Federal Court  Cour fédérale

Date: 20200406

Docket: IMM-4179-19

Citation: 2020 FC 491

Ottawa, Ontario, April 6, 2020

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

ELENA CRENNA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision by the Immigration Appeal Division [IAD], allowing the Minister's appeal from a decision of the Immigration Division [ID]. The IAD found the Applicant was "inadmissible on security grounds for engaging in an act of espionage that is against Canada or that is contrary to Canada's interests" pursuant to paragraph 34(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

II. Facts

[2] The Applicant is a 58-year-old woman who is a dual citizen of Russia and the United States of America. She married David Crenna, a Canadian citizen, in 2012. In September, 2013, the Applicant moved to Canada to reside with Mr. Crenna. Mr. Crenna sponsored the Applicant for permanent residence in December, 2013. The application was dismissed by the IAD giving rise to this judicial review.

[3] The facts are not contested. The relevant facts are as follows.

A. *Mr. Crenna's professional history and events prior to the Tver Housing Project*

[4] In 1994, Mr. Crenna, whose evidence the IDA found credible, was a private housing consultant. He was appointed field manager and co-director of the Tver Housing Project [THP] by the Canada Mortgage and Housing Corporation [CMHC] in 1994. CMHC is a Crown corporation wholly owned by the Government of Canada.

[5] Prior to his appointment by CMHC, Mr. Crenna had a significant history with CMHC, and held senior positions in the Government of Canada.

[6] In the 1960s, CMHC hired Mr. Crenna directly out of graduate school to work in its policy division. Over his time at CMHC he became a manager of policy development, a ministerial advisor, and a director of CMHC's international relations, among other things.

[7] In 1981, Mr. Crenna was seconded from CMHC to the Office of Prime Minister of Canada, the Rt. Hon. P. E. Trudeau. He served as one of Prime Minister Trudeau's two policy advisors until 1984; the Prime Minister also had a Principal Secretary. Mr. Crenna liaised (he was the "ham in the sandwich") between the Prime Minister's Office and the Privy Council Office on a wide range of issues including foreign affairs, defence matters and social policy. The Privy Council Office houses the Government of Canada's most senior public servants. The Privy Council Office reports to the Prime Minister directly or through staff such as Mr. Crenna.

[8] The main project Mr. Crenna worked on while seconded from CMHC was the Prime Minister's Peace Initiative. He described this Peace Initiative as being aimed at taking advantage of changes in the Soviet Union to bring about an end to the Cold War. His work with the Peace Initiative continued after he left the Prime Minister's Office, and ended in 1994.

[9] During that time, Mr. Crenna was instrumental in establishing the Canadian Institute for International Peace and Security, funded by the Government of Canada. At that time and subsequently, he volunteered with a related privately funded organization called the Canadian Centre for Arms Control and Disarmament [Centre].

[10] After his secondment with the Prime Minister ended, Mr. Crenna returned to CMHC as a policy advisor. His evidence was that he ultimately became responsible for CMHC's corporate budget of about one billion dollars. In this role, he was engaged in formulating CMHC's strategic plan and budget documents. He then became a private consultant for 19 years, and went to the Canadian Home Builders Association.

[11] As part of his work with the Centre, Mr. Crenna was involved in a defence conversion project in Russia. At that time, Russia had reduced its military expenditures and started a process of opening up to western ideas and business. The Russian economy, he testified, had essentially collapsed because 25 percent of all production had been going into defence spending.

[12] Mr. Crenna saw an opportunity and proposed a project to the Centre which the Canadian government agreed to fund. The purpose of the project was to match Canadian companies with Russian companies to make civilian goods. This project ended in December, 1993.

B. *Russian - Canadian business opportunity identified in Tver, Russia*

[13] In 1994, Mr. Crenna identified a project in Russia that would be funded by CMHC and the World Bank among others. The project would provide an opportunity for Canadian businesses in relation to the construction of Canadian-style wood frame houses in Russia. The project could benefit Canadian companies in terms of the export of Canadian technology, material and supplies. It was attractive to Russia because it could provide employment and training for Russian military personnel demobilized because of defence expenditure reductions. This project was part of Russia's defence conversion.

