Federal Court of Appeal | Cour d'appel fédérale

Date: 20201123

Docket: A-285-19

Citation: 2020 FCA 202

CORAM: **GAUTHIER J.A.**
DE MONTIGNY J.A.
LOCKE J.A.

BETWEEN:

RAJESVARAN SUBRAMANIAM

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard by online video conference hosted by the Registry on October 21, 2020.

Judgment delivered at Ottawa, Ontario, on November 23, 2020.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: GAUTHIER J.A.
LOCKE J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] This is an appeal from a decision of Justice Heneghan of the Federal Court dated June 13, 2019, which dismissed an application for judicial review of a decision made by an officer of the Immigration, Refugees and Citizenship Canada (IRCC) Backlog Reduction Office. The officer in question refused to process the application of Mr. Rajesvaran Subramaniam (the appellant) for

permanent residence on humanitarian and compassionate (H&C) grounds, pursuant to the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the IRPA).

[2] In 2011, the appellant was found inadmissible by the Immigration Division (ID) of the Immigration and Refugee Board because he had engaged in people smuggling as *per* paragraph 37(1)(*b*) of the IRPA. In 2017, invoking a recent shift in the legal test for people smuggling, the appellant filed an application for permanent residence on H&C grounds. The officer held that the prior inadmissibility finding precluded the exercise of the discretionary relief provided for in subsection 25(1) of the IRPA, and therefore refused to process the application.

[3] The appellant contends that the text of subsection 25(1) does not constitute an absolute bar to considering applications made by those who have previously been found inadmissible on the basis of sections 34, 35 or 37 of the IRPA. Alternatively, the appellant submits that the Minister retains residual discretion when presented with applications from foreign nationals in Canada (as opposed to applicants from outside of Canada), who have previously been found inadmissible under the same provisions.

[4] The Federal Court certified the following serious question of general importance, as contemplated by paragraph 74(d) of the IRPA:

> Where a foreign national has previously been determined to be inadmissible pursuant to s. 34, 35 or 37 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act"), and there has been a subsequent change to the interpretation of the ground of inadmissibility, is the foreign national barred from making an application under s. 25(1) of the Act?

I. Factual context

[5] The appellant, a citizen of Sri Lanka, arrived in Canada on a cargo ship, the MV Sun Sea, on August 13, 2010. Upon arrival, the appellant made a claim for refugee protection.

[6] On November 1, 2010, an immigration enforcement officer from the Canada Border Services Agency (CBSA) prepared a report under subsection 44(1) of the IRPA, being of the view that the appellant was inadmissible to Canada for engaging in people smuggling as *per* paragraph 37(1)(*b*). The subsection 44(1) report was referred to the ID for an admissibility hearing by the delegate for the Minister.

[7] On August 29, 2011, the ID issued a deportation order after finding the appellant inadmissible to Canada under paragraph 37(1)(*b*). The basis of the inadmissibility finding was that the appellant had engaged in people smuggling by working aboard the MV Sun Sea. While no evidence supported the view that the appellant had been paid for his work nor that he was affiliated to a transnational organized criminal group, the legal test for people smuggling did not, at the time, require such evidence.

[8] On January 12, 2012, the Federal Court denied leave for judicial review of the ID's decision. As the inadmissibility finding became final, the appellant's claim could not be referred to the Refugee Protection Division (RPD) under paragraphs 104(1)(*b*) and 101(1)(*f*) of the IRPA. He submitted an application for Pre-Removal Risk Assessment (PRRA), which remains outstanding.

[9] On March 15, 2017, the appellant filed an application for permanent residence on H&C grounds. By then, subsection 25(1) of the IRPA had been amended so as to exclude from H&C exemption a foreign national who "is inadmissible" pursuant to sections 34, 35 or 37 (*Faster Removal of Foreign Criminals Act*, S.C. 2013, c. 16).

[10] The legal test for people smuggling under paragraph 37(1)(*b*) had also been clearly redefined by the Supreme Court of Canada as it rendered its decision in *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58, [2015] 3 S.C.R. 704 [*B010*]. In *B010*, the Supreme Court notably held that paragraph 37(1)(*b*) "targets procuring illegal entry in order to obtain, directly or indirectly, a financial or other material benefit in the context of transnational organized crime", and that refugee claimants can escape inadmissibility if "they merely aided in the illegal entry of other refugees or asylum-seekers in the course of their collective flight to safety" (at para. 72).

