Federal Court  Cour fédérale

Date: 20221114

Dockets: IMM-1695-20
IMM-1697-20

Citation: 2022 FC 1543

Ottawa, Ottawa, November 14, 2022

PRESENT: The Honourable Madam Justice Rochester

Docket: IMM-1695-20

BETWEEN:

FERNANDO A. ARDUENGO NAREDO

Applicant

and

THE MINISTER OF CITIZENSHIP & IMMIGRATION

Respondent

Docket: IMM-1697-20

AND BETWEEN:

NIEVES DEL CARMEN S.M. SALAZAR

Applicant

and

THE MINISTER OF CITIZENSHIP & IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] These are applications for judicial review of two virtually identical humanitarian and compassionate [H&C] decisions [Decisions] rendered by a senior immigration officer [Officer] of Immigration, Refugees and Citizenship Canada [IRCC], dated February 21, 2020, refusing the Applicants' applications for permanent residence from within Canada H&C grounds.

[2] The present matters have a lengthy and complex history. The Applicants, Mr. Fernando Alfonso Arduengo Naredo and Ms. Nieves Del Carmen San Martin Salazar are citizens of Chile who came to Canada in 1978 as a married couple and claimed refugee protection. Since that time, over four decades, the Applicants have sought to regularize their status in Canada.

[3] While in Chile, the Applicants were members of the intelligence and security branch of the Chilean police force, the Police Intelligence Directorate / Direccion de Inteligencia de Carabineros [DICAR], during the regime of General Augusto Pinochet. The Officer found that DICAR was an organization that committed crimes against humanity and that the Applicants were complicit in DICAR's activities. The Officer further found that actions taken by the Applicants while they were members of DICAR far outweighed the H&C factors cited by the Applicants. Consequently, the Officer concluded that a waiver of the Applicants' inadmissibility under paragraph 35(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] was not justified. Paragraph 35(1)(a) of the IRPA provides that a permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for committing an

act outside Canada that constitutes an offence referred to in sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24. Those sections encompass genocide, crimes against humanity and war crimes.

[4] The Applicants submit that the Officer breached procedural fairness by not advising the Applicants that inadmissibility under paragraph 35(1)(a) of the IRPA was being contemplated in the context of the H&C applications. The Applicants further submit that it was an abuse of process for the Officer to find the Applicants inadmissible under paragraph 35(1)(a) of the IRPA, (i) rather than have the matter proceed before the Immigration Division for an admissibility hearing, and/or (ii) on the basis of information that has been known to the Minister for decades. The Applicants allege that the Officer erred by finding that paragraph 35(1)(a) of the IRPA applied to the Applicants. Finally, the Applicants argue that the Officer unreasonably assessed the H&C factors by placing undue emphasis on the Applicants' involvement with DICAR.

[5] The Respondent submits that there is no basis for the Applicants' allegation that the Officer failed to advise them that inadmissibility under paragraph 35(1)(a) of the IRPA was being contemplated given that the Applicants received correspondence from the Officer specifically to this effect on two occasions. The Respondent further submits that: (i) it is well within the jurisdiction of a decision maker on an H&C application to determine whether an applicant is inadmissible under the IRPA; and (ii) there is no requirement to provide an applicant with an admissibility hearing before the Immigration Division prior to rendering a decision on an H&C application. The Respondent argues that it was not an abuse of process to rely on information known to the Minister for decades because the Minister has consistently shown

concern about the Applicants' activities in DICAR, beginning at the time they arrived in Canada in 1978 and throughout the various proceedings since that time. Finally, the Respondent pleads that the Officer reasonably found that the H&C factors submitted by the Applicants were not sufficient to outweigh the very serious obstacle to their admissibility, being the actions taken by the Applicants while they were members of DICAR.

[6] Having considered the extensive record before the Court, including the parties' written and oral submissions, as well as the applicable law, the Applicants have failed to persuade me that the Officer's Decisions were unreasonable. Although aspects of the Decisions could have been more detailed, and I applaud the Applicants having provided information concerning human rights violations to Amnesty International and the Chilean special investigations unit in the years following their arrival in Canada, I do not agree that the Officer erred such that this Court's intervention is warranted. For the reasons below, and despite the able submissions by counsel for the Applicants, these applications for judicial review are dismissed.

[7] The Applicants filed separate judicial review applications that were heard jointly on the basis of a single certified tribunal record. The Applicants filed the same memorandum of fact and law dated December 20, 2021, in each file. The Respondent followed suit and filed the same responding memorandum in each file. As such, a single set of reasons is appropriate for both matters and shall be placed on each Court file.

II. Context

[8] From September 11, 1973, through March 11, 1990, Chile was ruled by a military dictatorship, under General Pinochet. Human rights violations from this period of military rule included executions, detentions, torture and rape.

[9] As per the record, DICAR played a significant role in intelligence gathering and carrying out arrests as part of a larger intelligence group, known as the Joint Command, whose main purpose was to suppress dissent. The clandestine operations carried out by DICAR included kidnappings, detentions, interrogations, torture, rape and murders.

[10] Mr. Arduengo Naredo was a civilian agent recruited by DICAR in March 1974. He remained a member of DICAR until April 1977.

[11] Ms. Salazar joined the police in January 1975. She was transferred to DICAR in January 1976, where she met Mr. Arduengo Naredo. She remained with DICAR until she retired in April 1977.

[12] On February 25, 1978, approximately ten months after they left DICAR, the Applicants entered Canada as visitors. Shortly thereafter in March, they claimed refugee status.

[13] The lengthy history of the Applicants' efforts to regularize their status in Canada spans four decades. The Certified Tribunal Record [CTR] is comprised of 19 volumes totalling slightly

less than 5,900 pages. Since their arrival in Canada, the Applicants have had two children, who are now adults. Mr. Arduengo Naredo is now in his mid-70s, and Ms. Salazar is in her late 60s.

[14] Given the arguments raised by the Applicants, notably procedural fairness, abuse of process, delay, and a failure to act on allegations of criminal inadmissibility earlier, a detailed history of the Applicants' claims and proceedings is warranted.

[15] The Applicants' refugee claims were examined and first refused by the Refugee Status Advisory Committee [RSAC] on February 23, 1979. In its report, dated October 4, 1978, the RSAC expressed concerns about Mr. Arduengo Naredo's knowledge of torture and execution of political adversaries while in DICAR. Following a review of the case in light of information received from Chile, the RSAC considered that Mr. Arduengo Naredo "may have been a persecutor of prisoners while a member of the Chilean Intelligence" and for these reasons the Applicants were not entitled to refugee status.

[16] The Applicants became the subject of an inquiry hearing on admissibility on June 15, 1979, at which point the Applicants again claimed refugee status. The refugee claims were re-examined by the RSAC who determined, in its report dated November 14, 1979, that the Applicants did not qualify for protection as Convention refugees by reasons of: (a) "both [the Applicants] have been active agents of DICAR over several years, have admitted their participation in detentions and have witnessed incidents of torture and killings. There is indication to believe they have, in fact, participated in the brutalities committed by DICAR"; and (b) "it would violate the spirit and intent of Article 1 of the Refugee Convention and Protocol to

grant refugee status to any person who has admitted participating in an official capacity in acts contrary to the principle of the Convention."

[17] An application for redetermination by the Immigration Appeal Board [IAB], dated March 31, 1980, was permitted to proceed. The IAB, in a decision dated November 21, 1980, determined that the Applicants were not refugees. Two sets of reasons were issued, dated February 2 and 17, 1981. The panel found that: (a) the Applicants had not left DICAR for reasons of suspected disloyalty, rather Mr. Arduengo Naredo was considered a security risk by virtue of his health and Ms. Salazar retired because dating and marriage between members of DICAR was forbidden; (b) they failed to establish plausible facts upon which to base a fear of persecution; and (c) that the Applicants "who by their own testimony, have participated in kidnappings, surveillance and brutality" are outside the definition of a Convention refugee.

[18] The IAB decision was appealed. In a decision dated December 18, 1981, the majority of the Federal Court of Appeal (MacKay J. dissenting) allowed the Applicants' appeals on the basis that one of the two sets of reasons issued by the IAB misstated the test by referring to "would" be subject to persecution rather than "a well-founded fear of persecution" (*Naredo v Canada (Employment and Immigration)*, 1981 CanLII 2708).

[19] On June 22, 1982, before a redetermination was made, the Applicants withdrew their appeal because they received approval in principle for their application for permanent residence under the "pre-Chilean visa programme". By way of letter dated November 8, 1983, the Applicants were informed that the Minister of Immigration [Minister] had studied the case and

considered the Applicants' establishment in Canada and "determined that he quite strongly supported the views of the [RSAC], the [IAB] and senior Commission officials that persons such as the [Applicants], who have been party to acts of human torture, do not deserve the protection of a democratic institution." Consequently, the approval was revoked and immigration officials were informed that a resumption of the inquiry on removal would continue.

[20] With the IAB's approval, the Applicants reinstated their appeal, which was heard in a joint hearing over three days in February and April 1985. The Applicants chose to refuse the right to deal with the matters *de novo* and consented to the IAB considering the transcripts from the previous proceedings along with the testimony of the Applicants during the redetermination. The IAB also noted that the delay in the matter being heard was due to adjournments being requested by the Applicants. In a decision dated April 15, 1985, the IAB found: (a) issues with the Applicants' credibility; (b) the Applicants did not have a well-founded fear of persecution; and (c) the Applicants' departure from Chile was substantially motivated by economic considerations.

[21] Following the IAB's reconsideration, the Applicants filed an application for judicial review in 1985. In January 1986, counsel for the Applicants wrote requesting Minister's Permits on humanitarian grounds. By that time, the Applicants had two Canadian-born children and had willingly cooperated with Amnesty International, which had sent representatives to interview them. The Applicants received Minister's Permits on April 15, 1986. Consequently, in September 1986, the Applicants withdrew their judicial review of the IAB decision.

[22] The Applicants' case had garnered some negative press in 1986, as well as public criticism from members and organizations within the Chilean community, including a statement by the Toronto Chilean Society. On November 13, 1986, the Applicants were informed by an officer in the Canada Immigration Center that processing of the Applicants' applications for permanent residence was put on hold in order to review the case in more detail and any action on it was suspended for the time being (*Naredo v Canada (Minister of Employment and Immigration)*, [1990] 37 FTR 161 at 165 [*Naredo 1990*]).

[23] By way of letter dated December 28, 1988, the Applicants were informed that the review had been concluded and that there were insufficient H&C grounds to warrant granting permanent residence from within Canada. Consequently, the letter informed them that the Minister's Permits issued on April 15, 1986, would not be renewed. The Applicants were informed they had to depart Canada by February 28, 1989. Counsel for the Applicants provided submissions to the Office of the Minister on January 4, 1989, objecting to the decision. The Minister responded, by way of letter dated February 9, 1989, that it was the Minister's prerogative to reverse a decision to move forward with processing the Applicants' application for permanent residence from within Canada, which had been based in part on the impression that the Applicants had the support of the Chilean community in Canada. The Minister's letter confirmed that there would be no further move to extend favourable consideration to the Applicants.

[24] The Applicants did not leave Canada as required by February 9, 1989, and as such a Ministerial Deportation Order was issued in March 1989 on the basis that they lacked temporary resident status or a valid Minister's Permit. The Applicants were advised that travel

arrangements had been made for them to be returned to Chile on July 25, 1989, however, they were not removed because proceedings were launched in the Federal Court seeking to quash the order of deportation and order the Minister to process the applications for permanent residence on the following grounds: (a) the Minister was estopped from deporting them having previously exercised discretion to process their applications; (b) abuse of process; and (c) breaches of sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*] (*Naredo 1990* at 162).

