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Rodriguez Anzola v. Canada (Citizenship and Immigration), 2026 FCA 90 (CanLII)

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Docket: A-408-24

Citation: 2026 FCA 90

CORAM: STRATAS J.A.
LEBLANC J.A.
GOYETTE J.A.

BETWEEN:

NINI JOHANA RODRIGUEZ ANZOLA

Appellant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard at Toronto, Ontario, on October 20, 2025.

Judgment delivered at Ottawa, Ontario, on May 11, 2026.

REASONS FOR JUDGMENT BY:	LEBLANC J.A.
CONCURRED IN BY:	STRATAS J.A. GOYETTE J.A.

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REASONS FOR JUDGMENT

LEBLANC J.A.

I. Introduction

[1] This is an appeal of a judgment of the Federal Court (*per* Fothergill J.) (the Application Judge) dated November 28, 2024 (2024 FC 1914) (the Judgment), dismissing the appellant's application

for judicial review of a decision of the Immigration Division (the ID) of the Immigration and Refugee Board of Canada (IRB).

[2] In its decision, dated May 31, 2023 (ID File 0003-C2-00553-01 AH) (the ID Decision), the ID found the appellant, Nini Johana Rodriguez Anzola (Ms. Rodriguez Anzola or the appellant), to be inadmissible to Canada on grounds of serious criminality pursuant to paragraph 36(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 (the Act) for having committed an offence in her country of origin (trafficking or carrying illegal drugs) which, if committed in Canada, would constitute an offence under an Act of Parliament – here the *Controlled Drugs and Substances Act*, SC 1996, c. 19 – punishable by a maximum term of imprisonment of at least 10 years.

[3] Ms. Rodriguez Anzola, a refugee claimant from Colombia, does not dispute that she pleaded guilty to the Colombian offence, received a jail sentence of 48 months and did not appeal her conviction or sentence. Nor does she dispute the equivalency of the essential elements of the Colombian and Canadian offences.

[4] However, Ms. Rodriguez Anzola claims that she, together with her husband, Mr. Botero Martinez, who faced the same charges and who also fled Colombia to seek refugee status in Canada, were coerced into committing that crime by the Revolutionary Armed Forces of Colombia (the FARC), a Colombian narco-trafficking and guerilla organization. She further claims that, although the defence of duress can legally be raised under Colombian law, it was not practically and reasonably available to her (and her husband), something she says the ID failed to meaningfully consider in rendering its decision in her case.

[5] The Application Judge refused to interfere with the ID's decision, finding that the ID had properly limited its analysis to the equivalency of the Colombian and Canadian offences and to whether Ms. Rodriguez Anzola had committed the essential elements of the offence.

[6] That said, the Application Judge accepted that Ms. Rodriguez Anzola's case "may be distinct from those that gave rise to the leading appellate jurisprudence on criminal inadmissibility" and that, therefore, "[s]he should be given the opportunity to revisit the matter before [this Court], in light of the particular circumstances that gave rise to the finding of inadmissibility in her case" (Judgment at para. 48). He observed in this regard that the recent decision of this Court in *Canada (Public Safety and Emergency Preparedness) v. Gaytan*, 2021 FCA 163 (*Gaytan*) "confirmed that the ID may consider a defence of duress in the context of inadmissibility proceedings pursuant to [paragraph] 37(1)(a) of the [Act] (membership in a criminal organization; participation in specified transnational crimes)", which, in his view, "suggests that empowering the ID to consider certain defences for the first time would not be excessively burdensome" (Judgment at para. 47).

[7] As a result, and as permitted by paragraph 74(d) of the Act, the Application Judge certified the following question for appeal:

> In determining whether an individual is inadmissible under [paragraph] 36(1)(b) of the *Immigration and Refugee Protection Act*, are the Immigration Division and Immigration Appeal Division of the Immigration and Refugee Board entitled to consider extenuating circumstances that caused certain legal defences not to be practically available to the claimant in the foreign jurisdiction?

[8] For the reasons set out below, I would grant the appeal and answer in the affirmative the following question, which I find to be more focused on the appellant's circumstances than the question certified by the Application Judge:

> In determining whether an individual is inadmissible under paragraph 36(1)(b) of the *Immigration and Refugee Protection Act*, are the Immigration Division and Immigration Appeal Division of the Immigration and Refugee Board entitled to consider extenuating circumstances that caused the legal defence of duress not to be practically available to the claimant in the foreign jurisdiction?

II. Background

A. *The facts leading to the appellant's refugee claim and subsequent inadmissibility proceedings*

[9] The facts that led to Ms. Rodriguez Anzola (and her husband) fleeing Colombia for Canada are not in dispute. They were aptly summarized as follows by the Application Judge:

> [10] Mr. Botero Martinez worked as a taxi driver in Colombia. One of his clients was in charge of the FARC in Cundinamarca and Bogota. He demanded that Mr. Botero Martinez and Ms. Rodriguez Anzola transport cocaine abroad. He threatened to harm the family and recruit the children into the FARC.
>
> [11] The couple initially ignored repeated telephone calls from the FARC, but in November 2016, Ms. Rodriguez Anzola's niece returned from school crying. She said that three men had approached her and threatened to hurt her cousins if her uncle did not answer his telephone.
>
> [12] Mr. Botero Martinez and Ms. Rodriguez Anzola eventually acceded to the FARC's demands. On November 16, 2016, they ingested cocaine in advance of a flight to Spain. However, they were apprehended by the Colombian authorities at the Bogota airport.
>
> [13] In December 2020, while Mr. Botero Martinez was still serving his criminal sentence, he continued to receive threatening telephone calls from the FARC. At the end of his house arrest in February 2021, the family moved to another location within Colombia.
>
> [14] Mr. Botero Martinez says he was physically assaulted in November 2021. The following month, his children were approached by members of the FARC. On January 1, 2022, one of his sons and his girlfriend were seriously injured.
>
> [15] Mr. Botero Martinez arrived in Canada with his sons and niece on January 11, 2022, and sought refugee protection. Ms. Rodriguez Anzola arrived in Canada on April 11, 2022, and made a similar refugee claim.

[10] Shortly after their respective arrival to Canada, Ms. Rodriguez Anzola and her husband were referred to the ID for admissibility hearings due to their criminal convictions in Colombia. Those hearings were held separately, before different ID members, and produced, on the same set of facts and arguments, conflicting outcomes as Mr. Botero Martinez was found not to be inadmissible to Canada for serious criminality on the ground that the defence of duress, although legally available, was not reasonably available to him and that, consequently, the equivalency between the Colombian and Canadian offences had not been established.

[11] I note that the ID's finding in Mr. Botero Martinez's case is currently under appeal before the Immigration Appeal Division and that said appeal is being held in abeyance pending the outcome of the present matter.

B. *The ID Decision*

[12] In the present matter, the ID found that Ms. Rodriguez Anzola had the opportunity to present the defence of duress at trial but had chosen not to, noting that she had instead pleaded guilty to the impugned offence in exchange for a significantly reduced sentence. The ID further noted that Ms. Rodriguez Anzola was at the time represented by counsel, that counsel was aware of the threats she and her family had sustained and that discussions were held with the prosecution on the involuntary nature of her actions.