[11] In his application, the appellant asked the officer not to rely on his prior inadmissibility finding, for which he said the legal foundation had shifted since the issuance of *B010*. Resorting to jurisprudential exceptions to the doctrine of *res judicata* as well as to the interests of justice, he insisted on not being barred from even applying for the relief of subsection 25(1). The appellant also submitted the alternative argument made within the context of this appeal, and asked the officer to consider his application by exercising residual discretion.

[12] By letter dated June 18, 2018, the Manager of the IRCC Backlog Reduction Office in Vancouver, acting as an H&C officer, notified the appellant of his refusal to process the

application, thereby returning the application and initiating a refund of process fees. The critical part of his short reasons reads as follows:

> Subsection 25(1) bars an applicant inadmissible under s. 37 from H&C consideration. Consequently, as the Immigration Division determined Mr. Subramaniam to be inadmissible under para. 37(1)(b) and issued a removal order on these grounds, his application for permanent residence based on H&C considerations cannot be processed. The Supreme Court of Canada's decision in *B010* does not overcome the bar in ss. 25(1), and an H&C decision-maker has no jurisdiction to set-aside a removal order issued by the Immigration Division.

II. The Impugned Decision

[13] On June 13, 2019, the Federal Court dismissed the appellant's application for judicial review of the Manager's decision. The Judge found that the Manager's interpretation of subsection 25(1) was reasonable in light of the clear wording of the provision. She further held that Parliament's intent, when enacting the 2013 amendments to subsection 25(1), was "to exclude a foreign national who is inadmissible under sections 34, 35 or 37, from eligibility for the exercise of H&C discretion" (Reasons, at para. 23). In her view, the appellant's proposed interpretation of subsection 25(1) "renders the bar against inadmissible persons in section 25(1) meaningless" (Reasons, at para. 26). Finally, the Judge noted that the appellant could apply to the ID for a re-opening of his inadmissibility decision, and seek ministerial relief pursuant to subsection 42.1(1) of the IRPA.

[14] As previously mentioned, the Federal Court certified one question pertaining to the application of subsection 25(1) to foreign nationals whose grounds of inadmissibility have been, since their inadmissibility findings, interpreted differently.

III. Issues

[15] The appellant submits that the certified question raises three separate issues. In my view, there is no need to dissect the certified question in discrete sub-questions. To the extent that they are relevant to answering the question certified by the Federal Court, I will address them in my reasons.

IV. Standard of review

[16] On appeal from a decision of the Federal Court sitting in judicial review of a decision of an administrative decision-maker, this Court must "step into the shoes" of the Federal Court to determine whether it identified the appropriate standard of review, and whether it applied this standard properly: *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paras. 45-47.

[17] There is broad agreement between the parties that the applicable standard of review is that of reasonableness. While the appellant had previously submitted that the core question of this appeal raised an issue of "true jurisdiction", thus attracting a correctness standard, he has since reconsidered his position in light of the Supreme Court's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*]. As per the Direction issued by Justice Mactavish on January 24, 2020, the appellant provided further submissions on the subject, and acknowledged that the appeal from the Federal Court's decision is to take place on the reasonableness standard. Indeed, reasonableness is the presumptive standard of review of an administrative decision, especially when a tribunal's interpretation of its home statute is at stake,

unless either legislative intent or the rule of law requires a correctness standard. Neither of those two exceptions apply in the case at bar. Consequently, the Federal Court did not err in identifying the reasonableness standard of review.

[18] I shall therefore review the decision of the Manager to refuse to consider the appellant's H&C application with the guidance of the contextual constraints set out in *Vavilov*, with a view to determining whether the Federal Court properly applied the reasonableness standard. In doing so, I will refrain from deciding the issue myself and focus instead on the decision actually made, to ascertain whether it falls within the range of possible outcomes.

V. Analysis

[19] As a general rule, foreign nationals who apply to enter or remain in Canada must satisfy an officer that they are not inadmissible and meet the requirements of the IRPA. Foreign nationals may be inadmissible on grounds set out in sections 34 to 42 of the IRPA. Under subsection 44(1) of the IRPA, certain designated officers may prepare a report in Canada setting out why they are of the opinion that a permanent resident or foreign national is inadmissible, which is then transmitted to a delegate of the Minister of Public Safety. If the Minister's delegate is of the opinion that the report is well-founded, he or she may issue a removal order or refer the report to the ID for an admissibility hearing pursuant to subsection 44(2) of the IRPA: *Tran v. Canada (Public Safety and Emergency Preparedness),* 2017 SCC 50, [2017] 2 S.C.R. 289, at para. 6.