[25] On July 24, 1990, the Federal Court dismissed the application finding that: (a) the Minister was entitled, upon learning more, to refuse to extend or cancel a Ministerial Permit; (b) the Minister, like her predecessors, had considered the Applicants for the exemption and rejected them; (c) the arguments of estoppel and legitimate expectations must fail; (d) the Minister had not acted unfairly; and (e) the Applicants have no legal rights to remain in Canada. Justice Muldoon stated that "what truly appears to be the sticking point as between the government and the applicants is their criminal conduct, in terms of Canada's view of criminal conduct, while they were willing members of DICAR in Chile", before proceeding to analyze in detail the conduct that was admitted by the Applicants while relying on provisions of the *Criminal Code*, RSC 1985, c C-46 (*Naredo 1990* at 169-173). The Federal Court also noted the volume of material in the record and rejected the Applicants' arguments about the long delay on the part of the Minister to bring this matter to a head.

[26] The Applicants appealed. On June 6, 1995, the Federal Court of Appeal dismissed the appeal finding that: (a) the motions judge correctly determined that promissory estoppel did not assist the Applicants; (b) the Minister was entitled to issue deportation orders without a hearing, as fairness was satisfied because the Applicants had the opportunity to make submissions in writing, which they availed themselves of; and (c) having Canadian-born children did not confer on the Applicants any *Charter* rights to remain in Canada. In its reasons, the Court of Appeal noted that it did not necessarily adopt the motion's judge characterization of the Applicants' conduct in Chile as this was not relevant to the issue on appeal.

[27] The Applicants appealed to the Supreme Court who refused the leave to appeal on January 11, 1996 (198 NR 397, Docket no 24820).

[28] A decision of an immigration expulsion officer was communicated to the Applicants on January 22, 1996, wherein the officer determined that the Applicants' deportation orders were to be executed on February 13, 1996, by removal of the Applicants to Chile.

[29] On January 31, 1996, the Applicants and their children commenced proceedings in the Federal Court. The Applicants sought judicial review of the decision of the immigration expulsion officer. The Applicants' children commenced both an application for judicial review and an action relating to the deportation orders and the officer's refusal to hear their submissions during the Applicants' removal interview. The Applicants and their children brought three motions on the three related matters before the Federal Court seeking stays of the deportation orders, while the Respondent brought a motion to strike in one of the children's' motions.

Judgment was rendered orally on February 5, 1996, staying the execution of the deportation orders until such time as the Applicants' applications for leave and judicial review were heard, and postponing the rest of the motions *sine die.*

[30] On May 29, 1997, the Federal Court rendered judgment on the Applicants' application for judicial review of the immigration expulsion officer's decision. The Federal Court declined to set aside the officer's decision or declare certain provisions of the *Immigration Act* to be of no force and effect by virtue of sections 7 and 12 of the *Charter*. The Federal Court did, however, stay the deportation orders to permit the Applicants to submit, within 45 days, an application to stay in Canada on H&C grounds. The Federal Court considered that such an application permitted the Applicants to raise their "concerns regarding events that may have occurred that have changed their situation into one in which there is risk".

[31] As to the proceedings filed by the Applicants' children, the application for leave and judicial review was dismissed and the action was struck for disclosing no reasonable cause of action, and a subsequent appeal was discontinued.

[32] On July 11, 1997, the Applicants filed applications for permanent residence on H&C grounds, including extensive materials and written submissions. They were interviewed at the Mississauga CIC on October 30, 1997. On October 14, 1997, the National Security Screening Division stated that there are reasonable grounds to believe that the Applicants may be inadmissible for being involved in war crimes. On November 25, 1997, the officer conducting the H&C examination requested a risk assessment. The Applicants provided additional

submissions on risk on July 9, 1998. Shortly thereafter, the Applicants' file was provided to the War Crimes Unit, which rendered a negative risk opinion on September 11, 1998. The risk assessment was disclosed to the Applicants, who provided further submissions on risk on December 31, 1998.

[33] Following the Applicants' further submissions on risk, a second risk assessment was performed. The second assessment, dated January 15, 1999, resulted in a positive risk assessment on the basis that the Chilean government had shown some interest in the case by hiring a Canadian law firm to track the outcome of the case in Canada. The Applicants were afforded the opportunity to provide further submissions.

[34] On August 5, 1999, the officer refused the applications on H&C grounds. The officer considered the record, including the positive risk opinion, before concluding that: (a) if the Applicants were escorted back to Chile and if they faced charges, the Amnesty Laws would ensure that due process would be applied in their case, and there would be no or little risk of inhumane treatment, torture or death; and (b) even though the positive factors in the matter were accepted, "after considering the actions of [the Applicants] while they were members of the Dicar in Chile, an organization which can be considered one with a single, limited brutal purpose, and, considering the objectives of the *Immigration Act*, I am not satisfied that the H & C grounds in this case are sufficient to warrant processing this application from within Canada on an exceptional basis".

[35] The Applicants sought judicial review of the H&C decision on a number of grounds. On August 3, 2000, the Federal Court allowed the judicial review on the basis that the decision was unreasonable for having minimized the interests of the Applicants' children. The Federal Court found that the officer's reasons did "not reflect the 'attentiveness and sensitivity to the importance of the rights of children, to their best interests, and to the hardship that may be caused to them' that is required by the *Baker* decision". (*Naredo v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 15973). The matter was therefore sent back for redetermination.

[36] The redetermination took several years, during which a number of exchanges took place concerning the file and several rounds of updated submissions were filed. Notably, on January 14, 2004, January 23, 2006, October 21, 2006, and August 12, 2008. By that time, the file was comprised of thousands of pages of material and contained over 80 letters and affidavits in support. Indeed, when referring to a request for further time in 2008 in order to provide updated submissions, the Applicants stated, "[a]s your office is aware, the files for [the Applicants] are lengthy and complicated …".

[37] In addition, during that time, the Applicants separated and ultimately divorced. In 2004, counsel had notified CIC that Mr. Arduengo Naredo and Ms. Salazar had separated and commenced new common-law relationships. As a result, counsel for the Applicants requested that the files be separated and individual decisions be rendered for Mr. Arduengo Naredo and Ms. Salazar, albeit they agreed to be interviewed together should one be scheduled. In 2006, in light of the change of marital status it was requested that individual decisions be issued but that

the applications be processed, assessed and considered at the same time. Consequently, various volumes of the files were split and sent to different locations. By 2008, the files were in the process of being considered separately by two different members.

[38] Furthermore, and in parallel, a Pre-Removal Risk Assessment [PRRA] application was provided to Mr. Arduengo Naredo on September 17, 2007. On October 18, 2008, the PRRA application forms were submitted, with the written submissions and the full submission package following in November 2008. Additional exchanges took place between CIC and counsel for the Applicants, that were also aligned with the processing of the H&C applications redetermination. In the Decisions currently under review, the Officer states that on November 28, 2008, the PRRA application was refused.

[39] In addition, and in parallel, Mr. Arduengo Naredo was listed on the national consolidated report of war crimes and possible war crimes, and thus Mr. Arduengo Naredo and Ms. Salazar's cases were monitored by the Crimes Against Humanity and War Crimes Section of the Department of Justice and the Ontario War Crimes Unit. The aforementioned section of the Department of Justice and the Royal Canadian Mounted Police also investigated the Applicants.

[40] On November 14, 2012, Mr. Arduengo Naredo's H&C application was again refused [2012 H&C Decision]. The officer highlighted previous actions described by Mr. Arduengo Naredo while he was a member of DICAR, along with the earlier findings of the IAB that:

> Naredo took part in at least two dozen incidents of torture which he says were always commenced by the use of electric devices. Sometimes these "interrogations" were augmented by placing the suspect's head under water or butting lighted cigarettes on the

> subject's whole body. Naredo says that his whole team of four persons, including himself, participated in each of the incidents of torture, although he himself at no time applied any force to any of the detainees but merely acted as a guard or as a witness to the statements made by the detainees.

[41] The officer considered the risk alleged by Mr. Arduengo Naredo, should he be returned to Chile, stemming from his membership in DICAR, along with his establishment in Canada and the hardship associated with leaving Canada. The officer acknowledged Mr. Arduengo Naredo's submission that he has not been charged with a criminal offence in Chile or Canada, but concluded as follows:

> I have taken into consideration the applicant's actions in Chile when he was a member of the Secret Police. The fact that no action has ever been taken against the applicant does not negate his actions during the Pinochet era. The actions of the applicant in question are not from a third party or a rumour; the applicant himself disclosed the information. I am not satisfied that I have been presented with sufficient evidence to conclude that he was not a party to the incidents as described.
>
> I am not making a finding on whether the applicant is inadmissible for any crime committed in Canada or in Chile or anywhere else in the world. However, taking into account the applicant's actions during his membership with DICAR, I find that the incidents described by the applicant to be greatly disturbing. I am not persuaded that the applicant's establishment in Canada or the positive factors in his request for an exemption are sufficient to overcome his actions undertaken while he was a member of the DICAR.
>
> I reiterate my contention that the granting of an exemption in an H&C context is for exceptional consideration and was not meant to shield one from prosecution or due process under the law. Moreover, the fact that the applicant has not been charged with any offence does not absolve the applicant of his actions committed while a member of the DICAR.
>
> I have given significant weight to the applicant's actions while he was a member of the DICAR. He took part in two dozen incidents of torture; actions that included but was not limited to kidnappings,

> forcible confinement and torture. While I acknowledge that the applicant states that he was forced into joining the organization, I note that he remained with DICAR for a period of four years. I am not satisfied that he has presented sufficient evidence of any concerted attempts that he made to leave the organization. He stated under oath that he was expelled from DICAR for refusing to fulfill orders. I find that these actions do not weigh in his favour and his establishment and length of time in Canada, while significant, does not overcome the atrocities committed during his membership with the DICAR.

[42] The same officer who rendered the 2012 H&C Decision also conducted a PRRA and determined that Mr. Arduengo Naredo would not face a risk should he be returned to Chile [*2012 PRRA Decision*]. Mr. Arduengo Naredo had pleaded that he faced a risk due to his involvement in DICAR, and in particular, that he would face reprisals from individuals who took part in the atrocities he witnessed. The officer was not satisfied that recent objective evidence supported Mr. Arduengo Naredo's allegation that people who committed crimes during the Pinochet regime were involved in the current Chilean government and remain interested in harming him. She found the determinative issue to be the availability of state protection. The officer considered that if Mr. Arduengo Naredo "were to face charges for his actions that took place during his years in DICAR, the documentary evidence satisfies me that the application would receive due process in the legal system in Chile."

[43] Mr. Arduengo Naredo sought judicial review of both the *2012 H&C Decision* and the *2012 PRRA Decision*. Following discussions between the parties, it was agreed that the matters would be redetermined. As a result of the agreement between the parties, on December 13, 2013, the Federal Court ordered that both matters be redetermined before different officers.

Subsequently, the PRRA process was put on hold pending the redetermination of the H&C applications.

[44] On January 27, 2014, counsel for the Applicants provided further documentation and submissions to the CIC. The submissions state, *inter alia*, that:

> The issue in Mr. Arduengo's case has always been his past involvement with the Chilean police intelligence agency, the DICAR, under the Pinochet regime. …
>
> There has not been a formal determination of whether Mr. Arduengo could have been considered complicit in the crimes committed by DICAR officers. While I do not think he was complicit, particularly given his defection early in the years of the Pinochet regime, if this is the view then please permit him to seek a finding that he has been rehabilitated. From his defection to the present time, he has been remorseful about his past contact with the military – sorry he ever unwittingly got drawn into it.