[13] The ID held that it would not be appropriate, in such circumstances, “to speculate now on the possible application of certain defences” (ID Decision at para. 58). Being satisfied that the Colombian and Canadian offences were equivalent, the ID found Ms. Rodriguez Anzola to be inadmissible to Canada for serious criminality.

[14] In concluding as it did, the ID relied in large part on *Beltran v. Minister of Citizenship and Immigration*, 2016 FC 1143 (*Beltran*), where the Federal Court held that the test for equivalency “does not contemplate the ID weighing evidence of a possible defence not raised in the foreign jurisdiction in order to determine whether the impugned conduct would have resulted in a conviction in Canada” (ID Decision at para. 55, quoting *Beltran* at para. 18).

[15] I note that the ID neither discussed, nor mentioned, *Gaytan* in its reasons.

C. *The Judicial Review Proceedings and the Judgment*

[16] On judicial review, Ms. Rodriguez Anzola argued that the ID had committed two reviewable errors.

[17] First, she claimed that the ID had breached her right to procedural fairness by denying her request to submit additional materials in advance of the second – and final – day of the inadmissibility hearing. These materials (the Additional Material) consisted of two packages of

documents, one containing counsel's notes in relation to a decision of the Refugee Protection Division of the IRB granting refugee status to Ms. Rodriguez Anzola's children and niece; the other containing additional information concerning Ms. Rodriguez Anzola's fear of the FARC. The ID denied Ms. Rodriguez Anzola's request on the ground that the Additional Material was "not germane to what was being decided and largely focused on events and issues that post-date the conviction that is the subject of this proceeding" (ID Decision at para. 30).

[18] Second, Ms. Rodriguez Anzola argued that the ID Decision was unreasonable on the ground that the ID had failed, when conducting the equivalency analysis, to meaningfully address her inability to raise the defence of duress at her criminal trial.

[19] On procedural fairness, the Application Judge opined that the outcome regarding that issue was dependent on whether the ID was right in limiting its role to asserting the equivalency of the Colombian and Canadian offences as a matter of law and determining whether Ms. Rodriguez Anzola had committed the essential elements of the offence.

[20] As indicated at the outset of these reasons, the Application Judge determined that the ID's approach was consistent with binding jurisprudence and was therefore reasonable. As a result, he concluded that the Additional Material, to the extent it concerned the broader circumstances surrounding Ms. Rodriguez Anzola's criminal trial, was irrelevant and that, therefore, the decision not to consider that material did not breach her right to procedural fairness.

[21] On reasonableness, the Application Judge opined that the position advocated by Ms. Rodriguez Anzola departed from well-established principles, including that the ID must take a foreign conviction at face value and is not required, in determining whether the impugned conduct would have resulted in a conviction in Canada, to weigh evidence of a possible defence not raised in the foreign jurisdiction and speculate on the chances of success of that defence.

[22] However, as mentioned previously, the Application Judge accepted that Ms. Rodriguez Anzola's circumstances may be distinct from those that gave rise to the leading appellate jurisprudence on inadmissibility for serious criminality and that, therefore, she should be given the opportunity to revisit the present matter on appeal before this Court.

III. Issues and standard of review

[23] The main issue in this appeal concerns the authority of the ID, when called upon to determine whether an individual is inadmissible under paragraph 36(1)(b) of the Act, to consider extraneous circumstances that caused the legal defence of duress not to be practically available to that individual in the foreign jurisdiction. If that authority exists, then a second issue arises and it is whether the ID committed a reviewable error in making a finding of inadmissibility in Ms. Rodriguez Anzola's circumstances.

[24] It is settled law that when this Court hears an appeal from a decision of the Federal Court on judicial review, its role is to determine first whether the Federal Court selected the appropriate standard of review. If it did, then this Court must determine whether that standard was applied properly. When called upon to determine whether the appropriate standard was applied properly, this Court "performs a *de novo* review of the administrative decision" (*Northern Regional Health Authority v. Horrocks*, 2021 SCC 42 at para. 10; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45-47 (*Agraira)*; *Gaytan* at para. 20).

[25] Here, the Application Judge reviewed the substance of the ID's finding of inadmissibility, including the ID's approach in making that determination, on the presumptive standard of reasonableness. This was the correct call (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 170 (*Vavilov*); *Gaytan* at para. 21). This is not disputed by the parties.

[26] What is in dispute is whether the Federal Court properly applied that standard to the circumstances of the case. Ms. Rodriguez Anzola contends it did not. To the extent that this Court,

at that stage of the analysis, must "step into the shoes" of the Federal Court and focus on the ID Decision (*Agraira* at para. 46, quoting *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at para. 247), it must apply the standard of reasonableness to its own review of that decision.

[27] I pause to point out that this task is no different because the present appeal has been initiated on the basis of a certified question. Indeed, it is trite that the fact that appeals in the immigration context can only be brought through the certified question regime established under the Act, "neither rebuts the presumption of reasonableness, nor alters [this Court's] task when it hears appeals from first instance judicial review decisions" (*Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21 at para. 51 (*Mason*)). This is not disputed by the parties either.

[28] As a third issue in this appeal, Ms. Rodriguez Anzola reiterates that it was procedurally unfair on the part of the ID not to consider the Additional Material and that the Application Judge erred in failing to set aside the ID Decision on that ground. She contends that this portion of the ID Decision must be reviewed on a standard of correctness, which, she says, is the standard applicable to questions of procedural fairness.

[29] However, to the extent that the Additional Material was found to be irrelevant as not being germane to what was being decided, and as largely focusing on events that post-dated Ms. Rodriguez Anzola's conviction in Colombia, I am not persuaded that the ID's refusal to consider the Additional Material raises procedural fairness concerns. On the contrary, the refusal in my view, is more akin to the ID determining what factually constrained the exercise of what it considered, rightly or wrongly, to be the scope of its decision-making authority in this case. This goes to the actual merits of the ID Decision and is reviewable, therefore, on a standard of reasonableness.

[30] Be that as it may, given the conclusions I have reached on the first two issues, it will not be necessary to address the third issue.

IV. Analysis

A. *The ID had the authority to consider extraneous circumstances causing the legal defence of duress not to be practically available to Ms. Rodriguez Anzola in Colombia when determining whether she was inadmissible under paragraph 36(1)(b) of the Act*

[31] In addressing this first issue, I will first explain why the question certified by the Application Judge needs to be slightly modified. Second, I will describe, in broad terms, the Act's inadmissibility framework. Third, I will summarize the parties' positions on that issue. Fourth, I will address whether, in the first place, duress is a relevant constraint when determining inadmissibility under paragraph 36(1)(b) of the Act. In so doing, I will discuss both the relevance and impact of *Gaytan* on the present matter. I will discuss as well the place – and importance – of the defence of duress on the concept of criminal liability in Canadian criminal law and its interplay with the Act's inadmissibility framework, including when a non-citizen is found to be inadmissible for having been convicted of a serious crime in the foreign jurisdiction but who can show that they were prevented from raising the defence of duress due to extraneous circumstances. Finally, I will demonstrate that a positive response to that first question, contrary to the respondent's contention, does not overrule this Court's previous jurisprudence on inadmissibility for serious criminality and is consistent with the text, context and purpose of paragraph 36(1)(b) of the Act.