[20] Once the inadmissibility report is referred to the ID, the tribunal holds a hearing under section 45 of the IRPA. If the tribunal is of the view that the individual is inadmissible, it makes the applicable removal order which, in the case of transnational crime (paragraph 37(1)(*b*)), is a deportation order: IRPA, section 45; *Immigration and Refugee Protection Regulations*, SOR/2002-227, paragraph 229(1)(*e*) (Regulations). Individuals who have been found inadmissible on security grounds, because of involvement in crimes against humanity, or because of involvement in organized or transnational crime may not appeal the ID's admissibility decision to the Immigration Appeal Division: IRPA, subsection 64(1). Nevertheless, the ID's admissibility decision remains subject to judicial review by the Federal Court: IRPA, subsection 72(1).

[21] Prior to 2013, persons found inadmissible on the basis of sections 34, 35 or 37 could avail themselves of the H&C exemption laid out in subsection 25(1) of the IRPA. Like any other foreign nationals applying for permanent resident status, they could apply to the Minister for a discretionary exemption from any applicable criteria or obligations, including the requirement that they not be considered inadmissible to Canada. However, the enactment of *Bill C-43: An Act to Amend the Immigration and Refugee Protection Act (Faster Removal of Foreign Criminals Act)* (Bill C-43) had the effect of excluding from H&C consideration a foreign national who is inadmissible under sections 34, 35 or 37 of the IRPA. This amended version of subsection 25(1) now reads as follows:

25(1) Subject to subsection (1.1), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible – other than under section 34, 35 or 37 – or who does	25(1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire – sauf si c'est en raison d'un

not meet the requirements of this Act, and may, on request of a foreign national outside Canada – other than a foreign national who is inadmissible under section 34, 35 or 37 – who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	cas visé aux articles 34, 35 ou 37 –, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada – sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 – qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

[22] The appellant is of the view that the Judge erred in viewing the phrase "is inadmissible", found in subsection 25(1), as an equivalent of the phrase "has been found to be inadmissible". The appellant states that such reading demonstrates a failure to consider the highly discretionary role of an H&C officer and the scheme of the IRPA in its full context, in addition to violating the presumption of consistent expression.

[23] On this last principle, the appellant contends that the different verb tenses used throughout the IRPA, when referring to a status of inadmissibility, have their own implications. It must therefore be presumed that the legislature's choice of the phrase "is inadmissible", as in the case of subsection 25(1), is intended to convey a different meaning than that of "has been found inadmissible" or even of "is determined to be inadmissible". This last phrase has been discussed, within the context of subsection 112(3) of the IRPA, in *Tapambwa v. Canada (Citizenship and Immigration)*, 2019 FCA 34 [*Tapambwa*]. This Court notably held that the use

of the present tense in the phrase “is determined to be inadmissible” did not suggest that PRRA officers have the authority to revisit prior findings on exclusion and inadmissibility. The appellant suggests that *Tapambwa* is distinguishable, for in that case the verb tense was more akin to the present perfect tense, as an action or state begun in the past and completed at the time of speaking. In the appellant’s view, this Court’s interpretation of the phrase “is determined to be inadmissible” must further be distinguished, because it relied heavily upon the limited role of PRRA officers within the general scheme of the Act.

[24] The appellant argues that while PRRA officers are confined to the assessment of allegations of risk prior to removal, H&C officers are tasked with making highly discretionary decisions such as inadmissibility findings. In this regard, the appellant points to a number of decisions where the Federal Court, presented with inadmissibility findings for which the legal analysis had later been overturned, held that H&C officers could revisit such determinations. In response to the Judge’s characterizations of his position as rendering parts of subsection 25(1) “meaningless”, the appellant submits that prior inadmissibility findings would only be revisited in exceptional cases, i.e. where a valid exception to issue estoppel is raised. Finally, the appellant reasserts that his proposed interpretation is consonant with the legislature’s intent. Indeed, if H&C officers are granted jurisdiction to make inadmissibility findings in cases where none had been made previously, then they may review prior findings to which exceptions to issue estoppel apply.