[45] On March 31, 2014, the Applicants' files were transferred from other offices to the Backlog Reduction Office in Vancouver (now HMID-Vancouver). On November 9, 2015, the files were assigned to a C3 Security Officer. As a result, on November 16, 2015, procedural fairness letters were sent to counsel for the Applicants seeking updated information. On December 18, 2015, counsel for the Applicants provided further information, including in relation to Mr. Arduengo Naredo's health.

[46] During that period, CIC shared information on the matter with the Canada Border Services Agency [CBSA] Enforcement, who was considering the question as to whether the Applicants were barred from section 96 Refugee Protection in the PRRA process. Furthermore, in 2016, CBSA Enforcement also considered whether to convoke the Applicants to admissibility

hearings to determine whether they were described under subsection 35(1) of the IRPA. As a result, action on the Applicants' files at HMID-Vancouver was put on hold until CBSA Enforcement decided whether to hold admissibility hearings for Mr. Arduengo Naredo and Ms. Salazar. On April 26, 2018, after CBSA Enforcement decided not to convoke admissibility hearings for the Applicants, 18 volumes of the Applicants' files were returned to HMID-Vancouver.

[47] On November 30, 2018, the Officer who rendered the Decisions at issue, wrote to counsel for the Applicants: (a) informing them that he now had carriage of the files; (b) providing them with an opportunity to submit updated submissions; (c) noting that Mr. Arduengo Naredo may be inadmissible under subsection 35(1) of the IRPA by reason of his association and employment with DICAR; and (d) stating that "[u]pdated submissions regarding this alleged inadmissibility are also welcome".

[48] In December 2018, counsel for the Applicants requested an extension "to file submissions as to admissibility" until February 28, 2019, which was granted. Updated submissions for both Applicants were filed accordingly.

[49] On May 21, 2019, the Officer wrote to counsel for the Applicants informing them that he would be relying on portions of the 1990 Rettig Commission Report "Report of the Chilean National Commission on Truth and Reconciliation" [Rettig Report], disclosing the Rettig Report to them, and providing an opportunity to make submissions on it.

[50] On July 10, 2019, counsel for the Applicants responded and: (a) queried what portions of the extensive and lengthy Rettig Report did the Officer consider relevant to the Applicants; (b) provided submissions on portions of the Rettig Report; (c) provided submissions on the Applicants' involvement with DICAR, and the subsequent assistance they provided to Amnesty International and the Chilean Police; and (d) sought to confirm that the Officer had the previous submissions and supporting documents in the file.

[51] On July 11, 2019, the Officer replied: (a) attaching an extract of materials from the Rettig Report entitled, "Evidence of the Use of Torture by the Chilean Government in the 1970s"; (b) confirming that he had all the files, 18 in number; and (c) providing the Applicants with an extension until the end of September 2019, in order to make further submissions.

[52] On October 25, 2019, the Applicants filed further submissions. Among other things, the Applicants noted that they were not mentioned in the Rettig Report and that they "have not faced allegations or criminality or involvement in human rights abuses …They were not made the subject of an adjudication or admissibility hearing on the grounds of criminality or involvement in international crimes. It is now far too late to commence proceedings on the basis of allegations which are more than four decades old."

[53] On February 21, 2020, the Officer rendered the Decisions, refusing the Applicants' applications for permanent residence on H&C grounds.

III. The Decisions Under Review

[54] In short, the present H&C applications were first filed on July 11, 1997, but given the steps, rejections, proceedings, and redeterminations, detailed in the section above, the reassessments that form the basis of the present proceedings are dated February 21, 2020. As also noted above, the Officer had the 18 volumes of files relating to the Applicants and the applications at issue. The resulting Decisions are lengthy, with the decision on Ms. Salazar's application totalling 53 pages and the decision pertaining to Mr. Arduengo Naredo totalling 55 pages.

[55] In summary, the Officer found reasonable grounds to believe that the Applicants were inadmissible under paragraph 35(1)(a) of the IRPA for their complicity in crimes against humanity while they were members of DICAR, the intelligence arm of the Chilean Police force during the regime of General Augusto Pinochet. The Officer concluded that the H&C factors raised by the Applicants did not justify a waiver of their inadmissibility.

[56] The portions of the Decisions that are relevant to the issues raised in these applications for judicial review shall be dealt with in Section VI (Analysis) of this judgment, below.

IV. Issues and Standard of Review

[57] The Applicants raise a number of issues, which I reformulate as follows:

1. Was it an abuse of process for the Officer to address the question of the Applicants' inadmissibility under paragraph 35(1)(a) of the IRPA rather than have the matter proceed before the Immigration Division for an admissibility hearing?

2. Did the Officer breach procedural fairness by not advising the Applicants that inadmissibility under paragraph 35(1)(a) of the IRPA was being contemplated in the context of the H&C applications?

3. Was it an abuse of process for the Officer to find the Applicants inadmissible, and thus refuse the H&C applications, based on information that has been known to the Minister for decades?

4. Was the Officer's finding that paragraph 35(1)(a) of the IRPA applied to the Applicants unreasonable?

5. Did the Officer unreasonably assess the H&C factors by placing undue emphasis on the Applicants' inadmissibility?

6. Should one or more questions be certified?

[58] The first three issues relate to procedural fairness and abuse of process. Such issues in administrative contexts have been considered reviewable on a correctness standard or subject to a "reviewing exercise … 'best reflected in the correctness standard' even though, strictly speaking, no standard of review is being applied" (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*Canadian Pacific*]). The focus of the reviewing court is essentially whether the procedure followed by the decision maker was fair and

just (*Canadian Pacific* at para 54; *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35).

[59] As to the remaining two issues, the applicable standard of review is one of reasonableness as set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]). A reasonable decision "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85).

[60] It is the Applicants who bear the onus of demonstrating that the Officer's Decisions are unreasonable (*Vavilov* at para 100). For the reviewing court to intervene, the challenging party must satisfy the court that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency", and that such alleged shortcomings or flaws "must be more than merely superficial or peripheral to the merits of the decision" (*Vavilov* at para 100).

V. Further Submissions on the Issue of Abuse of Process

[61] In the context of their submissions on abuse of process, the Applicants relied on *Blencoe v British Columbia (Human Rights Commission),* 2000 SCC 44 [*Blencoe*] and *Beltran v Canada (Citizenship and Immigration),* 2011 FC 516 [*Beltran*]. *Blencoe* dealt with the issue of abuse of process in the context of administrative delay. In *Beltran*, a decision addressing the issue of abuse of process in the context of an admissibility hearing, this Court relied on *Blencoe*.

[62] Subsequent to the hearing of this matter, the Supreme Court rendered its decision in *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29 [*Abrametz*]. In *Abrametz*, the Supreme Court addressed in detail *Blencoe* and the applicable test for whether a delay in administrative proceedings amounts to an abuse of process. Consequently, the Court provided the parties with an opportunity to file further submissions in light of the decision in *Abrametz*, of which they availed themselves.

VI. Analysis

[63] Prior to considering each of the issues identified above, a brief consideration of the nature of H&C relief under section 25 of the IRPA is warranted. An exemption under subsection 25(1) of the IRPA is an exceptional and discretionary remedy (*Huang v Canada (Citizenship and Immigration)*, 2019 FC 265 at paras 19-20; *Fatt Kok v Canada (Citizenship and Immigration)*, 2011 FC 741 at para 7). Subsection 25(1) of the IRPA provides the Minister with the discretion to exempt foreign nationals from the ordinary requirements of that statute and to grant permanent resident status to an applicant in Canada if the Minister is of the opinion that such relief is justified by H&C considerations. The H&C discretion is a flexible and responsive exception that provides equitable relief, namely to mitigate the rigidity of the law in an appropriate case (*Rainholz v Canada (Citizenship and Immigration)*, 2021 FC 121 at paras 13-14 [*Rainholz*]).

[64] H&C considerations are facts, established by evidence, that would excite in a reasonable person in a civilized community the desire to relieve the misfortunes of another provided these misfortunes warrant the granting of special relief from the otherwise applicable provisions of the IRPA (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paras 13, 21

[*Kanthasamy*]). Subsection 25(1) has been interpreted to require an officer to assess the hardship that an applicant will experience upon leaving Canada. In an application for H&C relief, an applicant may raise a wide variety of factors to show hardship, with such commonly raised factors including establishment in Canada, ties to Canada, the consequences of separation from relatives, the best interests of the children [BIOC], and health considerations (*Rainholz* at para 16).

[65] It bears mention that under subsection 25(1) of the IRPA, the Minister "may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of [IRPA]", "other than under section 34, 35 or 37", "if the Minister is of the opinion that it is justified by [H&C] considerations relating to the foreign national, taking into account the [BIOC] directly affected." As noted above, paragraph 35(1)(a) of the IRPA provides that a permanent resident or foreign national is inadmissible for "committing an act outside Canada that constitutes an offence referred to in sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*".

[66] Currently, an officer is not permitted to grant an exemption under section 25 from the criteria under section 35 of the IRPA, however, at the time the present H&C applications were first filled, no such restriction was in place. Hence why, in the Decisions, the Officer found the Applicants inadmissible under paragraph. 35(1)(a) but nevertheless addressed the H&C factors raised by the Applicants and weighed them against the actions taken by the Applicants while they were members of DICAR.

A. *The finding of inadmissibility under paragraph 35(1)(a) of the IRPA by the Officer rather than by the Immigration Division*

[67] The Applicants allege that any determination on admissibility ought to have been brought before the Immigration Division. As detailed above, the CBSA had decided not to proceed with a report seeking an admissibility hearing. The Applicants submit, therefore, that the Officer did an "end-run" around the admissibility hearing provisions of the IRPA by determining the question of admissibility in the context of the H&C applications.

[68] The Respondent submits that there is no requirement that an applicant shall be sent to the Immigration Division for a determination on admissibility prior to rendering a decision on an H&C application. The Respondent states that it is well within the jurisdiction of an officer on an H&C application to determine whether an applicant is inadmissible under the IRPA, and relies on *Guzelian v Canada (Immigration, Refugees and Citizenship)*, 2021 FC 460 [*Guzelian*]. The Respondent submits that the Applicants are already inadmissible to Canada, have removal orders in effect, and thus there was no need to have a report prepared under section 44 of the IRPA and proceed with an admissibility hearing before the Immigration Division. Practically speaking, there was no necessity in doing so because the Respondent did not need to seek a removal order on the basis of inadmissibility under paragraph 35(1)(a) of the IRPA.

[69] I find that the Respondent was not obliged to bring the matter before the Immigration Division. Subsection 44(1) of the IRPA provides that an "officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister." [Emphasis

added]. If the Minister considers that the report is well founded, then pursuant to subsection 44(2) of the IRPA "the Minister may refer the report to the Immigration Division for an admissibility hearing." [Emphasis added]. The language of section 44 is permissive, and the Applicants are unable to refer me to an authority that imposes such an obligation upon an officer or on the Minister.

[70] As to whether the Officer was entitled to consider the issue of the admissibility of the Applicants, I find that the Officer was. An officer considering an H&C application has the jurisdiction to determine whether an applicant is inadmissible under the IRPA. By way of example, in *Guzelian*, Justice Richard G. Mosley considered the issue of whether a finding by an officer that an applicant was inadmissible underparagraph 35(1)(a), in the context of an H&C application, was reasonable. At no point in time was there any question that the officer in *Guzelian* had jurisdiction to render a decision on inadmissibility in the context of the H&C application, rather the issue was whether the decision was reasonable based on the evidence before the officer.