[14] The project was located in Tver, Russia and, as noted above, was called the Tver Housing Project or THP. The THP started in May, 1994.

[15] CMHC put Mr. Crenna in charge of the THP as its field manager and co-director.

C. *Mr. Crenna hires the Applicant as an interpreter on the THP*

[16] In 1994, the Applicant, whose evidence the IAD found credible, was a Russian/English interpreter. At the time, the Applicant was working in Tver, Russia as an interpreter for a US university.

[17] The Applicant and Mr. Crenna met in May, 1994. Mr. Crenna needed an interpreter not only to interpret and translate conversations with Russian speakers but also to edit a translation of a construction manual being prepared in relation to the THP. Mr. Crenna hired the Applicant as a senior interpreter for the duration of the THP. She did not sign a confidentiality agreement.

[18] Shortly after the Applicant was hired, she was approached by a Russian intelligence agent [FSB Agent] of the Federal Security Service of the Russian Federation [FSB]. I should note the Applicant referred to this intelligence officer as a KGB agent. There is no doubt this person was an agent of one of Russia's several intelligence services, whose roles and responsibilities were in a state of flux. The Russian government wanted information on the THP. The Applicant deposed and the Respondent agrees that this first meeting with the FSB Agent took place in June, 1994.

[19] As noted already, the facts are not in dispute.

[20] At this first meeting with the Applicant, which took place in June, 1994, the Russian FSB Agent asked the Applicant questions about the THP. The Applicant provided the requested information to him.

D. *The Applicant reports FSB contact to Mr. Crenna, as field manager and co-director of the THP - and Mr. Crenna asks the Applicant to cooperate with the FSB and tell them anything they asked*

[21] The uncontested evidence is that pretty soon after she was contacted by the FSB, the Applicant reported the approach to Mr. Crenna as the Canadian field manager in charge, and as the person who had hired her. That would have been in June, 1994.

[22] Importantly, the IAD reasonably found that Mr. Crenna "was the Applicant's immediate superior and was authorized to give her instructions."

[23] When told by the Applicant of the FSB Agent's contact, she said Mr. Crenna told her to tell the FSB Agent anything he wanted to know, and asked her to cooperate. Mr. Crenna said he asked her to cooperate with the FSB.

[24] At this point, having reviewed the record, the record admits of only one reasonable construction, namely that Mr. Crenna either instructed or asked the Applicant to cooperate with the FSB, and to tell the FSB Agent anything the agent wanted to know. Importantly, whether Mr. Crenna instructed the Applicant to tell the FSB anything it asked, or asked her to cooperate with the FSB, judicial review of this matter is constrained by the fact that Mr. Crenna consented to and authorized the disclosures made by the Applicant to the FSB. I will review the record in this respect in more detail in the analysis section of these reasons.

[25] It is also clear on the record that the Applicant was not in a romantic relationship at the time Mr. Crenna asked or told her to cooperate with the FSB Agent. Likewise there is no other reasonable construction of the facts in this case. I will also review the record in this respect in more detail in my analysis.

E. *Mr. Crenna did not report the Applicant's report of FSB contact*

[26] Mr. Crenna did not tell his superiors about the Applicant's report to him concerning the FSB contact, nor of his instruction or request as her superior that the Applicant cooperate and tell the FSB Agent anything he wanted to know.

[27] Mr. Crenna's evidence, which again I note the IAD found credible, was that he had several reasons for not reporting these contacts, or his request that the Applicant cooperate with the FSB, to his superiors. First, he considered such contacts by Russian intelligence were expected and therefore not worth reporting. Second, he did not want to jeopardize the THP. Third, while there was another CMHC person superior to Mr. Crenna in Russia, Mr. Crenna had difficulty with this individual because he or she had misbehaved creating an embarrassing situation. Finally, Mr. Crenna testified he had an arrangement with Canadian Security Intelligence Service [CSIS] at a much higher level, to the effect that if something outside the scope of the THP happened, he would let CSIS know.