[25] None of these arguments, considered separately or together, are sufficient to establish the unreasonableness of the Manager’s interpretation of subsection 25(1). In my view, the Federal

Court could properly determine that the Manager did not err in finding that Mr. Subramaniam is not eligible to make an H&C application because he is inadmissible under paragraph 37(1)(*b*) of the IRPA. Nor did the Manager err in refusing to re-assess inadmissibility and to set aside the removal order issued by the ID on the basis that he had no jurisdiction to do so.

[26] When the words of subsection 25(1) are read in their entire context and according to their grammatical and ordinary sense, harmoniously with the scheme and object of the Act and the intention of Parliament (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21), there is no doubt in my mind that the interpretation favoured by the Manager is eminently defensible and reasonable. It clearly accords with the express legislative purpose of the amendments to section 25 of the IRPA introduced by Bill C-43, as evidenced both by the parliamentary debates surrounding the adoption of that legislation and the various interpretative tools released by the government.

[27] Of particular relevance is the Legislative Summary of Bill C-43 (Publication No. 41-1-C43E – 30 July 2012/Revised 3 October 2012, pp. 4, 8 and 9), which notably provides that, as a result of the 2013 amendments, foreign nationals determined to be inadmissible on security grounds, for violating human and international rights or for organized criminality, are ineligible for H&C relief. While by no means determinative of the matter (*R v. Moriarity*, 2015 SCC 55, [2015] 3 S.C.R. 485, at para. 31), such extrinsic source is nonetheless instructive. See also:

- House of Commons Debates: 1st Session, 41st Parliament, Volume 146, Number 151 (Sept. 24, 2012);
- Evidence from the Senate Committee on Social Affairs, Science and Technology, 1st Session, 41st Parliament, Issue No 38;

- Backgrounder: Faster Removal of Foreign Criminals Act – What will it do (2012-06-20) (Joint Book of Authorities, Tab 56);
- Backgrounder: Introducing the Faster Removal of Foreign Criminals Act (2012-06-20) (Joint Book of Authorities, Tab 57);
- Operational Bulletin 527 – June 20, 2013, "C-43 – Changes to Humanitarian and Compassionate Requests" (Joint Book of Authorities, Tab 62);
- Program Delivery Instructions: Humanitarian and Compassionate: Intake and who may apply (2020-04-16) (Joint Book of Authorities, Tab 64).

[28] As for the text of subsection 25(1), as amended by Bill C-43, it is crystal clear. It constitutes an absolute bar to the consideration of applications made by those who are inadmissible pursuant to sections 34, 35 or 37, and there is nothing which provides any discretion or authority to an H&C decision-maker to re-determine a previous final inadmissibility finding. Moreover, this is the most consistent interpretation with the purpose and intention of Parliament.

[29] The appellant makes much of the fact that the provision is written in the present tense, as opposed to the past or the present perfect tense. In my view, this is insufficient to suggest that H&C officers may revisit previous inadmissibility findings. In *Tapambwa*, this Court considered a similar argument upon discussing the interpretation of subsection 112(3) of the IRPA. In this respect, this Court wrote that "[t]he present tense 'is determined to be inadmissible' refers to the fact that once determined to be inadmissible, an applicant remains inadmissible" (at para. 46). The same reasoning applies here. I note, moreover, that the French version of these two phrases is identical; both "is inadmissible" and "is determined to be inadmissible" are translated by "qui est interdit de territoire", which is further confirmation that nothing turns on these different formulations.

[30] I find the appellant's attempt at distinguishing "is inadmissible" from "is determined to be inadmissible" to be rather unconvincing, the latter of which he presents as "more akin to the present perfect tense" (Appellant's Memorandum of Argument, at para. 53). The Legislative Summary of Bill C-43, for instance, does not seem to operate such a distinction as it uses the phrase "determined to be inadmissible" on one occasion (Joint Book of Authorities, p. 388). Even assuming that the two phrases are distinct for purposes of statutory interpretation, the phrase "is inadmissible" ineluctably captures a prior state of inadmissibility when such determination has already been made; it describes a status that is ongoing.

[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.

[32] This difference, however, does not justify putting aside the conclusions reached by this Court in *Tapambwa*. It must be noted, in this regard, that the lack of authority of PRRA officers to make inadmissibility findings in the first place provided only some support to this Court's interpretation of subsection 112(3) (*Tapambwa*, at para. 53). Indeed, that fact alone did not entirely inform this Court's conclusion as it constitutes only a piece of the architecture of the IRPA. Rather, one must look at the entire process by which an applicant is deemed inadmissible,

and on which this Court heavily relied to interpret subsection 112(3). I have described this process at paragraphs 19 and 20 of these reasons.