(1) The Scope of the Certified Question

[32] The test for certification consists in finding whether there is a serious question of general importance and of broad significance which transcends the interests of the parties to the litigation. The certified question must also be dispositive of the appeal. As such, the certification process must not be used as a tool to obtain from our Court declaratory judgments on questions which need not be decided to dispose of the case (*Canada (Minister of Citizenship and Immigration) v. Zazai*, 2004 FCA 89 at paras. 11-13).

[33] Hence, this Court retains the authority to reformulate a certified question in a way that more accurately reflects the issue at stake. This will be the case where the question is formulated in "rather general terms" (*Li v. Canada (Minister of Citizenship and Immigration) (C.A.)* (FCA), 1996 CanLII 4086 (FCA), [1997] 1 FC 235 (*Li*) at para. 11; *Khan v. Canada (Minister of Citizenship*

and Immigration) (C.A.), 2001 FCA 345 at para. 17; *Tretsetsang v. Canada (Citizenship and Immigration)*, 2016 FCA 175 at para. 5, Rennie J.A. in dissent but not on that point).

[34] Here, the central issue concerns the defence of duress and its practical availability in Ms. Rodriguez Anzola's circumstances. Seeking the Court's view on whether the ID is entitled to consider extenuating circumstances that caused "certain legal defences" not to be practically available to the claimant in the foreign jurisdiction is both too vague and too broad.

[35] To better reflect the real issue at stake, and account for the particular nature of the defence of duress, the question must, in my view, be limited to whether the ID is entitled to consider extenuating circumstances that caused the legal defence of duress not to be practically available to the claimant in the foreign jurisdiction.

(2) The Act's inadmissibility framework

[36] Sections 33 to 42 of the Act set out various grounds of inadmissibility to Canada, ranging from national security to public health and misrepresentations. Those found at sections 34 to 37 of the Act are more particularly aimed at "facilitat[ing] the removal of [non-citizens] who constitute a risk to Canadian society on the basis of their conduct, whether it be criminality, organized criminality, human or international rights violations, or terrorism" (*Gaytan* at para. 36, quoting *Sittampalam v. Canada (MCI)*, 2006 FCA 326 at para. 21).

[37] Subsection 36(1) is more specifically concerned with conduct amounting to "serious criminality." This provision sets out three categories of conduct giving rise to inadmissibility on such ground. The one used against Ms. Rodriguez Anzola is found at paragraph 36(1)(b). It reads as follows:

Serious criminality	*Grande criminalité*
36(1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	**36(1)** Emportent interdiction de territoire pour grande criminalité les faits suivants :
…	[…]
(b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or	**b)** être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction sous le régime d'une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;
…	[…]

[38] Inadmissibility under paragraph 36(1)(b) is established using a test of equivalency developed by the jurisprudence. This test essentially asks whether the acts committed outside Canada and punished there would have been punishable here, in Canada (*Li* at para. 13). The answer to that question, and I will get back to this later in these reasons, requires a comparison not only of the definitions of the offence committed abroad and of the offence that would have been punishable in Canada, but also of the defences particular to those offences or classes of offences (*Li* at para. 19). This, in turn, may require evidence "as to how the offence [abroad] had actually been committed" (*Li* at para. 12, quoting *Brannson v. Minister of Employment and Immigration* (FCA) [1981] 2 FC 141 at p. 152-153 (*Brannson*)).

[39] Inadmissibility proceedings are governed by sections 44 and 45 of the Act. The authority to conduct inadmissibility hearings is vested in the ID which, by virtue of subsection 162(1) of the Act, possesses in respect of proceedings brought before it under this Act, "sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction".

(3) The Position of the Parties

[40] Ms. Rodriguez Anzola contends that to avoid deeming morally innocent people inadmissible to Canada in situations like hers, which would be contrary to the statutory objectives of paragraph 36(1)(b) of the Act, the equivalency analysis ought to include an assessment of the factual circumstances underlying the foreign conviction. Unlike previous inadmissibility cases, she says, she did not make the strategic choice to not raise a defence of duress but was silenced by her fear of the FARC throughout her criminal trial.

[41] The appellant claims that paragraph 36(1)(b) of the Act only targets those whose morally blameworthy conduct poses a risk to Canadian society. Quoting *Li*, she contends that the purpose of that provision is "obviously to exclude from Canada persons who have done things abroad, for which they have been convicted there, which Canada regards by its laws as constituting serious misconduct" (Appellant's Memorandum of Fact and Law at para. 66, quoting *Li* at para. 17).

[42] This, she says, was reaffirmed recently in *Gaytan* which also underscored the importance of precedents as a legal constraint on how and what an administrative tribunal can lawfully decide. In this respect, the appellant notes that *Gaytan* relied on the example given in *Vavilov* of an "immigration tribunal" called upon to determine whether a person's conduct abroad constitutes a criminal offence under Canadian law for the purposes of sections 35 to 37 of the Act. There, the Supreme Court stated that it "would clearly not be reasonable" for such a tribunal "to adopt an interpretation of a criminal law provision that is inconsistent with how Canadian criminal courts have interpreted it" (Appellant's Memorandum of Fact and Law at para. 66, quoting *Gaytan* at para. 68).

[43] Ms. Rodriguez Anzola claims therefore that to comply with Canadian standards of criminal conduct, the "centrality of the defense of duress in criminal law proceed[ing]s", needed to be recognized by the ID and meaningfully applied to her circumstances (Appellant's Memorandum of Fact and Law at para. 67).

[44] She also asserts that although it was rendered in the context of section 37 of the Act (membership in a criminal organization), *Gaytan* signals that moral blameworthiness is now a central concern in the determination of inadmissibility generally and suggests, based on some other recent decisions, "an evolving obligation for decision-makers to consider the circumstances surrounding the conviction to avoid absurd consequences in which punishment is imposed on morally innocent people for whom inadmissibility advances neither public safety nor international justice" (Appellant's Memorandum of Fact and Law at para. 77).

[45] The respondent disagrees. It contends that the ID Decision is consistent with binding jurisprudence of this Court and should, therefore, be left undisturbed. It submits that the prevailing equivalency test was established nearly 40 years ago by this Court and is still good law despite the passage of time. Quoting *Li*, the respondent says that under that test, it is not open to the individual concerned to challenge the validity or merits of the conviction abroad. The retrial of the case applying Canadian rules of evidence or procedure is not open to that individual either.

[46] Here, according to the respondent, what the appellant is really seeking is a change in the equivalency test to require the ID to consider the merits of the foreign conviction in order to determine whether the individual concerned had a fair trial or is morally blameworthy. This, the respondent says, is simply not contemplated by the equivalency test and is, in any event, inconsistent with the text, context and purpose of paragraph 36(1)(b) of the Act.

[47] Furthermore, the respondent submits that there is little, if anything, in the statutory scheme to indicate that inadmissibility decision-makers are equipped to look behind a foreign conviction. The approach advocated by the appellant would require these decision-makers to conduct criminal trials or appeals on foreign convictions, a role which would raise a host of obvious practical, evidentiary and other legal concerns. This, it says, cannot have been what Parliament intended that role to be.

