of the *Charter*, and Article 14 of the *Convention against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment*, to act upon, or totally ignore, evidence obtained by torture?
>
> Question 3: In a Minister's appeal pursuant to subsection 63(5) of IRPA, where that appeal is allowed, and the subsequent hearing on H&C grounds, pursuant to subsection 69(2) of IRPA, can the two hearings and determinations be conducted and made by two different members of the IAD, or must they be made by the same member?

[201] It is uncontentious that neither the ID nor the IAD can render a decision based on evidence obtained by torture. Further, although Mr. Ching argued that judicial guidance is needed on Question 3, that question is not dispositive of the Applications before me, and so is inappropriate for certification. I will certify none of these three questions.

[202] The Respondent submitted the following question for certification:

> On a judicial review application challenging a tribunal's decision on the basis of abuse of process, does the Federal Court's jurisdiction allow the Court to send back for redetermination a separate decision from the tribunal that is not the subject of the judicial review application?

[203] In reply submissions, Mr. Ching took issue with the phrasing of this question, and proposed the following in the alternative:

> Where abuse of process, in the administrative process, is advanced and argued, does the Federal Court have jurisdiction to grant an abuse of process remedy over separate decision(s) by the same tribunal, and the action(s) of the parties before the tribunal?

[204] As I noted in my analysis above, the Respondent conceded in its further post-hearing submissions that the Federal Court does have the jurisdiction to examine, and order relief in respect of, an interlocutory administrative decision not itself under judicial review when considering whether an ongoing proceeding discloses an abuse of process. However, in my view, this question still merits certification, given that it does not appear to have been dealt with by this Court until now, and its answer has relevance for any administrative tribunal that regularly issues interlocutory decisions of substance.

[205] I am also satisfied that the central issue in these Applications (i.e., whether the IAD's failure to determine whether evidence before it was obtained by torture amounts to an abuse of process) merits certification, as its answer has bearing on administrative decision-makers who are faced with evidentiary disputes of that kind.

[206] As a result, I will certify the following two questions:

> Question 1: Where it is argued that an interlocutory decision made in an ongoing proceeding before the IAD gives rise to abuse of process, but that interlocutory decision is not itself the subject of the application for judicial review, does the Federal Court have the jurisdiction to:
>
> > (a) examine the interlocutory decision to determine whether it gives rise to an abuse of process; and
> >
> > (b) if an abuse of process is found, set aside all interlocutory decisions rendered in the IAD's proceeding and order that it be redetermined?

> Question 2: Is it an abuse of process for the IAD to make a determination of inadmissibility without first determining whether any of the evidence before it was obtained by torture, when the ID has found that evidence was obtained by torture and the point is disputed by the parties?

VII. Conclusion

[207] Mr. Ching's Applications are allowed in part, with questions to be certified in accordance with these reasons. No costs are awarded.

JUDGMENT IN IMM-4585-16 AND IMM-1531-17

THIS COURT'S JUDGMENT is that:

1. IMM-4585-16 and IMM-1531-17 are granted, in part, as follows:

   a. All decisions issued thus far by the Immigration Appeal Division [IAD] in IAD File Number VA9-02915 are set aside.

   b. IAD File Number VA9-02915 shall be heard and redetermined by a different member of the IAD.

2. The following questions are certified:

> Question 1: Where it is argued that an interlocutory decision made in an ongoing proceeding before the IAD gives rise to abuse of process, but that interlocutory decision is not itself the subject of the application for judicial review, does the Federal Court have the jurisdiction to:
>
> > (a) examine the interlocutory decision to determine whether it gives rise to an abuse of process; and
> >
> > (b) if an abuse of process is found, set aside all interlocutory decisions rendered in the IAD's proceeding and order that it be redetermined?
>
> Question 2: Is it an abuse of process for the IAD to make a determination of inadmissibility without first determining whether any of the evidence before it was obtained by torture, when the ID has found that evidence was obtained by torture and the point is disputed by the parties?

3. No costs are awarded.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	IMM-4585-16, IMM-1531-17
STYLE OF CAUSE:	MO YEUNG CHING v THE MINSTER OF IMMIGRATION REFUGEE AND CITIZENSHIP MO YEUNG CHING v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 27, 2018
JUDGMENT AND REASONS:	DINER J.
DATED:	AUGUST 16, 2018

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