[33] In my view, the fact that inadmissibility determinations by the ID are conclusive and final unless set aside by the Federal Court entails a lack of authority to reverse such findings for both PRRA officers and H&C officers. Indeed, subsection 25(1) and subsection 112(3) operate within the same statutory framework, and the former provides no more indication than the latter for the authority to revisit inadmissibility findings.

[34] Subsection 25(1) has been described by the Supreme Court in *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 S.C.R. 909 at paragraph 21, as providing "equitable relief". It is simply not meant as an appeal mechanism of prior inadmissibility findings.

[35] In light of the above, this Court's conclusion that permitting PRRA officers to reconsider questions of exclusion and inadmissibility "would have the effect of injecting a level of appeal in the form of a *de novo* determination" (*Tapambwa*, at para. 57) is equally applicable, with the necessary adaptations, to H&C officers. Moreover, accepting Mr. Subramaniam's argument that an officer can exercise discretion under subsection 25(1) to revisit a tribunal's inadmissibility determination on sections 34, 35 or 37 when determining whether the statutory bar to section 25 applies, would render that statutory bar meaningless and contrary to Parliament's intent. It is no answer to argue that in most cases, the statutory bar would operate in a "mechanistic way" and

that prior inadmissibility findings would be determinative in the vast majority of cases. Either H&C officers have the authority to look beyond prior inadmissibility findings, or they do not.

[36] The appellant also argues that his sole avenue of relief, should the Manager's decision be upheld, is no proper equivalent to the H&C exemption granted under subsection 25(1). Admittedly, the ministerial relief of subsection 42.1(1) only has the effect of ignoring the inadmissibility, but does not provide claimants with permanent resident status. The Federal Court did not, however, suggest otherwise by simply stating that such relief was available to the appellant. More importantly, the fact that subsection 42.1(1) is arguably more confined in scope than subsection 25(1), does not militate in favour of the appellant's proposed interpretation. Parliament has not imposed a statutory bar to certain individuals in subsection 25(1) only for them to find similar relief in another provision. Having said this, if ministerial relief is granted (and there is good reason to believe that it might be granted in the very special circumstances of this case), the appellant will become eligible to make an H&C application under section 25 and to seek an exemption from the requirement to obtain a permanent resident visa and to meet the selection criteria for an immigrant class.

[37] The appellant relies on a few cases for the proposition that an inadmissibility finding may be reconsidered where it would not be in the interests of justice to rely on a finding that was based on a later overturned legal analysis. A careful examination of these decisions, however, reveals that they have no bearing on the case at bar.

[38] Mr. Subramaniam relies, in particular on *Hamida v. Canada (Citizenship and Immigration)*, 2014 FC 998, [2015] 4 F.C.R. 44 [*Hamida*] to suggest that there is some discretion for H&C officers to re-assess inadmissibility findings due to a change in the jurisprudence following *B010*. Mr. Hamida filed an application for permanent residence on H&C grounds after having been found inadmissible pursuant to paragraph 35(1)(*a*) by the RPD. Crucial to the discussion of this case is the fact that Mr. Hamida's application was filed before the Bill C-43 amendment to the eligibility criteria in section 25 was introduced. At the time, officers had the discretion to grant exemption from inadmissibility, even if such status was based on sections 34, 35 or 37, where it was warranted by H&C considerations.

[39] In that case, the officer denied Mr. Hamida's relief because H&C considerations did not override the seriousness of the ground of inadmissibility (i.e. complicity in crimes against humanity). However, the Supreme Court subsequently rejected the legal test at the very basis of the appellant's inadmissibility finding in *Ezokola v. Canada (Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 S.C.R. 678 [*Ezokola*].