[28] Thus, when asked why he didn't tell his superior about the FSB contact, he answered by asking why he should report to a "retail clerk" when he was in contact with the "general manager."

[29] This evidence was uncontradicted.

F. *Applicant's meetings with FSB Agent*

[30] The Applicant had five to seven meetings with the FSB Agent during the currency of the THP. As authorized and requested by Mr. Crenna, the Applicant cooperated and answered the FSB Agent's questions and told the agent what he wanted to know.

[31] The Applicant also acted as a Russian-English interpreter during two visits to Canada involving discussions between Canadian and Russian businesspeople and Canadian government officials.

[32] First, in September 1995, the Applicant accompanied a group including two executives from Russian construction firms, on a two-week visit to Canada as part of a visit by the Chief Architect of Russia. A meeting between the Applicant and the FSB Agent followed her return to Russia.

[33] Second, in December 1995, the Applicant went to Canada for approximately two weeks once again to accompany Russian business executives wishing to purchase equipment. In Canada, she attended a reception with the Russian Minister of Construction and CMHC representatives. A meeting with the FSB Agent followed on her return to Russia.

[34] The Applicant met with the FSB Agent at other times during the course of the THP which started in 1994 and ended in 1996.

G. *Relationship between Applicant and Mr. Crenna, and the Respondent's repeatedly unsuccessful "sex spy" allegations*

[35] In August 1994, some two months or so after Mr. Crenna authorized the Applicant's disclosure to the FSB, the Applicant and Mr. Crenna entered into a romantic relationship.

[36] The romantic relationship ended two years later when the THP finished in July, 1996.

[37] Several years later, in 2008, Mr. Crenna contacted the Applicant to tell her of a novel published in 2007 titled *Comrade J: The Untold Secret of Russia's spy in America after the end of the cold war* [*Comrade J* book]. This book was written by one Pete Earley and despite the use of different names, some alleged this novel concerned Mr. Crenna's work in Russia and his relationship with the Applicant. It was said to portray the Applicant as a sex spy.

[38] Before both tribunals below, the Minister Respondent relied on the *Comrade J* book, and alleged the Applicant was a "sex spy" who operated a "honey trap." Both the ID and the IAD found the novel was unreliable. Both the ID and the IAD rejected the Minister's sex spy allegation. The IAD concluded:

> [59] I do not attach any probative value to the *Comrade J* book based on, the statements of a former Russian spy, who defected to the United States. The report and the testimony of the expert, Professor M. Wark, on this subject are compelling and I am of the opinion that the book is not reliable. It is probable that this book enabled the immigration authorities to identify the respondent and raise the issue of inadmissibility on security grounds; however, the statements contained therein are not established as being proven facts. I therefore agree with the conclusions of my ID colleague in this regard and I do not accept the appellant's claims that the respondent was used as a "sex spy" by the FSB.

[39] Importantly, the Respondent did not rely on the *Comrade J* book nor allege the Applicant was a sex spy before me.

[40] When Mr. Crenna contacted the Applicant in 2008 to tell her about the *Comrade J* book, the Applicant was living in the USA.

[41] The Applicant had obtained US citizenship through naturalization in 2004. In this connection she was investigated and interviewed by the US Federal Bureau of Investigation [FBI]. She did not encounter any issues with the FBI, or US immigration or US citizenship. She did not face any allegations of espionage. The Applicant had no difficulty becoming a US citizen.

[42] Eventually Mr. Crenna and the Applicant resumed their relationship. They married in 2012.

H. *Applicant sponsored for permanent resident status in 2013 and cleared by CSIS, one of the Respondent's Senior Immigration Officers, and the ID*

[43] In 2013, Mr. Crenna sponsored the Applicant for permanent residence status in Canada, which application underlies this judicial review.

[44] In this connection, in 2015, the Applicant attended a screening interview with the Canadian Security Intelligence Service [CSIS]. CSIS is Canada's security and intelligence service. Its role is to investigate activities suspected of constituting threats to the security of

Canada and to report these to the Government of Canada. Identification of espionage is included in its expertise. CSIS made no adverse finding against the Applicant. CSIS left the admissibility decision up to the Respondent Minister's officials at Immigration, Refugees and Citizenship Canada [IRCC]. I note the CSIS review took place some 7 years after the *Comrade J* book was published. In effect, CSIS took the position that the sponsorship could proceed.