[48] Finally, the respondent contends that *Gaytan* is of no assistance to Ms. Rodriguez Anzola in that it does not provide the "necessary foundation for the Court to overrule its previous decisions" (Respondent's Memorandum of Fact and Law at para. 40). This is so, the respondent claims, because the Court's comments about moral culpability were explicitly made regarding membership assessments under sections 34 and 37 of the Act, and because there is nothing to suggest therein that the Court intended its comments to extend to inadmissibility assessments made under paragraph 36(1)(b).

(4) Duress is a relevant constraint when determining inadmissibility under paragraph 36(1)(b) of the Act

[49] There is no doubt, in my view, when one considers *Gaytan* as well as the particular nature and importance of the defence of duress in Canadian criminal law, that duress is a relevant constraint in determining inadmissibility under paragraph 36(1)(b) of the Act.

(a) *Gaytan*

[50] At the hearing of this appeal, the parties, at the invitation of the Court, spent some time discussing whether there was any principled basis not to apply *Gaytan* to the present matter. If *Gaytan* is applicable, then this panel is bound to it by virtue of the horizontal *stare decisis* principle, according to which the Court follows its prior decisions unless it can be shown that the prior decision sought to be followed is manifestly wrong (*Miller v. Canada (Attorney General)*, 2002 FCA 370 at paras. 9-10; *R. v. Sullivan*, 2022 SCC 19 at paras. 74-79; *Feeney v. Canada*, 2022 FCA 190 at para. 16; *Chen v. Canada*, 2023 FCA 146 at paras. 10-11; *Patel v. Dermaspark Products Inc.*, 2025 FCA 145 at paras. 31-32).

[51] Here, there were no serious attempts on the part of the respondent to show that *Gaytan* is manifestly wrong. The issue, then, becomes whether *Gaytan* serves as a basis – or a building block – for a positive response to the appeal's first issue. As I indicated above, there is no doubt that it does.

[52] I have already pointed out the respondent's position regarding *Gaytan*. It says that *Gaytan* concerns solely membership assessments under sections 34 and 37 of the Act and contains no indication that the Court intended its comments to extend to inadmissibility assessments under paragraph 36(1)(b). With respect, *Gaytan* goes further than that.

[53] In *Gaytan*, the certified question was indeed specific to paragraph 37(1)(a) of the Act and to whether the ID could consider the defence of duress in determining inadmissibility for being a member of a criminal organization. The appellant in that case, the Minister of Public Safety and Emergency Preparedness (the Minister), was of the view that duress could only be raised before him in the context of an application for ministerial relief under subsection 42.1(1) of the Act.

[54] The Minister raised several arguments in support of his position. One of them was that importing criminal law notions into the admissibility framework was inconsistent with the scheme of the Act because such notions have no direct application to that framework. While he recognized that the defence of duress was aimed at protecting persons charged with an offence from unconstitutional punishment, that is from punishment for morally involuntary actions, the Minister was claiming that inadmissibility was purely a finding that an individual falls within a class of persons defined in the Act, resulting in inadmissibility not being concerned with moral blameworthiness, with punishment for one's actions, or with that person's constitutional protections. According to the Minister, these were crucial distinctions that the Federal Court had failed to account for when dismissing his claim that the ID had no authority to consider the defence of duress when ministerial relief is otherwise available under subsection 42.1(1) of the Act (*Gaytan* at para. 28).

[55] I pause to note that at the time *Gaytan* was decided, ministerial relief was – and is still – not available in inadmissibility matters based on section 36 of the Act.

[56] This argument led the Court to examine the intersection between criminal law and the inadmissibility framework, and in particular sections 34 <u>to</u> 37, which, as indicated previously, have

the common purpose of "facilitat[ing] the removal of [non-citizens] who constitute a risk to Canadian society on the basis of their conduct, whether it be criminality, organized criminality, human or international rights violations, or terrorism" (*Gaytan* at para. 36).

[57] This analysis is based on the Supreme Court's directions in *Vavilov* regarding the role of binding precedents on the interpretation of statutory law or the common law, as constraints on how and what an administrative decision-maker can lawfully decide, and their relevance in assessing the reasonableness of administrative decisions. As stated by the Supreme Court, this includes decisions of an "immigration tribunal" called upon to determine what constitutes a criminal offence under Canadian criminal law for the purposes of "sections 35 to 37 of the Act" (*Gaytan* at para. 68, quoting *Vavilov* at para. 112).

[58] This means that Canadian criminal law and how it has been interpreted by the courts is a relevant constraint when those provisions of the Act, not just paragraph 37(1)(a), are being applied. The Court, in *Gaytan*, concluded that "it would take much clearer language from Parliament to remove the availability of the consideration of duress from the ambit of matters the [ID] might consider in an admissibility proceeding" (*Gaytan* at para. 74). This statement, responding to the Minister's argument that importing criminal law notions into the admissibility framework generally was inconsistent with the scheme of the Act, was clearly not limited to inadmissibility proceedings grounded in paragraph 37(1)(a) of the Act.

[59] Interestingly, the Court "pause[d] to stress that it [was] not disputed that duress may be raised before the [ID] in matters where inadmissibility is not subject to ministerial relief" (*Gaytan* at para. 75, emphasis in original). As indicated, inadmissibility matters based on section 36 of the Act (serious criminality and criminality) are not subject to ministerial relief.

[60] There, the Court discussed a scenario where the Minister would have initiated inadmissibility proceedings against Mr. Gaytan for having committed a criminal offence overseas, as permitted by

paragraph 36(1)(c) of the Act, instead of bringing the matter, as he had done, under paragraph 37(1)(a) of the Act, and said this:

> According to the Minister's logic, this would have made duress a relevant consideration because inadmissibility proceedings for serious criminality are not subject to ministerial relief, even though these proceedings would have been based on the same set of facts as the one that led the Minister to raise subsection 37(1)(a) in the case at bar. I agree with the respondent that such an approach, if allow[ed] to stand, would lead to absurd results, as duress would then be available depending solely on which inadmissibility provision the Minister decides to proceed with. Such result cannot not have been intended by Parliament (*Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, 154 DLR (4e) 193 at para. 27)
>
> (*Gaytan* at para. 75)

[61] Apart from the fact that the respondent is now taking an entirely different position in the present matter, this, in my view, is a clear indication that the Court, in *Gaytan*, considered criminal law, including duress, to be a relevant constraint beyond the confines of paragraph 37(1)(a).

[62] Therefore, the respondent's contention that there are no indications in *Gaytan* that the Court intended its comments to extend to inadmissibility assessments under paragraph 36(1)(b), is incorrect.

[63] Besides, I do not read the ID Decision as saying that duress cannot be considered by the ID when applying the equivalency test in a paragraph 36(1)(b) matter. As was the case in *Beltran*, on which the ID relied heavily, Ms. Rodriguez Anzola's claim of duress was dismissed only because the defence of duress, although legally available to her, was not raised in the course of her criminal proceedings in Colombia. There is also case law where other criminal law defences – self-defence for example – were held to be applicable in a paragraph 36(1)(b) matter in circumstances, which I will discuss in more detail below, somewhat similar to those of the present case (*Zeine v. Canada (Citizenship and Immigration)*, 2023 FC 1370 (*Zeine*)).