[71] In addition, in *Subramaniam v Canada (Citizenship and Immigration)*, 2020 FCA 202 [*Subramaniam*], when considering the difference between when inadmissibility arises in the context of PRRA applications as compared to when it arises in the context of an H&C application, the Federal Court of Appeal found that it was clear that an officer considering an H&C application may render a determination on inadmissibility:

> [31] There is, admittedly, a crucial difference on how and when inadmissibility arises in the course of processing a PRRA (subsection 112(3)) and an H&C application (subsection 25(1)). Within the context of the former, inadmissibility "is a status that

> the applicant acquired prior to his request for a PRRA" (*Tapambwa*, at para. 58). For the purposes of subsection 25(1), however, it is clear that an applicant may be inadmissible either as a result of a prior inadmissibility finding, or of a determination reached by an H&C officer.
>
> [Emphasis added.]

[72] The Applicants plead that the Officer assumed the role of the Immigration Division and bypassed the statutory process for rendering a determination on inadmissibility under section 35 of the IRPA. The Applicants have, however, been unable to point the Court to any authority precluding the Officer from rendering the determination. Instead, the authorities cited by the Applicants relate to: (i) a motion seeking to stay admissibility proceedings before the Immigration Division (*Oberlander v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 294); and (ii) duplicate proceedings, namely vacation proceedings before the RPD commenced in parallel with an appeal from a decision by the Immigration Division on admissibility (*Thambiturai v Canada (Solicitor General)*, 2006 FC 750).

[73] During the hearing, the question arose as to whether there was a practice of referring such cases to the Immigration Division, such that the Applicants' cases ought to have been determined by the Immigration Division on the basis of an established practice of doing so. There was no common ground that such practice exists, nor have I been referred to any authority relating thereto. Accordingly, I do not find that there was any such practice that supports the Applicants' position on this point.

[74] The Applicants plead that for allegations as serious as those under paragraph 35(1)(a), it was an abuse of process to determine the issue in the context of an H&C application, and it ought

to have been referred to the Immigration Division where the Applicants would have been provided with a fair oral hearing and an opportunity to respond. I will deal with the issues of the right to be heard and the ability to adduce evidence in the next two sections of this judgment. I note, however, that as the issue of admissibility was determined in the context of an H&C application, the burden fell on the Applicants to demonstrate they were not inadmissible, which differs from an admissibility hearing conducted under section 45 of the IRPA. As stated by Justice Mosley in *Guzelain*:

> [20] The general principle is that the burden of proof falls on the party who seeks the exclusion, as recognized by the Supreme Court of Canada in *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 at para 29 [*Ezokola*]. Such would be the case, for example, should a report had been made against the Applicant under IRPA s 44 and an admissibility hearing conducted under IRPA s 45. In that case, the burden would rest with the government.
>
> [21] This Court has held, however, that where an applicant seeks to have the Minister exercise discretion under s 25, it falls on the applicant to demonstrate that he is not inadmissible: *Ahmed v Canada (Citizenship and Immigration)*, 2020 FC 791 at paras 68-74 citing *Kumarasekaram v Canada (Citizenship and Immigration)*, 2010 FC 1311.

[75] In addition, had the matter proceeded before the Immigration Division there would have been an oral hearing. In contrast, an H&C application is a paper-based process and applicants are not entitled to expect an interview (*Singh v Canada (Citizenship and Immigration)*, 2022 FC 339 at para 33). While it is clear in the context of this judicial review that the Applicants would no doubt have preferred that the matter proceed to an admissibility hearing as opposed to being determined in the context of the H&C application, as that process may have had certain procedural advantages for them, I am not persuaded that a failure to proceed with an admissibility hearing before the Immigration Division constituted an abuse of process.

[76] In addition, there is an inconsistency in the Applicants' position. On October 25, 2019, when providing submissions to the Officer on the issue of inadmissibility under paragraph 35(1)(a) of the IRPA, in response to the procedural fairness letters dated November 30, 2018, May 21, 2019, and July 11, 2019, the Applicants objected to the possibility of admissibility proceedings, stating, "[i]t is now far too late to commence proceedings on the basis of allegations which are more than four decades old." It is therefore somewhat challenging for the Applicants to now argue that the Officer or the Respondent erred and ought to have prepared a report pursuant to section 44 of the IRPA with a view to referring them to an admissibility hearing, when at the time the Applicants' submissions to the Officer opposed such proceedings and argued that they should not be commenced.

[77] The Applicants have also pleaded that the issue of inadmissibility under section 35 of the IRPA involves consideration of duress, and by not referring the matter to the Immigration Division they were thus deprived of the right to a full and fair defence and to lead evidence on duress. I disagree. As discussed in detail in Section VI(B) below, the Applicants were provided with ample notice that inadmissibility under section 35 was being contemplated by the Officer. They were not precluded from leading evidence and filing any material that spoke to the issue of inadmissibility and specifically, duress.

[78] The topic of duress has been raised in the past by the Applicants. The 2012 H&C Decision reflects that, noting, "the applicant states that he was forced into joining the organization". In the Decisions at issue, the Officer considered the issue of the dilemma faced by members of such organizations, namely whether such a member either acquiesces or denounces

and faces the possibility that they or their family may be severely punished. In considering that issue, the Officer addressed the submissions from the Applicants as to why they stayed and felt helpless to leave. The Applicants had the opportunity to adduce evidence on this point, and did so. Consequently, the Officer turned his mind to the issue and dealt with it based on the record before him. Had they wished to provide further evidence, they were not precluded from doing so. I therefore find that they were not deprived of a right to make submissions or submit evidence in their defence by virtue of the fact that this matter was not referred to the Immigration Division for an admissibility hearing.

[79] Finally, the Applicants submit that on a number of occasions the Respondent made the decision not to proceed with an admissibility inquiry after having considered it. In particular, in 1988, the Applicants state that the decision not to proceed was made on the basis that it would have been time consuming and senior immigration officials believe it would have been difficult for the Minister to prove criminality allegations. The Applicants note that more recently, in 2016, CBSA Enforcement considered whether to hold admissibility hearings. The Applicants submit that this “end-run” around the admissibility provisions by the Officer is all the more egregious because it is a deliberate litigation choice and the Officer was aware that there had been previous decisions not to convoke an admissibility hearing before the Immigration Division.

[80] The Respondent reiterates that there was no obligation on their part to prepare a report under section 44 and then have the Applicants sent to the Immigration Division for a determination on admissibility.

[81] The evidence relied upon by the Applicants from 1988 are comprised of two pieces of correspondence dated November 22 and December 1, 1988, entitled “Memorandum to the Minister” and “Fernando Alfonso Arduengo and Spouse, … Removal Procedures for Minister’s Permit Holders IS 10.53 Immigration Manuals”, respectively. In summary, the Memorandum to the Minister notes the negative media attention, a prior decision to land being based on misinformation, the findings of the Immigration Appeal Board and the Federal Court, a recommendation that sanctuary should not be offered “to persons who have taken part in the persecution of their own nationals”, and a consideration that there was no procedural fairness issue on the basis that the RSAC twice determined that they were not refugees, as did the IAB in 1980 and 1985. Two options were proposed: (i) process the Applicants’ applications for permanent residence; or (ii) allow the Minister’s Permits to expire and request they leave Canada, and should they fail to do so, authorize Ministerial Deportation Orders. The Minister selected the second option.

[82] As to the December 1, 1988, memorandum, it noted the Minister’s decision that the Applicants should be removed from Canada, as they admitted to having been former members of DICAR and having “participated in, and witnesses, the torture of Chilean citizens”. The memorandum concluded that “given the [Applicants’] length of time in Canada, Ministerial Deportation Orders would be the more viable and expedient approach”, and provided recommendations as to the procedure to follow. The memorandum also canvassed in detail proceeding “to removal via the inquiry process”, noting that the Applicants were originally reported and sent to an immigration inquiry in 1978 for lack of an immigrant visa under the prior Act, and continued in 1979 under the Act in force at the time. The memorandum then canvassed

reporting the Applicants and having an inquiry for: (i) expired visitors permits; (ii) lacking an immigrant visa at a port of entry; (iii) for continuing to work without a permit; (iv) failing to comply with the requirements of the Act or any orders lawfully given under the Act; and (v) reasonable grounds to believe that a crime against humanity has been committed outside Canada. The memorandum highlighted the challenges for each of the options for reporting the Applicants. For the last option, the memorandum noted that it would be difficult to establish the allegation in the report and would no doubt result in considerable delay before the inquiry could be concluded.

[83] In short, in 1988, a memorandum to the senior legal counsel in Immigration Legal Services recommended that Ministerial Deportation Orders would be the better approach rather than reporting the Applicants and holding inquiry hearing under a number of different paragraphs of the Act in force at the time, including those addressing crimes against humanity. I agree with the Applicants that in the 1988 memorandum, the drafter of the memorandum was of the view that establishing the allegation in the report would be difficult and the process would be time consuming.

[84] Where my view differs from the Applicants' view, however, is in relation to the effect of the Respondent, in 1988 and 2016, having considered the option of reporting the Applicants and proceeding to an admissibility hearing, but deciding not to move forward with that option. It is clear from the record that much time and effort has gone into the Applicants' immigration and refugee proceedings in Canada, both on the part of the Applicants and on the part of the Respondents. This is even more so given the length of time the Applicants have spent in Canada. It is understandable that both parties would spend time considering the options available to them,

evaluating the strengths and weaknesses of those options, and selecting their courses of action accordingly. I do not find that the Respondent should be faulted for having engaged in this process.

[85] Nor do I find that the fact that the Respondent considered the option of reporting the Applicants and having an admissibility hearing in 1988 and 2016, somehow, creates an obligation on the part of the Respondent to proceed with such a report and an admissibility hearing. As I have found above, the Respondent was not under an obligation to bring the matter before the Immigration Division. Accordingly, the fact that the Respondent considered doing so, but then did not, does not constitute an abuse of process or result in the Officer having conducted an "end-run" around the admissibility hearing provisions.

B. *Did the Officer breach procedural fairness by not advising the Applicants that inadmissibility under paragraph 35(1)(a) of the IRPA was being contemplated in the context of the H&C applications?*

[86] The Applicants plead that it was unfair for the Officer to not make it clear that he was going to make a finding of inadmissibility under section 35 of the IRPA. The Applicants submit that the Officer advised that he was making a "security assessment" in the context of determining the H&C applications, not that he would be making a determination on inadmissibility that would impact the H&C decision. The Applicants argue that it was unfair of the Officer not to make it clear he would determine the Applicants admissibility under section 35 when the only grounds of inadmissibility brought before him were the removal orders issued for the failure to leave Canada when required to do so (i.e., lack of status).

[87] The Respondent pleads that the Applicants were expressly informed that inadmissibility under section 35 of the IRPA by reason of their activities with DICAR was being considered. The Respondent states that while the Officer also mentioned a security assessment, this term is used for inadmissibility and is not inconsistent with conducting an analysis under section 35 of the IRPA. Furthermore, the Respondent submits that the Applicants submissions in response to the Officer indicate that they were well aware that inadmissibility under paragraph 35(1)(a) of the IRPA was being considered.