[45] In February, 2016, a Senior Immigration Officer [IRCC Officer] of the Respondent Minister's department determined the Applicant had not engaged in acts of espionage against Canada or contrary to Canada's interests. Instead, the IRCC Officer found the Applicant "was a known conduit of harmless information" about the THP. In my view, this finding comports with the factual constraints arising from the record in this case.

[46] The IRCC Officer found the Applicant was not inadmissible. In effect, the Minister's IRCC Officer also agreed that the sponsorship could proceed.

[47] Later in 2016, the Applicant was interviewed by an officer of the Canada Border Service Agency [CBSA]. Her husband was also interviewed. In November, 2017, CBSA completed an inadmissibility report pursuant to subsection 44(1) of the *IRPA* which alleged reasonable grounds to believe the Applicant engaged, between 1994 and 1998, in an act of espionage contrary to Canada's interests. The CBSA considered the Applicant inadmissible per paragraph 34(1)(a) of *IRPA*.

[48] This report was transmitted to a Minister's Delegate. Thereafter, the ID held an admissibility hearing.

[49] In May, 2018, after a three-day hearing the ID found the Applicant was not inadmissible on espionage grounds and that her sponsorship could proceed. First, the ID ruled the Minister had not demonstrated reasonable grounds to believe the Applicant had engaged in an act of espionage. Second, the ID concluded that even if there were reasonable grounds to believe the Applicant engaged in espionage, "the Minister has not made a compelling case to establish that Canada or Canada's interests were jeopardized or affected in a negative way." Third, the ID concluded "[t]he Minister failed to present reliable or compelling evidence to refute or challenge the testimony of [the Applicant] or any of the witnesses she presented."

[50] In effect, the ID agreed with CSIS and the Minister's IRCC Officer that the sponsorship could proceed.

[51] The Respondent Minister appealed the ID's decision to the IAD. The IAD allowed the Minister's appeal.

III. IAD Decision under judicial review

[52] In a decision dated June 20, 2019, the IAD allowed the Minister's appeal. It found there were reasonable grounds to believe the Applicant is inadmissible pursuant to paragraph 34(1)(a) of the *IRPA* because she engaged in acts of espionage contrary to Canada's interests [Decision].

[53] In reviewing and setting out the material facts, I should note that both the ID and the IAD found the Applicant and Mr. Crenna “testified in a credible manner.”

[54] However, the IAD parted company from the ID’s other conclusions regarding (1) whether the Applicant engaged in acts of espionage and (2) whether she had acted contrary to Canada’s interests. The IAD concluded the Applicant met both tests necessitating an inadmissibility finding pursuant to paragraph 34(1)(a).

[55] On the critical issue of whether the Applicant engaged in acts of espionage, the IAD made the following findings:

> The notion of secrecy
>
> [24] With regard to the second part of the definition of espionage, I also disagree with the conclusion of my colleague from the ID; I am of the opinion that the fact that David Crenna, the respondent's immediate superior, authorized her to answer the questions of the Russian intelligence agent is not sufficient to conclude that the respondent’s actions were not covert or secret. In her testimony, the respondent has repeatedly stated that she did not transmit sensitive, secret or confidential information to the Russian intelligence agent simply because she had no access to this type of information. David Crenna confirmed that the THP information was public, anyway, and that at no time did the respondent have access to confidential or protected material. He confirmed that he had given permission to the respondent to talk to the Russian intelligence agent and strongly recommended that she answer the agent's questions, since he was anxious for the project to be successful in Russia. I am of the opinion that the nature of the information collected and how it was transmitted to the intelligence agent is irrelevant in this case. The notion of secrecy relates to the manner in which the information is collected, and in this case transmitted to the Russian intelligence agent, irrespective of the nature of information itself. It does not matter whether the information was secret, confidential or public, and requiring that the information that was the subject of espionage had any value whatsoever for the recipient, the FSB in this case, would be imposing a much too heavy burden of proof.