[64] There is no doubt, therefore, based on *Gaytan* (and on what appears to be the ID's own position on this point), that the defence of duress is a relevant constraint in a paragraph 36(1)(b)

analysis. In *Gaytan*, the Court stressed that coerced membership could not reasonably have been intended to be captured by sections 34 and 37 of the Act (*Gaytan* at para. 80) and I see no principled reason to carve out the defence of duress from the operation of the inadmissibility framework when it comes to coerce criminal conduct resulting in a conviction abroad.

[65] That said, the issue here is whether the ID, when conducting an equivalency analysis, can go so far as to look into the circumstances that caused the legal defence of duress not be practically available.

[66] To answer that question, it is important to first underscore the nature and centrality of the defence of duress in Canadian criminal law. That is so because the equivalency test, as we will see in more detail below, essentially asks whether the acts committed abroad would have been punishable in Canada (*Li* at para. 13).

(b) *The central importance of the defence of duress in Canadian criminal law*

[67] The defence of duress has two sources in Canadian criminal law: section 17 of the *Criminal Code*, RSC 1985, c. C-46 (the *Criminal Code*), which essentially excuses a person for a criminal act they commit when threatened or compelled by another person, and the *common law*. In *R. v. Ruzic*, 2001 SCC 24 (*Ruzic*), the Supreme Court held that it is a principle of fundamental justice that “only voluntary conduct – behaviour that is the product of a free will and controlled body, unhindered by external constraints – should attract the penalty and stigma of criminal liability” (*Ruzic* at para. 47).

[68] At issue in *Ruzic* was whether some of the restrictions to the defence of duress set out in section 17 of the *Criminal Code* – the “immediacy” and “presence” restrictions requiring the accused to show that he/she was compelled to commit the offence under threats of immediate death or bodily harm from a person who is present when the offence is committed – accorded with the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act*, 1982, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) (the *Charter*). The Supreme Court ruled that they did not.

[69] While the Supreme Court recognized that the legislator could restrict – and even remove– a criminal defence and that a withdrawal of a criminal defence would "not automatically breach s. 7 of the *Charter*" (*Ruzic* at para. 23), it held that the principles of fundamental justice require that criminal liability only result from morally voluntary conduct. As a result, it ruled the impugned restrictions to be in breach of section 7 of the *Charter* on the ground that those restrictions allowed individuals to be found guilty of involuntary actions (*Ruzic* at paras. 48 and 55). The Supreme Court further concluded that these restrictions were not saved by section 1 of the *Charter* (*Ruzic* at para. 91). In arriving at these conclusions, it underscored that "[t]he treatment of criminal offenders as rational, autonomous and choosing agents [was] a fundamental organizing principle of criminal law" (*Ruzic* at para. 45).

[70] A few years later in *R. v. Ryan*, 2013 SCC 3 (*Ryan*), the Supreme Court underlined the breadth of the constitutional protection enjoyed by the defence of duress when it observed that "important aspects" of its statutory version had been found to be unconstitutional in *Ruzic* (*Ryan* at para. 36).

[71] In concluding as it did in *Ruzic*, the Supreme Court reaffirmed that criminal liability "is founded on the premise that it will be borne only by those persons who knew what they were doing and willed it" (*Ruzic* at para. 34). In other words, the rationale underlying duress is that of moral involuntariness, a concept entrenched as a principle of fundamental justice (*Ryan* at para. 23, citing *Ruzic* at para. 47). This is so crucial that lack of moral voluntariness entitles the offender "to a complete and unqualified acquittal" (*Ruzic* at para. 43 quoting from *Rabey v. The Queen*, 1980 CanLII 44 (SCC), [1980] 2 S.C.R. 513, at p. 522).

[72] Therefore, moral involuntariness, which serves as the underlying rationale for duress, engages the most basic, fundamental and organizing principles of criminal liability in Canadian criminal law, meaning that to allow individuals who acted involuntarily to be declared criminally liable violates our Constitution (*Ruzic* at paras. 45 and 55). Put differently, in Canada, the *Charter* dictates that a crime committed by someone who acted involuntarily is not punishable and cannot attract the stigma of criminal liability. Put yet another way, duress strikes right at the core of

criminal liability and so, legally speaking, the accused must be treated for all Canadian legal purposes as if the accused has never committed a criminal offence.

[73] In *Ruzic*, the Supreme Court stressed that although it does not "negate ordinarily *actus reus*" (a guilty act) nor does it "ordinarily negate *mens rea*" (a guilty mind), and rather operates as an excuse, duress, "in its 'voluntariness' perspective", can "more justifiably fall within the 'principles of fundamental justice', even after the basic elements of the offence have been established." This is because, unlike the concept of "moral blamelessness", duress, in that perspective, can "more easily be constrained" (*Ruzic* at para. 42).

[74] It is rational to conclude, therefore, that voluntariness is an "essential ingredient" to any criminal offence in Canada, which means that if a foreign conviction results from the commission of an involuntary act because of duress, then that conviction cannot be regarded as equivalent in Canadian law as lack of voluntariness, cuts to the root of any criminal conviction such that Canada should not recognize a foreign conviction if it occurred in such circumstances.

[75] Again, in the immigration context, it stands to reason that in determining whether a crime committed outside Canada would have been punishable in Canada for the purposes of paragraph 36(1)(b) of the Act, duress is a relevant constraint given that, if it is established, the person convicted of that crime would be, in Canada, entitled "to a complete and unqualified acquittal". In other words, the acts underlying the conviction abroad would not be punishable here.

[76] Does that constraint extend to requiring the ID to look into the circumstances that led the individual concerned not to raise duress when it was otherwise legally available in the country where the conviction occurred? I believe it does because, ultimately, being deprived of the defence of duress due to some extraneous circumstances could amount to not having access to that defence at all.

[77] Therefore, the centrality of the defence of duress on the concept of criminal liability in Canadian law makes it incumbent on the ID to consider the circumstances that prevented the individual concerned from raising that defence in instances where it was otherwise legally available.

[78] In my opinion, this view does not overrule this Court's previous jurisprudence on inadmissibility for serious criminality and is consistent with the text, context and purpose of paragraph 36(1)(b) of the Act.

(5) This Court's jurisprudence on inadmissibility for serious criminality

[79] Although it precludes treating an inadmissibility proceeding as a retrial of the merits or validity of the foreign conviction, the jurisprudence of this Court on paragraph 36(1)(b) of the Act does not exclude factual considerations beyond the existence of a conviction in all cases, including the facts underlying the foreign conviction for the purposes of determining whether those facts would have led to a conviction in Canada. In fact, the Court cautioned against the equivalency test being reduced to a universal blanket, meaning that in some instances, there will necessarily need to be some consideration for unique circumstances.

[80] In *Brannson*, Urie J.A., in concurring reasons, expressly stated the need for additional facts "at least in circumstances where the scope of the [Canadian] offence is narrower in compass than that of in the foreign jurisdiction" and that, therefore, a blanket procedure should not be adopted for all instances where an immigration tribunal is called upon to determine whether the offence committed abroad would constitute an offence if committed in Canada (*Brannson* p. 145) (My emphasis).