[88] Having considered the exchanges between the Applicants and the Officer, the Applicants have failed to convince me that there was a breach of procedural fairness. I agree with the Respondent that in his letter dated November 30, 2018, the Officer specifically informed counsel for the Applicants that inadmissibility to Canada under subsection 35(1) of the IRPA on the basis of association and employment with DICAR was a concern and that updated submissions regarding this alleged inadmissibility were welcome. In the same letter, the Officer had also invited updated submissions on the applications, including employment, volunteer work, health, studies, finances, country conditions and any other information.

[89] On December 20, 2018, counsel for the Applicants requested an extension within which to “file submissions as to admissibility”. On February 28, 2019, the Applicants filed updated documentation and counsel’s submissions. The submissions focused on the Applicants joining DICAR, the reasons they left, their assistance to the Chilean prosecutions unit, and the fact that there has not been a finding that the Applicants were inadmissible because of their activities in DICAR.

[90] On May 21, 2019, the Officer wrote to counsel for the Applicants informing them that he would be relying on portions of the Rettig Report, and provided the Applicants with the opportunity to file further submissions. On July 10, 2019, counsel for the Applicants responded: (i) querying what portions of the Rettig Report were relevant to the Applicants; (ii) providing comments on the Rettig Report generally; (iii) making submissions as to the Applicants' involvement with DICAR and the steps they have taken to assist the Chilean authorities since leaving Chile; and (iv) reiterating that the Applicants have not been charged with or convicted of a criminal offence or had a security certificate issued against them.

[91] On July 11, 2019, the Officer replied attaching extracted sections from the Rettig Report entitled, "Evidence of the Use of Torture by the Chilean Government in the 1970s". The Officer further confirmed that he had all 18 volumes of files in the matter, and had inventoried all of their contents and "marked for reference their submissions, lawyers' letters and the relevant documentation concerning events in Chile." The Officer provided a further extension for submissions.

[92] On October 25, 2019, the Applicants filed further submissions highlighting: (i) the cooperation of the Applicants with NGOs and authorities; (ii) that it was dangerous to defect and flee Chile; (iii) the fact that they have not been made the subject of adjudication or admissibility hearings on grounds of criminality or involvement in international crimes; and (iv) that the Applicants have been remorseful about what involvement they had with DICAR and that neither had been aware of what they were getting into.

[93] The foregoing exchanges satisfy me that the Officer had highlighted that inadmissibility under section 35 of the IRPA was an issue, provided the Applicants with the materials not in their possession that he intended to rely upon, and provided multiple opportunities for them to make submissions on the issue. The responses provided by the Applicants demonstrate that they were aware that inadmissibility under section 35 of the IRPA was being considered by the Officer.

[94] The Applicants plead that the original H&C application was made in 1997 to address the risks the Applicants would face should they return to Chile, in conjunction with their establishment and the best interests of their children. The Applicants submit that it was unfair to add a new ground of inadmissibility that was not part of the H&C application, and that the Officer ought to have made it clear he was doing so.

[95] While it is clear that the Applicants object to inadmissibility under section 35 of the IRPA being considered by the Officer, I nevertheless find that they had sufficient notice that it was an issue. Consequently, there was no breach of procedural fairness by the Officer.

C. *Was it an abuse of process for the Officer to find the Applicants inadmissible, and thus refuse the H&C applications, based on information known to the Minister for decades?*

[96] The Applicants plead that the facts and allegations that formed the basis for the finding of inadmissibility have been known to the Respondent for more than 40 years, yet no steps were taken to advance allegations of inadmissibility on those grounds. Consequently, the Applicants plead that asking them do defend themselves more than 40 years later is unfair and an abuse of

process. The Applicants rely on *Beltran*, in which Justice Sean Harrington found that it was abusive to issue an opinion that Mr. Beltran, a successful refugee claimant, was inadmissible after the authorities had been aware of his situation for 22 years. The Applicants submit that the delay is on the extreme end of unreasonable.

[97] The Applicants submit that they disclosed their past in DICAR when they arrived in 1978, and since that time have been living peacefully in the community, establishing homes and families, and raising their children. To raise these allegations of criminality now constitutes inordinate delay, and thus an abuse of process. The Applicants argue that the prejudice caused by this delay is apparent, as they have lived with the stigma associated with a lack of status in Canada since 1978.

[98] The Respondent submits that the Applicants' reliance on *Beltran* is misplaced. In *Beltran,* the Court found that "it is completely wrong for the Government to keep information up its sleeve for 20 years" and then to use it to find a person inadmissible. The Court found that Mr. Beltran has lost the opportunity to answer the case against him. The Respondent pleads that, unlike in *Beltran,* the Minister has consistently shown concern about the Applicants' involvement in crimes against humanity and that the Applicants have had the opportunity to address the issue on multiple occasions. In particular, the Respondent notes that both the RSAC and IAB made findings of fact about the Applicants' involvement in crimes against humanity following processes during which the Applicants participated.

[99] The Respondent submits that, in light of all the circumstances of the case, the delay was not inordinate and has been explained by the Officer in his Decisions. Furthermore, the Respondent argues that there is no evidence in the record of prejudice suffered by the Applicants as a result of any delay in processing their H&C applications.

[100] I find that the Applicants have failed to demonstrate an abuse of process by the Officer in finding the Applicants inadmissible based on information known to the Minister for decades. First, the issue of the Applicants' activities while members of DICAR has remained a live issue throughout the various steps and proceedings over the past four decades. Second, the Applicants have failed to demonstrate that they meet the applicable test set out in *Abrametz* for whether a delay in administrative proceedings amounts to an abuse of process.

[101] First, having reviewed all 19 volumes spanning the time from when the Applicants first arrived in Canada to the present day, it is clear that the Applicants' activities while in DICAR became an issue shortly following their arrival and have remained so to this day. A detailed summary of the steps taken and the various proceedings over the past four decades is found in Section II (Context) of this judgment.

[102] Concerns were expressed by the RSAC, who examined and refused the Applicants' refugee claims in February 1979, as to Mr. Arduengo Naredo's knowledge of torture and execution of political adversaries while at DICAR. The Applicants became the subject of an inquiry hearing on admissibility on June 15, 1979, at which point the Applicants again claimed refugee status. The refugee claims were re-examined by the RSAC who determined, in its report

dated November 14, 1979, that the Applicants did not qualify for protection as Convention refugees by reasons of: (a) “both [the Applicants] have been active agents of DICAR over several years, have admitted their participation in detentions and have witnessed incidents of torture and killings. There is indication to believe they have, in fact, participated in the brutalities committed by DICAR”; and (b) “it would violate the spirit and intent of Article 1 of the Refugee Convention and Protocol to grant refugee status to any person who has admitted participating in an official capacity in acts contrary to the principle of the Convention.”

[103] The IAB in 1980 determined that the Applicants are outside the definition of a Convention refugee, and that “by their own testimony, have participated in kidnappings, surveillance and brutality”. The panel further found that the Applicants had not left DICAR for reasons of suspected disloyalty, rather Mr. Arduengo Naredo was considered a security risk by virtue of his health and Ms. Salazar retired because dating and marriage between members of DICAR was forbidden, and that they failed to establish plausible facts upon which to base a fear of persecution. The IAB decision was successfully appealed on the basis that the IAB misstated the test by referring to “would” be subject to persecution rather than “a well-founded fear of persecution” (*Naredo v Canada (Employment and Immigration)*, 1981 CanLII 2708).

[104] In 1982, approval in principle for permanent residence under a “pre-Chilean visa programme” was revoked by the Minister on the basis that “he quite strongly supported the views of the [RSAC], the [IAB] and senior Commission officials that persons such as the [Applicants], who have been party to acts of human torture, do not deserve the protection of a democratic institution.”

[105] In 1985, the IAB's reconsideration found: a) issues with the Applicants' credibility; (b) the Applicants did not have a well-founded fear of persecution; and (c) the Applicants' departure from Chile was substantially motivated by economic considerations.

[106] The Applicants received Minister's Permits in 1986, but in 1988, the Applicants were informed that it had been concluded that there were insufficient H&C grounds to warrant granting permanent residence from within Canada, and as such the Minister's Permits would not be renewed. The issue again was the Applicants' past. The Applicants did not leave Canada as required, and as such a Ministerial Deportation Order was issued in March 1989.

[107] Proceedings were unsuccessfully brought in the Federal Court in order to quash the Deportation Order and force the Minister to process the application for permanent residence. The Federal Court noted that the sticking point as between the Applicants and the Minister was the conduct of the Applicants while they were members of DICAR in Chile (*Naredo 1990* at 169-173). The Federal Court of Appeal denied the appeal, and the Supreme Court refused leave.

[108] In 1996, after leave to the Supreme Court was refused, an expulsion order was communicated to the Applicants. The Applicants sought judicial review of the expulsion officer's decision, which was denied, however, the Federal Court provided a 45-day stay to permit the Applicants to lodge an application on H&C grounds.

[109] In 1999, the officer refused the H&C application, finding that even though there were positive factors "after considering the actions of [the Applicants] while they were members of

the Dicar in Chile, an organization which can be considered one with a single, limited brutal purpose, and, considering the objectives of the Immigration Act, I am not satisfied that the H&C grounds in this case are sufficient to warrant processing this application from within Canada on an exceptional basis". The Applicants sought judicial review of the decision, which was successful on the basis that the decision was unreasonable for having minimized the interests of the Applicants' children.

[110] A number of other steps were taken, and in parallel Mr. Arduengo Naredo was listed on the national consolidated report of war crimes and possible war crimes, and Mr. Arduengo Naredo and Ms. Salazar's cases were monitored by the Crimes Against Humanity and War Crimes Section of the Department of Justice and the Ontario War Crimes Unit.

[111] In 2012, Mr. Arduengo Naredo's H&C application was again refused. The officer highlighted previous actions described by Mr. Arduengo Naredo while he was a member of DICAR, and concluded:

> I have taken into consideration the applicant's actions in Chile when he was a member of the Secret Police. The fact that no action has ever been taken against the applicant does not negate his actions during the Pinochet era. The actions of the applicant in question are not from a third party or a rumour; the applicant himself disclosed the information. …
>
> I am not making a finding on whether the applicant is inadmissible for any crime committed in Canada or in Chile or anywhere else in the world. However, taking into account the applicant's actions during his membership with DICAR, I find that the incidents described by the applicant to be greatly disturbing. I am not persuaded that the applicant's establishment in Canada or the positive factors in his request for an exemption are sufficient to overcome his actions undertaken while he was a member of the DICAR. …

> I have given significant weight to the applicant's actions while he was a member of the DICAR. He took part in two dozen incidents of torture; actions that included but was not limited to kidnappings, forcible confinement and torture. …

[112] In the context of the present redeterminations, the submissions filed in 2014 note that "[t]he issue in Mr. Arduengo's case has always been his past involvement with the Chilean police intelligence agency, the DICAR, under the Pinochet regime." This was not a departure of the Applicants' previous position, as their submissions for the prior H&C redetermination also raise the issue of their activities while in DICAR. By way of example, in their 2006 submissions, they submit "the Arduengos have been effectively sanctioned for more than 23 years because of allegations that they have personally committed human rights violations … they face deportation because of these allegations …".

[113] As detailed in Section VI(B) above, the exchanges with the Officer and the submissions by the Applicants in 2018 and 2019, all dealt with the issue of the Applicants' activities while they were members of DICAR.

[114] Based on the foregoing, it is clear that the Applicants' activities while they were members of DICAR have remained a live issue, including in all of their refugee proceedings and in each H&C decision that has been rendered. The fact that this has been the "sticking point" and the main issue between the Applicants and the Minister has been previously noted by this Court (*Naredo 1990* at 169) and by the Applicants themselves in numerous H&C submissions. This differs significantly from the situation in *Beltran*, where Mr. Beltran had refugee status, the

government kept “information up its sleeve for 20 years”, and then initiated admissibility proceedings.