[40] Being of the view that the inadmissibility finding was central to the officer's decision, and "given the injustice of being judged on principles lacking in fairness" (*Hamida*, at para. 2), the Federal Court Judge referred the matter back to the same officer for reassessment, with the direction to consider *Ezokola* when assessing H&C considerations (*Hamida*, at para. 80). In doing so, the Judge nevertheless implicitly acknowledged that he could not have reached that conclusion had the application been filed after the 2013 amendments to subsection 25(1). Not only does he state that there would have been no need for the amendments to subsection 25(1) if

an inadmissibility finding was to take precedence over H&C considerations (*Hamida*, at paras. 59-60), as suggested by the respondent, but he also ended his reasons with this *caveat*:

> [82] In light of Bill C-43, applications for permanent residence for humanitarian and compassionate considerations may no longer be submitted by claimants who were previously found inadmissible under sections 34 to 36 of the IRPA. However, Bill C-43 allows the continued processing of applications made under the previous legislation in the case of applications on which no decision had been made when the amendments to subsection 25(1) came into effect. This type of application will therefore be of very limited significance in the future.

[41] In my view, this is a clear recognition that the amendments made to subsection 25(1) now prevent an inadmissible person from availing himself or herself of H&C consideration where their inadmissibility status is founded on sections 34, 35 or 37. Recent jurisprudential developments can be reviewed by an officer in the course of the H&C analysis, as one of the many factors that can be weighed against an applicant's inadmissibility, but only if the H&C process is available to the applicant. It is important to stress, moreover, that *Hamida* was not about the re-assessment or re-determination of a prior finding of inadmissibility, but the weighing of that inadmissibility against relevant H&C factors to determine if an exemption should be granted (see *Sabadao v. Canada (Citizenship and Immigration)*, 2014 FC 815, at para. 22). Since 2013, this weighing process is no longer available where inadmissibility has already been found on the basis of sections 34, 35 or 37.

[42] Mr. Subramaniam also relies on the conclusions reached by the Federal Court in *Oladele v. Canada (Citizenship and Immigration)*, 2017 FC 851 [*Oladele*], *Aazamyar v. Canada (Citizenship and Immigration)*, 2015 FC 99 [*Aazamyar*] and *Azimi v. Canada (Public Safety and Emergency Preparedness)*, 2015 FC 1177 [*Azimi*]. These cases are also distinguishable from the case at bar.

[43] In *Oladele*, the Judge reached a very similar, if not almost identical, conclusion to that of *Hamida*, holding that "decision-makers on H&C applications have discretion to consider the impact of *Ezokola* on previous findings of inadmissibility" (at para. 77). As in *Hamida*, however, the concerned individual was not barred from obtaining the relief laid out in subsection 25(1), since he had filed an H&C application prior to the amendments enacted in 2013.

[44] In *Aazamyar*, the applicant submitted an H&C application in December 2012, after the RPD found he was excluded from refugee protection for complicity in crimes against humanity. When reaching such a conclusion, the RPD did not make an inadmissibility finding, but rather decided on the applicant's exclusion from refugee protection pursuant to section 98 of the IRPA and Article 1F(a) of the *United Nations Convention Relating to the Status of Refugees*, [1969] Can. T.S. No. 6. Mr. Aazamyar's inadmissibility was decided for the very first time in the context of his H&C application. To make such finding, the officer relied on the facts found by the RPD, as required by section 15 of the Regulations. It is in that context that Mr. Aazamyar's application for judicial review was allowed and the matter remitted to a different H&C officer for re-determination in accordance with *Ezokola*. This case is also distinguishable from the present situation because, unlike Mr. Aazamyar, Mr. Subramaniam had already been found inadmissible by the ID when applying for H&C relief.

[45] In *Azimi*, the Judge held that PRRA officers and CBSA enforcement officers have no authority to revisit an exclusion from refugee protection finding by the RPD. The applicant was essentially seeking the reconsideration of such finding in light of *Ezokola*'s modification to the legal test for complicity. The Judge observed, in what seems to be *obiter* comments, that an

H&C application would have been the better forum to do so (at para. 24). Once again, as in *Aazamyar*, no prior finding of inadmissibility had been made, and thus the applicant was not barred from seeking the relief of subsection 25(1).

[46] *Hamida* and *Oladele* are without doubt instructive in cases where, at the processing stage of an H&C application, a prior admissibility finding has already been made with respect to a claim filed before the coming into force of Bill C-43. *Aazamyar* and *Azimi* are relevant, in cases where no prior admissibility finding has been made, regardless of the time at which the claim was filed. None of these four decisions deal with the specific type of cases at issue in this appeal, where a prior admissibility finding has already been made with respect to a claim filed after the coming into force of Bill C-43.