[81] In *Brannson,* the Court found that it was inappropriate to prevent the applicant from testifying about the facts of his conviction in the United States (for having used the mail to promote a fraudulent scheme), the immigration tribunal in that case having ruled that such evidence was irrelevant. For Urie J.A., the issue in that case concerned the extent to which the immigration

tribunal was "entitled to flesh out the evidence relating to the United States offence by ascertaining how the offence was committed by the applicant in order to ascertain whether the offence committed would constitute an offence in Canada" (*Brannson* p. 143). Urie J.A. concluded as follows:

> It is not sufficient [. . .] for the Adjudicator to simply look at the documentary evidence relating to a conviction for an offence under the foreign law. There must be some evidence to show firstly that the essential ingredients constituting the offence in Canada include the essential ingredients constituting the offence in the United States. Secondly, there should be evidence that the circumstances resulting in the charge, count, indictment or other document of a similar nature, used in initiating the criminal proceeding in the United States, had they arisen in Canada, would constitute an offence that might be punishable by way of indictment in Canada.
>
> (*Brannson* p. 144)

[82] Although it was not its role to inquire about the validity or merits of the conviction abroad, the immigration tribunal, according to Urie J.A., had, by contrast, "the obligation to ensure that the conviction in issue arose from acts which were encompassed by the provisions [of the Canadian offence]" (*Brannson* p. 145).

[83] Ryan J.A., with whom Kelly D.J. concurred, accepted that in instances where the definition of the foreign offence is broader than, but could contain, the definition of a Canadian offence "it may well be open to lead evidence of the particulars of the offence of which the person under inquiry was convicted" (*Brannson* p. 153). As we have seen, there are indications that Urie J.A. considered that the leading of such evidence would be relevant or required in other instances.

[84] In *Hill v. Canada (Minister of Employment and Immigration)*, (FCA) (1987) 1987 CanLII 9881 (FCA), 1 Imm. L.R. (2d) 1 (*Hill*), the issue was whether the elements of the crime of theft in Texas were equivalent to those in the *Criminal Code*, particularly in light of the requirement, in the Canadian definition, that the taking of the property be "without color of right". The evidence upon which the immigration tribunal in that case had made its finding of inadmissibility was "extremely sparse" (*Hill* p. 4).

[85] Hugessen J.A. (MacGuigan J.A. concurring), identified two fatal flaws with this evidence. First, it was completely lacking as to what was meant in the Texas statute by "theft". Second, it did not allow to determine whether Mr. Hill might have asserted a colour of right to his taking of the alleged stolen property, and, therefore, to determine whether the offence of which he was convicted in Texas would necessarily, if committed in Canada, have constituted an offence to the *Criminal Code* provision being compared with (*Hill* p. 5-6).

[86] In concurring reasons, with which MacGuigan J.A. also concurred, Urie J.A., set out his views as to how to perform the equivalency analysis:

> [F]irst, by a comparison of the precise wording in each statute both through documents and, if available, through the evidence of an expert or experts in the foreign law and determining therefrom the essential ingredients of the respective offences; two, by examining the evidence adduced before the adjudicator, both oral and documentary, to ascertain whether or not that evidence was sufficient to establish that the essential ingredients of the offence in Canada had been proven in the foreign proceedings, whether precisely described in the initiating documents or in the statutory provisions in the same words or not; and three, by a combination of one and two.
>
> (*Hill* p. 9)

[87] That test was applied in *Li*, the Court noting that it had been approved in cases subsequent to *Hill* (*Li* at para. 13). The Court also noted that the second way of establishing equivalence, the one that permits adducing evidence as to the circumstances of the acts committed abroad, "point[ed] up to the fundamental test of equivalence: would the acts committed abroad and punished there have been punishable here?" (*Li* at para. 13). *Li* also clarified that a comparison of the "essential elements" of the foreign and Canadian offences "requires a comparison of the definitions of those offences including defences particular to those offences or those classes of offences" (*Li* at para. 19).

[88] According to the Court, it was "obvious that persons could be convicted of the [foreign] offence in circumstances where they would not be guilty of an offence in Canada, given the defence available here [...]" arising out of the narrower meaning of the Canadian offense (*Li* at

para. 20). In the absence of any evidence pointing to the fact that what led to the foreign conviction would have constituted an offence within the narrower Canadian *Criminal Code* provisions, the Court concluded that there was no equivalency between the two offences (*Li* at para. 21).

[89] Some general threads can be pulled from this Court's jurisprudence:

a) A bare legal equivalence is not always sufficient to establish inadmissibility;

b) It is neither possible nor desirable to reduce the equivalency test to a universal blanket applicable in every case;

c) At a minimum, where a Canadian offence is more narrowly defined than a foreign offence, the decision-maker is entitled to inquire into the facts to determine whether the acts committed abroad fit into the elements of the Canadian offence;

d) Put differently, consideration of the facts underlying a foreign conviction is not precluded in all cases and is required in some;

e) It is the "essential ingredients" of the Canadian and foreign offences that must be compared, which include the legal availability of defences particular to the crime at issue; and

f) Challenging the validity or merits of the foreign conviction is no response to an inadmissibility proceeding.

[90] Although it precludes treating an inadmissibility proceeding like an appeal of the foreign conviction, the jurisprudence on paragraph 36(1)(b) of the Act confirms that the equivalency test should be treated as flexible enough to account for factual circumstances. In other words, it allows enough space to give some consideration for the unique circumstances of each case in determining equivalency.

[91] Transposed to the present matter, the fundamental question, therefore, is whether, when one considers both the essential "ingredients" of the Colombian and Canadian offences, the acts committed by the appellant in Colombia and for which she was punished there, would have been punishable here, taking into account the facts underlying the Colombian conviction.

[92] As I said earlier, duress and moral involuntariness are centrally important to Canadian criminal law. One could say that they are "essential ingredients" to any criminal offence in Canada. Again, in *Gaytan*, this Court considered duress in the context of inadmissibility proceedings and found that "Parliament did not intend membership to extend to those who were forcibly recruited by a terrorist or a criminal organization and performed acts consistent with the goals of such an organization while under duress" (*Gaytan* at para. 79), and the respondent has failed to provide a principled reason not to apply this reasoning to the context of serious criminality where the issue is that the individual was under duress both during the commission of the crime and during the subsequent legal proceedings.

[93] Therefore, if its existence is proven in the circumstances of this case, duress would strike at the root of the Colombian conviction such that for all Canadian legal purposes, including immigration, it would have to be regarded as a nullity, even after the basic elements of the offence (*actus reus* and *means rea*) have been established.

[94] The jurisprudence of this Court on equivalence allows for such flexibility.

[95] The recent decision of the Federal Court in *Zeine* is consistent with that approach. In that case, although there was no evidence that self-defence was raised at trial in the foreign jurisdiction – or could not have been raised due to extraneous circumstances – the Federal Court held that the "immigration tribunal" – an immigration officer in that case – had failed to consider the potential defence of self-defence, vitiating thereby the reasonableness of the officer's decision. The Federal Court judge stated that the issue of self-defence had sufficiently been raised in the material before

the officer to require consideration such that the foreign offence would not, if committed in Canada, be punishable here (*Zeine* at paras. 29-30). It concluded as follows:

> [33] Mr. Zeine could certainly have raised the issue of self-defence more clearly in his submissions. However, I conclude that the factual context of Mr. Zeine's conviction and his explanation regarding that context were such that the officer had to consider self-defence in assessing whether the facts that were proven in the Lebanese criminal case met the essential elements of section 267 of the *Criminal Code*: see *Garcia v Canada (Citizenship and Immigration)*, 2021 FC 141 at paras 26–28.