[115] The Applicants plead it was abusive for the Officer to rely on evidence that has been in the possession of the Minister for 42 years given no steps were taken to advance allegations of inadmissibility on these grounds. Given the record before me, I disagree. The allegations that formed the basis of the Officer’s determination of inadmissibility have been raised at each step, including all three H&C decisions. It bears remembering that the vast majority of the evidence relied upon was information that the Applicants had themselves provided. Given the two prior H&C decisions and the procedural fairness letters, it can hardly be said that the Respondent was not advancing these allegations prior to the present H&C Decisions, or that the information was kept “up its sleeve”. Moreover, as dealt with in Section VI(A) of this judgment, above, the Respondent had no obligation to advance these allegations only in the context of an admissibility hearing before the Immigration Division. As the Respondent has pleaded, not only was there no obligation to do so, there was no practical need to, as the Applicants have no status - they are not convention refugees nor permanent residents.

[116] Turning now to the applicable test as set out in *Abrametz* (para 101), to determine if a delay amounts to an abuse of process:

1. First, the delay must be inordinate. This is determined on an assessment of the context overall, including the nature and purpose of the proceedings, the length and causes of the delay, and the complexity of the facts and issues in the case; and

2. Second, the delay itself must have caused significant prejudice;

> 3. When these two requirements are met, the court or tribunal should conduct a final assessment as to whether abuse of process is established. This will be so when the delay is manifestly unfair to a party to the litigation or in some other way brings the administration of justice into disrepute.

(1) Inordinate Delay

[117] The Applicants plead that there are two periods at issue. First, the delay tied to "the failure to provide a fair opportunity in accordance with the statutory framework of IRPA to address before the Immigration Division the Applicants' admissibility in light of their past involvement with the Chilean police and their defection from it." The Applicants submit that their inadmissibility is a complex legal issue and the delay spans some forty years.

[118] Second, the Applicants raise the time frame for the delay in the H&C applications, originally filed in 1997, for a total of 23 years by the time of the Decisions at issue (including the redeterminations in between). The Applicants submit that the "H&C application is not complex" and the current processing time is said to be 20 months.

[119] The Applicants submit that the Minister has not provided any explanation for the delays and that such delays were not the responsibility of the Applicants.

[120] The Respondent submits that the Supreme Court has determined that the fact that a process has taken considerable time does not itself amount to inordinate delay, and one must consider the processing time in light of all the circumstances of the case (*Abrametz* at paras 50-51). The Respondent refers to the section titled "Applicants' Immigration History in Canada in

the Decisions," a section that is four pages long for each Applicant, which the Respondent submits provides a full and detailed explanation of the processing time, demonstrating that, given the fact of the case, the delay is not inordinate.

[121] The Supreme Court instructs that when determining whether a delay is inordinate, a court should consider a non-exhaustive list of contextual factors, including: (a) the nature and purpose of the proceedings; (b) the length and causes of the delay; and (c) the complexity of the facts and issues in the case. Having considered the contextual factors, and conducted an in-depth and detailed review of the history of the various proceedings involving the Applicants since 1978 as contained in the 19-volume record, I do not find the delay to be inordinate.

[122] As to the longer time frame of over 40 years to which the Applicants refer, it bears highlighting that during that period there have been well in excess of 20 proceedings commenced by the Applicants, including the various refugee claims, judicial reviews, appeals, actions, PRRAs, and H&C determinations. A detailed history is provided in Section II (Context) of this judgment. The Applicants complain about the 40-year delay, but a careful review of the record demonstrates the following. First, there has been steady progress in what are complex cases with voluminous records. Second, it is the Applicants who have availed themselves of possibly every procedural step open to them in order to remain in Canada over the past 40 years. This was certainly within their right to do, and they should in no way be faulted for that. Equally true, however, is that the Respondent should not be faulted for the fact that those steps have taken time and that over 40 years later, the issue of the Applicants' activities while in DICAR and their continued efforts to regularize their status in Canada, are yet again before an administrative

decision maker and this Court. When taking a global view of the volume of proceedings over the past 40 years, the Applicants' complaint is in essence not that the matter has not been resolved sooner, but rather that it has not been resolved in their favour.

[123] Turning to the H&C applications, the purpose of which is to consider whether H&C considerations warrant the granting of special relief from the otherwise applicable provisions of the IRPA (*Kanthasamy* at paras 10, 13). While the Applicants plead that the H&C application is not complex by its nature, in this particular case, I disagree. By the Applicants' own admission, the issue of the Applicants' activities while in DICAR and the impact on their admissibility, is complex. Given that has formed part of each of the H&C applications, along with large volumes of documents, they can hardly be said to be simple. In fact, by 2008, the H&C file was comprised of thousands of pages of material and contained over 80 letters and affidavits in support, and the Applicants, when referring to a request for further time in that year stated, "[a]s your office is aware, the files for [the Applicants] are lengthy and complicated …".

[124] As to the delays, since it was agreed on December 13, 2013, that the matter would be redetermined again, I note further submissions and information were provided in 2014, 2015, 2018 and 2019. During the 2016 – 2018 period, CBSA Enforcement was considering whether the Applicants were barred from section 96 refugee protection in the PRRA process and whether to convoke admissibility hearings. As detailed earlier in Sections II and VI(A) of this judgment, a request for updated submissions on inadmissibility under section 35 of the IRPA was raised with the Applicants in 2018 and numerous exchanges and submissions followed. From the record, each time the Applicants requested an extension on the deadline within which to file further

submissions, it was granted. Furthermore, the Applicants themselves raised the history and the complexity of the case with the Officer and sought to confirm he had all the records. The Officer confirmed that he was "in possession of all the files (18 in number, the oldest material dating from 1981) related to your clients' interactions with this department" and that he had inventoried all of their contents. The resulting Decisions are lengthy, with the decision on Ms. Salazar's application totalling 53 pages and the decision pertaining to Mr. Arduengo Naredo totalling 55 pages.

[125] While perhaps the matter could have proceeded more quickly, given the foregoing, I do not find that the delay was inordinate. Rather, given the history and complexity of the matter, including the fact that this was the third redetermination of the H&C applications, it was not inappropriate that both the Applicants and the Officer took the time they respectively required to consider all the materials and documentation, and prepare their respective submissions and Decisions accordingly.

(2) Significant Prejudice

[126] The Applicants plead that "[t]he prejudice is apparent", submitting that the Applicants have "lived with the stigma associated with the lack of status in the country since 1978" and will have to deal with the trauma of having been permitted to establish their homes, families and communities in Canada, only to lose it all through removal in their senior years.

[127] The Applicants argue that the delay is so egregious that prejudice is presumed. The Applicants state that *Blencoe* and *Abrametz* recognize that prejudice needs to be established, but

that the Supreme Court did not say that it could not be established through a presumption. The Applicants submit that a delay of 40 years is *per se* unfair and causes significant prejudice.

[128] The Respondent submits that the Applicants have failed to show that the processing time has caused them significant prejudice. The Respondent pleads that they have been confronted with their involvement in crimes against humanity while members of DICAR since their arrival in Canada in 1978 and have had the opportunity to address it on multiple occasions. The Respondent relies on *Abrametz* where examples of significant prejudice were provided, and argues that there is no evidence of such prejudice in this matter.

[129] I do not find the Applicants have demonstrated significant prejudice in line with the test as set out in *Abrametz*. The Supreme Court instructs that delay alone is insufficient to lead to an abuse of process and "proof of significant prejudice" is required (*Abrametz* at para 67). The Supreme Court notes that a delay may be detrimental but it may also be beneficial to a party, for example if a party is facing a penalty of disbarment as delay may be welcomed as the party could continue to practice (at para 67).

[130] While the Applicants refer to the stigma associated with the lack of status and the hardship tied to removal after having been present in Canada for over 40 years, they have not provided evidence of significant prejudice arising from the time taken to render the Decisions. The prejudice referred to by the Applicants arises rather from the fact that they have not been successful in their many attempts to regularize their status over the past decades. I do certainly have sympathy for the uncertainty they have faced over decades due to their lack of status and

the stress caused by the possibility of being removed. While not specifically highlighted by the Applicants, there are affidavits and letters in the record that do speak of the stress of not being able to travel since they are not permanent residents. I have no doubt that this has been very taxing for them, but this is tied to the fact that they have been unable to regularize their status.

[131] On the other hand, the Applicants have successfully sought stays of their removal orders on a number of occasions, including in 1997 when such a stay was obtained in order to permit them to proceed with H&C applications. I will not venture to opine on whether any delay in the proceedings, thus permitting the stay of the removal orders to continue, would have been beneficial to or welcomed by the Applicants, as it is sufficient to find that significant prejudice has not been proved.

[132] As to the notion raised by the Applicants that significant prejudice may be presumed by virtue of the length of time, I find this notion was rejected by the Supreme Court in *Abrametz*. The Supreme Court stated that if delay alone was sufficient, it would be tantamount to imposing a judicially created limitation period (at para 67). If one were to find that a delay of a certain period of time causes significant prejudice or is presumed to cause it without having to prove prejudice, then one is effectively eliminating the second requirement of the test as set out by the Supreme Court and imposing a limitation period. In *Abrametz*, the Supreme Court expressly rejected a call to "Jordanize" *Blencoe* and recognize inordinate delay as prejudicial in and of itself (at paras 45 – 48, 67).

[133] Furthermore, despite the Applicants' position that there have been delays of 40 and 23 years, for the reasons explained in section VI(C)(1) (Inordinate Delay*)* above, I disagree. This is simply not born out by the record.

(3) Final Assessment

[134] Should the first two requirements of the test be met, then a court or tribunal should conduct a final assessment of whether abuse of process is established. The Supreme Court instructs that this will be so when the delay is manifestly unfair to a party or in some other way brings the administration of justice into disrepute.

[135] I do not find that the first two requirements of the test have been met, nevertheless, I will briefly consider the arguments raised by the parties under this third requirement.

[136] The Applicants plead that one must consider the delays; ages; health issues; family ties; how the Applicants have been treated; the number of times they were told they could remain only to have it withdrawn; the failure to be transparent that inadmissibility would be considered in the context of the H&C Decision; the decision not to proceed with an admissibility hearing because it would be hard to prove; and refusing the H&C on the basis of criminal inadmissibility.

[137] The Respondent submits that this was neither manifestly unfair nor brings the administration of justice into disrepute. The lengthy processing time was explained in the Decisions, and several administrative bodies have made findings of fact about the Applicants' involvement in crimes against humanity following processes in which the Applicants

participated. The Respondent argues that the Officer's consideration of these facts does not bring the administration of justice into disrepute.

[138] I find many of the points raised by the Applicants do not address the issue of delay *per se*, and have been addressed elsewhere in this judgment. Even though I have not found there to be an inordinate delay, any delay in determining the H&C applications at issue in the present proceedings was not in my view manifestly unfair to the Applicants. Taken globally, and viewing delay through the lens of the fact that the Applicants activities in DICAR have been known to the Minister for decades, I do not find it brings the administration of justice into disrepute. As set out in detail previously, the Applicants' activities while in DICAR have been a persistent and live issue in the various proceedings for four decades. There is no unfairness in the fact that it was again an issue in the context of the present redetermination of the H&C applications.