[47] Under the previous version of subsection 25(1), "inadmissibility [was] not [to] be seen as a decisive obstacle, but as one of the factors to be weighed" (*Hamida*, at para. 60). Since the coming into force of Bill C-43, the same cannot be said of findings based on the grounds of inadmissibility enumerated at sections 34, 35 or 37. As rightly pointed out by the respondent, H&C considerations can only be weighed against an inadmissibility finding "once the H&C process has begun – a threshold which cannot be passed by individual's [sic] subject to the bar imposed by *Bill C-43*" (Respondent's Memorandum of Fact and Law, at para. 49).

[48] The appellant tries to escape from that conclusion by grafting the doctrine of issue estoppel onto section 25. According to the appellant, an H&C officer will in most instances defer to a previous inadmissibility finding because of the doctrine of issue estoppel. That common law

doctrine, however, allows for exceptions even when all the preconditions for its application are met, if and when it is in the interests of justice not to apply it. In failing to exercise that discretion and to determine whether issue estoppel should be applied in this case, the Manager erred. In my view, this line of argument is misguided for several reasons.

[49] First of all, the doctrine of issue estoppel (or *res judicata*) has been displaced by the clear language of subsection 25(1) of the IRPA, to the extent that H&C officers have no authority to re-determine the ID's adjudicated findings of inadmissibility. Faced with the same argument, this Court stated in *Tapambwa*:

> [67] As a second observation, *res judicata* has no bearing in circumstances when the second decision maker has no jurisdiction to make the decision in the first place. In *Administrative Law*, 11th ed. (New York: Oxford University Press, 2014) at p. 197, the authors note that "… the most obvious limitation on the doctrine of estoppel is that it cannot be invoked so as to give an authority powers which it does not in law possess. … Nor can any kind of estoppel give a tribunal wider jurisdiction than it possesses". The objection to the second decision maker making the decision is purely a jurisdictional one, rooted in the statutory scheme.

[50] Indeed, when questioned on that issue, counsel for the appellant conceded as much and accepted that her argument based on *res judicata* is predicated on a construction of subsection 25(1) that would allow an H&C officer to vary an inadmissibility finding previously made by another decision-maker. In other words, she accepted that this common law doctrine is irrelevant if her interpretation of that provision, based on the use of the words "is inadmissible", is to be rejected.

[51] Moreover, the pre-conditions for *res judicata*/issue estoppel are arguably not met. The inadmissibility hearing before the ID is an adversarial process and the decision is made by a

quasi-judicial tribunal following a hearing where the Minister of Public Safety is a party and represented by counsel. This is to be contrasted to the process contemplated by section 25, where an officer assesses, in the course of a non-adversarial process, an application for exemption to inadmissibility or a requirement of the IRPA. In such proceedings, the parties are therefore not the same.

[52] In any event, this Court has held that a change in the law resulting from a decision of the Supreme Court of Canada would not meet the "interests of justice" exception to issue estoppel. As this Court stated in *Tapambwa* (at para. 69), "[e]volving law is not a reason to depart from the doctrine of issue estoppel". I acknowledge, however, that this issue is not entirely settled, and that other decisions are to the effect that a change in the law provides an opportunity to argue that issue estoppel ought not to be applied: see, for example, *Oberlander v. Canada (Attorney General)*, 2016 FCA 52, at para. 22; *Apotex Inc. v. Schering Corporation*, 2018 ONCA 890, at para. 27. I need not say more in the context of the present case, as any further comments would be pure *obiter*.

[53] As an alternative argument, the appellant contends that subsection 25(1) provides for different obligations to consider an H&C application for applicants in Canada as opposed to applicants who are applying from outside Canada. In support of his position, the appellant points to the following textual distinction: while the Minister must consider the circumstances of a foreign national in Canada, he may process H&C applications from foreign nationals outside Canada. The appellant states that in cases where an applicant in Canada has previously been found inadmissible pursuant to sections 34, 35 or 37, the Minister is no longer mandatorily

required to consider the application. In other words, the statutory bar merely removes the requirement that the Minister must consider the application, and leaves room for the exercise of residual discretion.

[54] With respect, I believe that the appellant's alternative argument represents an overly formalistic approach to statutory interpretation. In my view, the argument must fail for two main reasons.

[55] First, the appellant's proposed interpretation focuses on a very narrow part of subsection 25(1). When read as a whole, the phrase "other than under section 34, 35 or 37" is not meant to qualify the mandatory requirement of considering H&C applications, but rather as an exception to the consideration itself of those applications. Any conclusion to the contrary would have the effect of disregarding the central element of subsection 25(1), namely, the consideration of H&C applications.