[96] The respondent insists that the equivalency analysis does not allow the ID to reconsider the validity or merits of the foreign conviction or to embark on "finicky evaluations" of the rules governing the legal process in the foreign jurisdiction, which, according to the respondent, is what Ms. Rodriguez Anzola is ultimately seeking.

[97] With respect, requiring the ID, for equivalency purposes, to consider whether the defence of duress was practically (or reasonably) available, does not amount to requiring the ID to reconsider the validity or merits of the foreign conviction or to proceed with "finicky evaluations" of the rules governing the legal process in the foreign jurisdiction. Again, the ID's task is to determine whether the offence committed abroad would, if committed in Canada, be punishable under Canadian law. As we have seen in the case law, an offence may very well be punishable abroad, but not in Canada. Such a finding does not require reconsideration of the merits or validity of the conviction abroad, let alone reconsideration on the basis of the Canadian standards of procedure or evidence.

[98] Besides, the appellant is not suggesting that the ID be entitled to retry the foreign case. She rather claims, as I understand it, that the ID be permitted to consider evidence about duress both during the commission of the crime she was charged with and during the subsequent legal proceedings, in order to determine, even after the basic elements of the offence have been established, whether her circumstances were egregious enough to regard her conviction in Colombia as never having happened.

[99] As I have indicated, I believe the equivalency test, as it has been applied so far, allows for this type of inquiry given the critical criminal liability interests at stake. I believe as well that this view is consistent with the text, context and purpose of paragraph 36(1)(b) of the Act.

(6) The text, context and purpose of paragraph 36(1)(b) of the Act

[100] As is now well-established, although an administrative decision-maker need not “engage in a formalistic statutory interpretation exercise in every case”, its decision must be consistent with the “modern principle” of statutory interpretation, which focuses on the text, context, and purpose of the statutory provision (*Mason* at para. 69, quoting *Vavilov* at paras. 118-119).

[101] Here, the ID did not engage in a statutory interpretation exercise of paragraph 36(1)(b). Its decision is essentially based on what it believes to be jurisprudential constraints.

[102] The respondent contends that neither the text, context or purpose of paragraph 36(1)(b) allows for consideration of the validity or merits of the foreign conviction. However, as indicated previously, this is not the point.

[103] The point is whether a text, context and purpose analysis of paragraph 36(1)(b) supports an interpretation that would allow the ID, in an equivalency analysis, to look into the circumstances, including those throughout the criminal trial, that caused the legal defence of duress not be practically available with the consequence that the foreign conviction would be regarded, given the centrality of the defence of duress to the concept of criminal liability in Canada, as a nullity for all Canadian legal purposes, including immigration.

[104] Paragraph 36(1)(b) operates as a ground of inadmissibility where a permanent resident or foreign national was convicted of an offence outside Canada which, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years. At the level of text, neither paragraph 36(1)(b) nor any other provision of the Act clearly specifies the precise terms of equivalency that are required to sustain a

finding of inadmissibility, including the evidence or the list of factors the ID is entitled to consider. In particular, nothing in the text of the Act directs immigration officials or tribunals to only consider the elements of the foreign and Canadian offences in all circumstances or precludes consideration of extraneous circumstances in all instances.

[105] This is probably so because it is highly unlikely that foreign jurisdictions would define their crimes in ways that are equivalent to the manner in which crimes are defined in Canada. This is why this Court has recognized that at least in instances where the elements of a Canadian offence are narrower than its foreign counterpart, the respondent must show that the facts that formed the basis of the conviction abroad fit the narrower Canadian elements.

[106] It is this opening – that the text of paragraph 36(1)(b) does not preclude the ID from considering the facts underlying the foreign conviction in all circumstances – which, in my view, allows this Court to consider whether the ID is entitled, when conducting an equivalency analysis, to consider evidence of duress throughout the criminal trial. If the text of the Act does not provide a clear answer to that question, context and purpose do.

[107] The respondent argues that legislative changes brought to the Act's inadmissibility framework in 1976 supports its position that from that point on, Parliament no longer intended immigration tribunals to consider the merits of a foreign conviction or the moral blameworthiness of the acts underlying the conviction. Through these amendments, Parliament moved away from the "vague and unsatisfactory" notion of "crimes involving moral turpitude" for an objective criterion based on Canada's *Criminal Code* (Respondent's Memorandum of Fact and Law at paras. 56-58).

[108] However, the legislative history of paragraph 36(1)(b) does not assist the respondent as the changes made to that provision do not speak to whether the facts underlying the foreign conviction are allowed to be considered in certain circumstances. As we have seen, according to the jurisprudence of this Court, they do sometimes matter.

[109] The respondent also claims, as a matter of context, that foreign nationals do not have an unqualified right to enter and remain Canada, meaning that Parliament has the right to impose conditions upon which non-citizens will be permitted to enter and remain in Canada, one such condition being that they will be denied entering or remaining in Canada if convicted abroad of certain criminal offences.

[110] Again, while it is correct to say that non-citizens do not have an unqualified right to enter and remain Canada, I fail to see how this argument assists in a meaningful way in determining whether paragraph 36(1)(b) precludes the ID from considering the facts underlying the foreign conviction in all circumstances.

[111] The respondent insists that its interpretation of paragraph 36(1)(b) finds support in the fact that Parliament created two approaches to determine inadmissibility for serious criminality or criminality, one based on whether a conviction exists, which is the case of that provision, the other based on the commission of specified acts, which allows for assessment of the purported crimes committed.

[112] I believe that in adopting the first approach, Parliament intended to provide a sort of a "bright line" test that would not contemplate a retrial of the facts. This is most obviously demonstrated by the fact that paragraph 36(1)(c) is a related provision that specifically contemplates consideration of criminal acts as opposed to criminal convictions. Paragraph 36(1)(c) requires that the respondent establish reasonable grounds to believe that certain facts exist. Under paragraph 36(1)(b), the intention must have been that the respondent be entitled to rely on the conviction itself as factual proof of the criminal acts committed abroad.

[113] Undoubtedly, Parliament envisioned that proving inadmissibility under paragraph 36(1)(b) would not require a retrial of the facts underlying the foreign conviction. But, again, this is not what is in issue here, and this is not what the appellant is asking for. She does recognize that she

committed the acts that led to her conviction. However, she contends that despite her conviction, there is good reason, in the form of persistent duress, not to regard her as a serious criminal.

[114] The respondent invokes the Act's objectives in maintaining the security of Canadian society and promoting security by denying access to Canadian territory to persons who are criminals or security risks (paragraphs 3(1)(h) and (i)), in support of its interpretation of paragraph 36(1)(b). However, the Act is also aimed at granting, "as a fundamental expression of Canada's humanitarian ideals, fair consideration to those who come to Canada claiming persecution", and at establishing "fair and efficient procedures that will maintain the integrity of the Canadian refugee protection system, while upholding Canada's respect for the human rights and fundamental freedoms of all human beings" (paragraphs 3(2)(c) and (e)).