(4) Conclusion – Abuse of Process

[139] For the reasons above, the Applicants have failed to demonstrate an abuse of process by the Officer in finding the Applicants inadmissible based on information known to the Minister for decades. The issue of the Applicants' activities while members of DICAR has remained a live issue throughout the various steps and proceedings over the past four decades and the Applicants have failed to demonstrate that they meet the applicable test set out in *Abrametz* for whether a delay in administrative proceedings amounts to an abuse of process.

D. *Was the Officer's finding that paragraph 35(1)(a) of the IRPA applied to the Applicants unreasonable?*

[140] As noted above, decisions on inadmissibility under paragraph 35(1)(a) of the IRPA are assessed against the standard of reasonableness (*Ukoniwe v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 753 at para 13).

[141] The Applicants submit that the Officer erred in finding that section 35 of the IRPA applied to the Applicants on the basis that the Officer had accepted that the Applicants needed to flee because of death threats, but faulted the Applicants for not doing it sooner. The Applicants argue that the Officer's conclusion that they could have walked away earlier ignored their realities at the time and that they were under duress.

[142] The Respondent submits that the Officer did not in fact find that the Applicants had to flee because of death threats. Rather, the Officer concluded, based on the evidence, that the Applicants had failed to establish that they undertook any concrete action to sever ties with DICAR before April 1977 or were constrained from travelling outside Chile before or after their departure from DICAR.

[143] The Applicants have failed to persuade me on this point. While they state that the Officer did not take issue with the Applicants' need to flee because of death threats, they do not provide a reference to a particular passage in the Decisions. Having reviewed the Decisions in detail, I find no such passage. Moreover, the Officer does not mention death threats in either of the Decisions. The only reference to death threats in the Decisions is in the middle of a lengthy 4-

page quote of the Applicants submissions dated July 10, 2019, where the Applicants alleged, "[n]either knew of DICAR's activities until they were involved and then it was too late to walk away without facing the threat of death".

[144] As to the Officer's finding that the Applicants were complicit, after considering evidence in the record as to the Applicants' freedom to travel outside of Chile while they were in DICAR and the timeline as to when they chose to leave Chile, the Officer concluded that there was little evidence that the Applicants took concrete action to sever their ties with DICAR earlier or could not have left earlier. The Officer concluded that they chose to remain and were complicit in DICAR's activities. Considering the record before the Officer, and the reasons he provided for his findings on this point, I am able to discern "an internally coherent and rational chain of analysis" and therefore decline to intervene (*Vavilov* at para 85; *Canada (Justice) v DV*, 2022 FCA 181 at para 17).

[145] The Applicants also allege that the Officer erred in his application of section 35 of the IRPA to the Applicants because the "record was incomplete in terms of what had existed in writing about their pasts and incomplete in the sense that they were not examined with a view to determining if they were culpable of the crimes of DICAR and with a view to addressing duress".

[146] The Respondent pleads in response that at no point have the Applicants advised that the CTR is incomplete. Furthermore, the Officer relied upon the statements made by the Applicants themselves. The Respondent raises the fact that the Officer had confirmed that he had all the

volumes of the file in November 2018, in response to the Applicants' query as to whether he was in possession of the entire file. The Respondent submits that the Officer was entitled to consider the entire record and take it into account when rendering his Decisions.

[147] The Applicants have not provided any specific examples or concrete evidence as to how, from the Respondent's side, the record is incomplete. As to information emanating from the Applicants, it was incumbent on the Applicants to convince the Officer to exempt them from the ordinary requirements of the IRPA. If they considered the record incomplete or wished to supplement the record in terms of the Applicants' activities while in DICAR and/or whether they were under duress, they were not precluded from doing so. In fact, they were specifically invited to do so by the Officer. Ultimately, the onus was on the Applicants to provide the Officer with submissions and evidence to support their case for H&C relief, and as such, any insufficiencies therein are not the fault of the Officer (*Daniels v Canada (Citizenship and Immigration)*, 2018 FC 463 at para 32; *Wu v Canada (Citizenship and Immigration)*, 2022 FC 1152 at para 25).

[148] In addition, to the extent that the Applicants' concern is that the statements relied upon by the Officer were incomplete because they were obtained in the context of their refugee proceedings, this does not render the Officer's Decisions unreasonable. I find that it was not unreasonable for the Officer to have relied upon information not only known to the Applicants, but also supplied by them. Indeed, although from a procedural fairness perspective, the Officer was not required to confront the Applicants with information they themselves had provided (*Guzelian* at para 35). Moreover, the Officer provided them with a number of opportunities to supplement the record.

[149] Consequently, the two arguments that the Applicants raise regarding the Officer's finding that section 35 of the IRPA applies have failed to convince me that the Officer erred.

E. *Did the Officer unreasonably assess the H&C factors by placing undue emphasis on the Applicants' inadmissibility?*

[150] The Applicants submit that the Officer's assessment of the H&C factors was unbalanced and unfair in that it unduly focused on the breach of the IRPA and failed to sufficiently consider other significant factors. The Applicants plead that the Officer's consideration of the H&C factors, when compared to his treatment of the Applicants' inadmissibility, was short, cursory and dismissive. The Applicants allege that the Officer did not review the prior submissions and ignored the risk to the Applicants in returning to Chile and their contributions by cooperating with an international NGO and the Chilean Court police.

[151] The Respondent disagrees and highlights that the Officer sets out in detail the Applicants' H&C submissions and the contents of letters from their spouses and their families. The Respondent acknowledges that the Officer does indeed provide very detailed reasons for his findings that the Applicants are inadmissible, along with extensive references to the evidence to support his findings. The Respondent pleads that given the serious obstacle to admissibility, the Officer was entitled to find that the H&C factors, were not sufficient to outweigh it. The Respondent submits that the Court should not engage in reweighing of the evidence.

[152] I am mindful of the instructions of the Supreme Court in *Vavilov*, that a reviewing court must refrain from reweighing or reassessing the evidence considered by the decision maker and

must not, absent exceptional circumstances, interfere with factual findings (*Vavilov* at para 125). Ultimately, I find that the Applicants' arguments on the assessment of the H&C factors as compared to the analysis of the Applicants' inadmissibility constitute an impermissible request to reweigh the evidence that was before the Officer.

[153] In *Latif v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 104, Justice James Russell considered the issue of the relative weighing of evidence in light of *Vavilov:*

> [55] In cases where the IAD is called upon to assess and weigh a significant number of variables, there is obviously scope for disagreement concerning the weight to be given to each variable, as well as the decision maker's final conclusion. Simple disagreement over these matters is not a ground of review and this Court has said many times that it is not in the business of re-weighing evidence. See *Vavilov*, at para 125 and *Zhang v Canada (Citizenship and Immigration)*, 2019 FC 1536 at para 26. Even if the Court would have reached a different conclusion than the IAD, this is not sufficient, in itself, to overturn the Decision. See *Vavilov*, at paras 15 & 83-86. In fact, in some cases, both a positive and a negative decision would be reasonable on the facts. See *Animodi v Canada (Citizenship and Immigration)*, 2015 FC 929 at para 80. This is because Parliament has granted the IAD a discretion in the IRPA which, provided it is exercised reasonably and in good faith, must be respected.

[154] There is good reason for this. Decisions on H&C grounds are largely factually driven, and Parliament has entrusted decision-making and fact-finding to IRCC officers, only to be disturbed if unreasonable. Having carefully reviewed the entire record in detail, and having read the Decisions "holistically and contextually" (*Vavilov* at para 97), I do not find that the Officer's unreasonably assessed the H&C factors and placed undue emphasis on the Applicants' inadmissibility.

[155] Turning first to the Applicants' inadmissibility. This Court has previously found that the persuasive value of H&C considerations must be more compelling the more serious the degree of inadmissibility (*Patel v Canada (Citizenship and Immigration)*, 2019 FC 394 at para 12 [*Patel*]; *Ouedraogo v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 310 at para 27 [*Ouedraogo*]).

[156] To summarize, the Officer concluded that there were reasonable grounds to believe that Ms. Salazar "actively participated in the surveillance of and extra-judicial arrest and detention of persons suspected of being politically opposed to the junta government of Chile". While part of DICAR, Ms. Salazar conducted undercover surveillance, provided armed security during arrests, and took notes of statements made by people while they were being interrogated and tortured by officers of DICAR. Similarly, the Officer concluded that Mr. Arduengo Naredo, while he worked with DICAR, provided transportation and armed security for extra-judicial arrests and detentions. Mr. Arduengo Naredo was also present and provided stenographic services for DICAR officers during the interrogation and torture of persons of interest to DICAR.

[157] For the purposes of this judgment, I do not consider it necessary to recount in detail the evidence in the record describing the events that transpired while the Applicants were members of DICAR, although I do note that the details are in a number of respects disturbing. Simply put, having reviewed the record, including having read all the transcripts, the above findings are not unreasonable in light of the evidentiary record. It therefore follows that it is also not unreasonable to expect that any H&C considerations must be compelling if they are to overcome the Applicants' inadmissibility, given the seriousness of the foregoing.

[158] The Officer considered the H&C factors raised by the Applicants. In each Decision, the Officer states, "[i]n correspondence with this department over many years, counsel for the Applicant raised H&C factors that the Applicant wished to be considered when the security assessment is made; the most recent summary of those factors are listed on" pages 28-35 of the Decision for Mr. Arduengo Naredo and pages 23-33 of the Decision for Ms. Salazar. The Officer's summary of the factors also includes reference to letters of support and photographs from their sons, partners and loved ones, describing their caring personality, their importance in their families' lives, and the sacrifices they made to come to Canada and raise their sons.

[159] The Officer found that the most important H&C factor put forward by the Applicants is the length of time they have spent in Canada. For both Applicants, the Officer considered that they had raised two sons in Canada; been gainfully employed to support their family; fully cooperated with the Chilean Police in their investigation of officers who were part of DICAR and other organizations that committed crimes against humanity during the Pinochet regime; shared their story with Amnesty International; and currently have Canadian spouses. The Officer noted Mr. Arduengo Naredo's medical issues, and the medical issues of Ms. Salazar's spouse. The Officer referred specifically to the "articulate" and "passionate" submissions from the Applicants' son, Fernando, and from Ms. Salazar's spouse, and highlighted that they mention that the Applicants "came forward to testify about a very dark period in Chile's history".

[160] Ultimately, the Officer concluded that the actions undertaken while the Applicants were members of DICAR, which included participating in extra-judicial arrests and the interrogation and torture of the persons so arrested, outweigh the contributions the Applicants made to

Canadians and Canadian society such that the H&C factors fall short of justifying a waiver of the Applicants' paragraph 35(1)(a) inadmissibility. Given the contents of the record, and the jurisprudence cited discussed above, the Applicants have failed to persuade me that the Decisions fail to meet the standard set out in *Vavilov*, being that the Decisions must be "based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (para 85). The Officer's reasoning is intelligible, transparent, and justified, and thus shall be granted deference.

[161] The Applicants plead that the Officer rejected in a bald fashion the H&C factors, without meaningful analysis. While the Applicants would have preferred further treatment of the factors, I do not find this to be a reviewable error. One is able to follow the chain of analysis and the reasons for which the Officer concluded that the positive H&C factors did not outweigh the Applicants' actions while part of DICAR. It is for the Officer to determine the relative weight attached to the Applicants' inadmissibility and the H&C factors, not this Court (*Evans v Canada (Citizenship and Immigration)*, 2021 FC 733 at paras 68-73).