[56] Second, it is my understanding that Parliament's intent, in enacting the statutory bar of subsection 25(1), was acting upon certain types of grounds of inadmissibility rather than on the geographical location of applicants. The fact that the statutory bar is "attached" to the two segments of subsection 25(1) – the one pertaining to applicants in Canada, and the one pertaining to those outside Canada – further reaffirms the lack of distinction. In other words, the amendment was not intended to give the Minister any discretion to process in-Canada applications any differently from those made outside of Canada, if the applicant is inadmissible on the basis of sections 34, 35 or 37.

[57] This reading of subsection 25(1) is consistent with the Operational Bulletin that followed the coming into force of Bill C-43:

> If a humanitarian and compassionate (H&C) request under subsection 25(1) is received on or after June 19, 2013, from a foreign national, inside or outside Canada, who is inadmissible under sections 34, 35 or 37, the request will no longer be examined as the foreign national is not entitled to make the request. Furthermore, the foreign national is also no longer to have their circumstances considered on the Minister's own initiative under subsection 25.1(1).
>
> Operational Bulletin 527 – June 20, 2013, "C-43 – Changes to Humanitarian and Compassionate Requests" (emphasis added).

[58] Section 25.1, which deals with Minister-initiated H&C applications and to which the Operational Bulletin refers, is also consistent with this approach. It makes clear that the statutory bar applies regardless of whether the foreign nationals are inside or outside of Canada:

25.1(1) The Minister may, on the Minister's own initiative, examine the circumstances concerning a foreign national who is inadmissible – other than under section 34, 35 or 37 – or who does not meet the requirements of this Act and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	25.1(1) Le ministre peut, de sa propre initiative, étudier le cas de l'étranger qui est interdit de territoire – sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 – ou qui ne se conforme pas à la présente loi; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

[59] It would certainly have been preferable for the Manager to address the appellant's alternative argument, as it was presented to him at the time. However, it cannot be expected from administrative decision-makers to "respond to every argument or line of possible analysis" (*Vavilov,* at para. 128, citing *Newfoundland and Labrador Nurses' Union v. Newfoundland and*

Labrador (Treasury Board), 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 25). In the present case, the alternative argument was rather an ancillary one, and the Manager's failure to treat such issue does not make his decision unreasonable.

[60] The same can be said with respect to the Manager's alleged failure to address the appellant's arguments about issue estoppel. As already noted, and as conceded by the appellant, this argument could only be entertained if one accepts that the Manager had the authority to assess the appellant's H&C application despite the previous inadmissibility finding made by the ID. Having concluded that subsection 25(1) bars an applicant who has been declared inadmissible under section 37 from H&C consideration, there was no need to canvass the interests of justice exception to the *res judicata*/issue estoppel doctrine. When read in the context of the law and in light of the record, and taking into account the expertise and the experience of the Manager, I am satisfied that the decision was reasonable and that the reasons, although brief, reveal a "rational chain of analysis" (*Vavilov,* at para. 103).

VI. Conclusion

[61] For all of the foregoing reasons, I am of the view that subsection 25(1), when read in its entire context and with due regard to the scheme and object of the IRPA and the intention of Parliament, does not lend itself to the appellant's interpretation. There is no authority in that legislation which allows an officer to exempt foreign nationals from the requirements of the IRPA on H&C considerations when they have been declared inadmissible under sections 34, 35 or 37.

[62] This outcome does not leave Mr. Subramaniam without relief. He may seek from the Minister an exemption from his status of inadmissibility pursuant to section 42.1, and thereafter apply for permanent resident status on H&C grounds.

[63] I would therefore dismiss the appeal and answer the certified question as follows:

> Q. Where a foreign national has previously been determined to be inadmissible pursuant to s. 34, 35 or 37 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act"), and there has been a subsequent change to the interpretation of the ground of inadmissibility, is the foreign national barred from making an application under s. 25(1) of the Act?
>
> A. Yes.

"Yves de Montigny"
J.A.

"I agree
Johanne Gauthier J.A."

"I agree
George R. Locke J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Lobat Sadrehashemi Lorne Waldman	FOR THE APPELLANT
Helen Park Tasneem Karbani	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Embarkation Law Corporation Vancouver, British Columbia Waldman & Associates Toronto, Ontario	FOR THE APPELLANT
Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE RESPONDENT