[115] From a statutory objectives' standpoint, therefore, while protecting Canadians is important, so too is maintaining procedural fairness and Canada's humanitarian posture. Hence, allowing the ID to consider whether a non-citizen is truly a serious criminal, in the sense that their conviction abroad is to be regarded, in Canadian law, as a nullity, does not substantially render Canada less safe, at least on the record presented. In the same vein, bluntly denying the opportunity to present evidence on the underlying circumstances of a criminal conviction abroad in all circumstances, with no regard for any context, would not be procedurally fair nor would it conform with Canada's humanitarian posture.

[116] Again, here, the appellant is not seeking a retrial of the charges she faced in Colombia. She admits having committed the acts she was charged for, albeit under duress. She rather says that she was unable to raise duress in the course of her criminal proceedings there and that, for this reason, she should not be regarded as a serious criminal within the ambit of the Act and of Canadian criminal law generally.

[117] In my view, this contention is different enough that it is not obvious from the text, context and purpose of paragraph 36(1)(b) of the Act that such consideration is precluded, especially in

light of the fact that if duress is successfully established, her conviction would have to be regarded, for all Canadian legal purposes, as a nullity.

[118] In sum, based on *Gaytan*, which establishes the defence of duress as a relevant constraint for the operation of the Act's inadmissibility framework, and this Court's jurisprudence on that framework's serious criminality provisions, which does not preclude consideration of the facts underlying a foreign conviction in all circumstances, and given the centrality of voluntariness as a fundamental governing principle of criminal liability in Canada, I would, being satisfied that this is consistent with the text, context and purpose of paragraph 36(1)(b) of the Act, answer the certified question, as reformulated in these Reasons, in the affirmative.

[119] The question now is whether this answer should result in the appeal being allowed. I believe it should.

B. *The ID did commit a reviewable error in finding Ms. Rodriguez Anzola inadmissible to Canada for serious criminality*

[120] As indicated at the outset of these Reasons, it is not disputed that the defence of duress was legally available to Ms. Rodriguez Anzola in Colombia and that despite differences in their wording, the Colombian defence and its Canadian counterpart were "sufficiently similar" (ID Decision at paras. 51-52).

[121] At paragraph 53 of its Decision, the ID summarized Ms. Rodriguez Anzola's position as follows:

> [53] Ms. Rodriguez Anzola argues that the defence of duress can be considered by the [ID]. Further, she argues there is no precedent that suggests if a person does not raise the defence of duress in the foreign jurisdiction, they would be precluded from doing so now.

[122] From there, the ID dismissed Ms. Rodriguez Anzola's claim on the basis that she had the opportunity to present a defence of duress during her criminal proceedings in Colombia but had

instead "willingly entered a plea of guilty" (ID Decision at paras. 56 and 58). Quoting from *Beltran*, the ID held that it was not its role to weigh evidence of a possible defence not raised in the foreign jurisdiction in order to determine whether the impugned conduct would have resulted in a conviction in Canada (ID Decision at para. 55).

[123] I find the ID Decision to be unreasonable for a number of reasons.

[124] First, having concluded that, in determining whether an individual is inadmissible under paragraph 36(1)(b) of the Act, the ID is entitled to consider extenuating circumstances that caused the legal defence of duress not to be practically available to the individual concerned in the foreign jurisdiction, the ID failed to address a critical issue.

[125] As appears from the ID Decision, Ms. Rodriguez Anzola testified having been unable to raise the defence of duress at her trial because she was sufficiently concerned for her safety and feared retribution from the FARC had she invoked that defence (ID Decision at para. 8). She testified as well that she ultimately pleaded guilty because she still felt pressure during her criminal proceedings to remain silent in court about the involvement of the FARC, again "for fear they might engage in some kind of retribution against her family" (ID Decision at para. 18; see also para. 51).

[126] There were no issues with Ms. Rodriguez Anzola's credibility, the ID being satisfied that she had testified candidly on the events leading up to her involvement in the commission of the offence and "credibly about the resulting court matters and her ultimate conviction" (ID Decision at para. 7).

[127] Therefore, there was evidence before the ID regarding not only the fact that Ms. Rodriguez Anzola was coerced in committing the offence for which she was ultimately convicted but also on the fact that she was coerced from raising duress as a defence against the charges laid against her.

[128] Because of the approach taken by the ID in this case, which ignored legal constraints on how – and what – it could lawfully decide, this evidence was completely – and unreasonably – disregarded. In sum, the ID failed to address significant legal and factual constraints raised by the appellant "[causing] the reviewing court to lose confidence in the outcome reached by the decision maker" (*Mason* at para. 69, quoting *Vavilov* at para. 122).

[129] Second, *Beltran* was only of limited application, if any, as, contrary to what was before the ID in the present matter, there was no evidence that Mr. Beltran could not practically avail himself of the defence of duress in the foreign jurisdiction (the United States). *Beltran* is a case where the defence of duress was not raised in the foreign jurisdiction while it was otherwise legally available and while there was no indication that it was not reasonably available to Mr. Beltran.

[130] As a result, the ID unreasonably felt bound to apply *Beltran* while the allegations before it was that the defence of duress was not raised due to persistent duress. In such context, the ID was constrained to look into the circumstances that made that defense unavailable to Ms. Rodriguez Anzola. However, this critical step in the analysis was totally ignored.

[131] Finally, contrary to the ID's decision regarding Mr. Botero Martinez, the appellant's husband, no consideration whatsoever seems to have been given to *Gaytan* in the present matter, whereas it appears to have been central to the ID decision in Mr. Botero Martinez's case (Appeal Book at 908-909). As indicated at the outset of these reasons, *Gaytan*, rendered in 2021, is not even mentioned in the ID Decision, rendered on May 31, 2023. As the Supreme Court stated in *Vavilov*, at paragraph 105, "[e]lements of the legal and factual contexts of a decision operate as constraints on the decision maker in the exercise of its delegated powers". *Gaytan* was, no doubt, as I indicated at paragraph 63 of these reasons, a relevant and critical constraint to what the ID could reasonably decide in this case.

[132] The ID's silence on this critical point caused "[a] failure of justification in light of the legal and factual constraints bearing on the decision" (*Mason* at para. 66), and undermines, therefore,

the level of confidence in the outcome reached by the ID (see also *Vavilov* at para. 112).

[133] In sum, what plagues the ID Decision is the ID's failure to account for significant legal and factual constraints that were relevant to what it had to decide in this case. In the result, I find that the ID Decision fails to bear the hallmarks of reasonableness.

V. Conclusion

[134] For all these reasons, I find the ID Decision unreasonable. Therefore, I would allow the appeal, answer the reformulated certified question in the affirmative, set aside the ID Decision and remit the matter to the ID, differently constituted, for reconsideration on the basis of these Reasons.

[135] It will be up to the ID member that will be tasked to reconsider the matter to determine the admissibility and relevance of any additional material Ms. Rodriguez Anzola might wish to bring forward on rehearing.

[136] As provided for under section 22 of the *Federal Citizenship, Immigration and Refugee Protection Rules*, SOR 93/22, no costs are awarded in proceedings brought under the Act, including appeals before this Court, unless there are special reasons to do so. Neither party claims that there are special reasons calling for an award of costs in this appeal.

[137] I would therefore allow the appeal, without costs.

"René LeBlanc"

J.A.

"I agree.
David Stratas J.A."

"I agree.
Nathalie Goyette J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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