[162] As noted above, the Applicants allege that the Officer did not review and consider all the prior H&C submissions. First, it is settled law that a decision maker is not obliged to refer explicitly to all the evidence and is presumed to have considered all the evidence in making the decision unless the contrary can be established (*Hashem v Canada (Citizenship and Immigration)*, 2020 FC 41 at para 28). The Applicants' request is tantamount to asking this Court to reweigh evidence the Officer is presumed to have considered. Second, the Officer states in the Decisions that he consulted the Applicants "1997 Humanitarian & Compassionate application

and subsequent submissions". As well, the Officer confirmed in his letter dated July 11, 2019, to the Applicants that he had all the 18 files, had inventoried them, and marked for reference, among other things, the submissions.

[163] Finally, the Applicants submit that the Officer ignored and/or gave little or no consideration of their contribution to the cause of justice in Chile by cooperating with international NGOs and the Chilean Police. The Officer in fact expressly considered this. Again, the Applicants are seeking to have this Court reweigh the evidence, which absent exceptional circumstances, it must not do (*Vavilov* at para 125).

[164] To conclude, the Applicants have failed to demonstrate that the Officer committed a reviewable error in his assessment of the H&C factors as compared to his analysis of the Applicants' inadmissibility under section 35 of the IRPA. Put differently, I do not find that the Officer placed undue emphasis on the Applicants' inadmissibility such that it warrants this Court's intervention.

F. *Should one or more questions be certified?*

[165] In general, decisions of this Court in immigration matters are intended to be final. An appeal to the Federal Court of Appeal is permitted under subsection 74(d) of the IRPA if, in rendering judgment, this Court "certifies that a serious question of general importance is involved and states the question."

[166] The Applicants state that the purpose of the certified question is not to protect the Federal Court from review of its judgments but rather to ensure that questions of general legal importance are heard by a higher court. I agree with the Applicants that the material issue is whether a question is a "serious question of general importance". There is considerable jurisprudence from the Federal Court of Appeal addressing what constitutes a serious question of general importance and providing guidance in this regard. In *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22, the Federal Court of Appeal described the criteria for certification in the following terms:

> [46] … The question must be a serious question that is dispositive of the appeal, transcends the interests of the parties and raises an issue of broad significance or general importance. This means that the question must have been dealt with by the Federal Court and must arise from the case itself rather than merely from the way in which the Federal Court disposed of the application. An issue that need not be decided cannot ground a properly certified question.
>
> [Citations omitted.]

[167] The Applicants have submitted seven proposed questions for certification. The Applicants submit that it is difficult to fix on appropriate questions because the Applicants' cases are layered, complex and have not been processed by way of an admissibility hearing to determine if they were described under section 35 of the IRPA. The Applicants recognize that a number of their proposed questions are similar and invite the Court to select among them or redraft them as the Court seems fit. The proposed questions are:

1. Does the failure of the Minister to initiate an admissibility hearing against the Applicants into allegations of international criminality under s. 35(1)(a) of the *Immigration & Refugee Protection Act*, S.C. 2001, c. 27 (previously s. 19(1)(j) of the

Immigration Act, R.S.C. 1985, c. I-2), thereby denying them an opportunity in accordance with the statutory process to defend themselves against the allegations, constitute an abuse of process where the evidence has been known to the Ministers for approximately 40 plus years, such that an immigration officer considering an H&C application is precluded from making a finding that the Applicants are described in s. 35(1)(a) of the Act?

2. Is it an abuse of process for an immigration officer to render a decision on the admissibility of the Applicants under s. 35(1)(a) of the IRPA as the justification for rejecting their H&C applications, where the allegations and evidence have been known to the Minister for more than four decades and not acted upon in accord with the provisions of the IPRA through a referral to the Immigration Division for a determination to be made under s. 35 of the Act?

3. Is it an abuse of process for an immigration officer to render a decision on the admissibility of the Applicants under s. 35(1)(a) of the IRPA as the justification for rejecting their H&C applications, where the officer is aware that there has been a decision made not to convoke an admissibility hearing before the Immigration Division into the allegations in accord with the due process provisions of the IPRA for a hearing before the Immigration Division?

4. If it would be an abuse of process to convoke an admissibility hearing on serious allegations of criminality (under s. 35 of the IRPA) known to the Minister since at least 1980, would it likewise be an abuse of process for an immigration officer to make such a finding for the purpose of refusing an application for permanent residence on humanitarian and compassionate grounds?

5. Does fairness require that a foreign national in Canada be afforded an opportunity to contest allegations of serious criminality under s. 35(1) of the IRPA at a hearing before the Immigration Division before the Minister may rely on a finding that the person is described in s. 35 of the IRPA as a significant, if not the most significant, factor justifying a refusal of an H&C application. And where the Minister has chosen not to convoke an admissibility hearing into these allegations for four decades at least, is this an abuse of process?

6. Does a delay of 40 plus years in making a decision on admissibility under s. 35(1) of the IRPA (previously s. 19(1)(j) of the *Immigration Act*) constitute such an egregious delay that serious prejudice must be presumed to support a finding of abuse of process?

7. Did the officer err in law in placing undue weight on his conclusion of inadmissibility as far outweighing all other factors?

[168] Proposed questions 1 through 5 are variations on the theme of whether it is an abuse of process or a breach of procedural fairness to not hold an admissibility hearing and render a decision on an H&C application where the evidence of inadmissibility has been known to the Minister for over 40 years.

[169] The question of abuse of process turns on the facts, more precisely, the fact that the Applicants' activities while members of DICAR have been a live issue through the various steps and proceedings over the past four decades. The present cases differ from *Beltran*, where the Minister kept "information up its sleeve for 20 years". The proposed questions relating to abuse of process that are based on information known to the Minister for decades, seek answers that

will ultimately turn on the complex and unique facts of the Applicants' cases. The Federal Court of Appeal is clear – to be properly certified, a question must transcend the interests of the parties, raise an issue of broad significance or general importance, and whose answer must not turn on the unique facts of the case (*Canada (Immigration and Citizenship) v Laing*, 2021 FCA 194 at paras 11-12).

[170] Furthermore, the Respondent pleads that the Applicants have been aware of the substance of their inadmissibility for their involvement in crimes against humanity since their arrival in Canada and have been given opportunities to address the issue on more than one occasion. The Respondent submits therefore that it was not an abuse of process for the Officer to consider this information in finding the Applicants inadmissible under section 35 of the IRPA and determining insufficient H&C grounds to overcome their inadmissibility.

[171] For the reasons detailed in Section VI(C) of this judgment, I agree with the Respondent. I further underscore that this was information that was provided by the Applicants themselves. They were notified that it would be an issue and were invited to make submissions in the context of the H&C applications at issue. In my view, the issue of abuse of process turns on the unique facts of this case and as such the first five questions proposed by the Applicants cannot be properly certified. In addition, while this Court has the discretion to reformulate a non-compliant certified question, I consider that any reformulated question on this issue would not meet the criteria for a properly certified question.

[172] The proposed question five also raises the issue of whether the Minister was obliged to bring the matter before the Immigration Division for an admissibility hearing rather than have the question of inadmissibility decided by the Officer. The Applicants submit that it is not settled law that an officer has jurisdiction to make such a finding, specifically with respect to section 35 of the IRPA. The Respondent submits that there is no requirement for an officer to refer a matter to the Immigration Division and it falls within the jurisdiction of an officer to make such a determination.

[173] For the reasons detailed in Section VI(A) of this judgment, the Respondent was not obliged to bring the matter before the Immigration Division and the Officer was entitled to make a determination regarding the Applicants' inadmissibility (*Subramaniam* at para 31; *Guzelian*). I do not find that this is unsettled law such that it raises an issue of general importance. Moreover, the fact that it is inadmissibility under section 35 of the IRPA that is at issue, as opposed to inadmissibility under other sections of the IRPA, does not in my view alter my conclusion.

[174] As to the sixth question proposed for certification, the Applicants ask whether a delay of 40 years in making an admissibility decision under section 35 of the IRPA constitutes such an egregious delay that serious prejudice must be presumed to support a finding of abuse of process. I do not find this to be a certifiable question, nor would a redraft by the Court resolve the issue. The Applicants are effectively seeking to have delay alone, without evidence of prejudice, be presumed to constitute serious prejudice after a certain amount of time. As dealt with in detail in Section VI(C)(2) of this judgment, the Supreme Court expressly rejected a call to "Jordanize" *Blencoe* and recognize inordinate delay as prejudicial in and of itself (*Abrametz* at paras 45 – 48,

67). The Supreme Court stated that if delay alone was sufficient, it would be tantamount to imposing a judicially created limitation period (*Abrametz* at para 67), which the Supreme Court declined to do. This question has thus been settled by the Supreme Court. In addition, this question turns on the unique facts of these two cases, being the history of these cases and whether there was in fact an inordinate delay. As per Section VI(C)(1) of this judgment, I have found there was not.

[175] The seventh question proposed by the Applicants refers to whether the Officer erred by placing undue weight on his conclusion of inadmissibility as compared to the H&C factors. I find that this is not an appropriate question for certification. I agree with the Respondent that the proposed question involves the weighing of evidence and the application of settled law to the particular facts of the cases. It is not for this Court, nor the Court of Appeal, absent exceptional circumstances, to reweigh the evidence (*Vavilov* at para 125) and it is settled law that the persuasive value of H&C considerations must be more compelling the more serious the degree of inadmissibility (*Patel* at para 12; *Ouedraogo* at para 27). The proposed question does not, therefore, transcend the interests of the parties to these two judicial reviews.

[176] It therefore follows that, having considered the issues raised in the seven questions proposed by the Applicants, I conclude that there is no question to be certified.

[177] Finally, both explicit and implicit in the Applicants' arguments in support of the certified questions and in the proceedings generally is the assumption that if the matter had been brought before the Immigration Division for an admissibility hearing, it would have been found to have

been an abuse of process on the basis of *Beltran*. As discussed in numerous places in this judgment, these cases differ significantly from the situation in *Beltran*, where Mr. Beltran had refugee status, the government kept "information up its sleeve for 20 years", and then initiated admissibility proceedings. While it would not be appropriate to venture into what would have happened had the matter been brought before the Immigration Division, it is sufficient to note that the issue of abuse of process has been pleaded and considered in these proceedings. The Applicants have not been deprived of the opportunity to have the issue of abuse of process fully ventilated.

VII. Conclusion

[178] For the foregoing reasons, these applications for judicial review are dismissed. I conclude that the Officer did not breach procedural fairness, nor was it an abuse of process for the Officer to find the Applicants inadmissible under paragraph 35(1)(a) of the IRPA. The Officer did not err in determining that paragraph 35(1)(a) of the IRPA applies to the Applicants, and reasonably found that the H&C factors submitted by the Applicants were insufficient to outweigh the actions taken by the Applicants while they were members of DICAR.

[179] Despite the submissions of the Applicants, I have concluded that the present proceedings do not raise a question that is suitable for certification.

JUDGMENT in IMM-1695-20 and IMM-1697-20

THIS COURT'S JUDGMENT is that:

1. The applications for judicial review are dismissed;

2. The style of cause in IMM-1695-20 is amended to name Fernando A. Arduengo Naredo as the proper Applicant; and

3. No question of general importance is certified.

"Vanessa Rochester"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1695-20
STYLE OF CAUSE:	FERNANDO A. NAREDO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
AND DOCKET:	IMM-1697-20
STYLE OF CAUSE:	NIEVES DEL CARMEN S.M. SALAZAR v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	MARCH 7, 2022
JUDGMENT AND REASONS:	ROCHESTER J.
DATED:	NOVEMBER 14, 2022

APPEARANCES:

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