[25] Unlike my ID colleague, I am of the opinion that the respondent acted secretly or covertly. First, the evidence clearly demonstrates that neither David Crenna nor the respondent informed THP participants and Canadians involved in the project whether in Canada or Russia that the respondent was collaborating with the FSB and passing information on them over to the organization. This means that, contemporaneously with the events, the participants were not aware that a project employee was reporting information to the FSB about Canadians or a project to which CMHC was contributing, which clearly seems to me to be a way of acting secretly without the knowledge of the main persons concerned.

[26] The ID member concluded that the witnesses at the hearing, many of whom are Canadian and who had worked in Russia for the THP, knew very well that the FSB would be interested in this project. They were not surprised to learn after the fact that the FSB was asking questions about the THP since this project had generated an influx of foreigners on Russian soil at a time when Russia had serious concerns about its national security. I do not think it is appropriate to rely on the findings after the fact by THP witnesses and participants. The fact that it is generally accepted that foreigners are almost certainly to be under surveillance by the Russian authorities or the FSB does not diminish the importance of what the respondent did for the benefit of the FSB or mean she acted any less secretly. The fact that an employee or participant in the THP expects the FSB to take an interest in the THP is completely different from expecting that one of their own would collaborate with the FSB. In my opinion, this situation is even more serious than being directly spied upon by the FSB since the respondent necessarily developed a certain relationship of trust and collegiality with Canadians and THP participants, unlike an agent of the FSB, for example, that would spy directly by other means.

[27] The evidence also shows that the respondent did not systematically report to David Crenna about which specific information she had passed on to the intelligence agent, nor even inform him after each time she met with him. Although he gave blanket consent to the respondent to discuss due THP with the intelligence agent, the evidence shows that he did not know they were discussing, and that he had no specific control over the nature of the information the respondent provided to that agent. Nor was David Crenna continually physically present in Russia, meaning that the respondent, as an interpreter for the THP, had interactions with various project participants without him being on hand. To consent so sweepingly to the disclosure of information to the THP when he himself was not a witness to the conversations that the

respondent was privy to and which she translated, creates, to my mind, a problem, since she was on her own in deciding what information site could or could not disclose to the FSB.

[28] During both of the respondent's visits to Canada David Crenna was generally on hand when she acted as an interpreter, particularly at receptions and meetings with various Canadians, businesspeople and government officials. Unlike the Canadian THP participants working in Russia, the various Canadians who were met in Canada, not all of whom were involved in the THP, such as businesspeople, could not have anticipated that the respondent would report their conversations that she heard or translated to a Russian intelligence agent. In this sense, the notion of secrecy persists and assumes an even greater importance in characterizing what the respondent did; and David Crenna could not authorize the transmission of information that was outside the THP itself.

[29] Lastly, I am of the opinion that the intimate relationship between the respondent and David Crenna throughout the THP severely undermines the validity of the consent that Mr. Crenna gave to the respondent in answering the FSB agent's questions. Although he was her immediate superior, and therefore authorized to give her instructions, the fact that they had started an intimate relationship changes the perception and content of the actual hierarchy in light of their mutual personal interests. The evidence shows that it was certainly a consensual relationship, but again this relationship was generally kept under wraps given the marital situation of David Crenna. For the panel, the close relationship between David Crenna and the respondent posed a clear conflict of interest in his position of authority over the respondent and vice versa. For this reason, and those stated previously, I cannot accept the argument of consent to authorize what the respondent did and conclude that she did not act secretly or covertly.

[30] I acknowledge that the respondent has consistently maintained that she did not disclose sensitive, secret or confidential information to the Russian intelligence agent since she did not have access to such information, and I do not question her credibility on this subject. Nevertheless, again, the nature of the information in question is not essential to reaching a conclusion of espionage. I am also of the opinion that the argument that the information was public, harmless or benign does not change anything. The fact that information is of a public nature does not necessarily make it accessible to everyone, let alone in the early 1990s, in the early post-Soviet era. If the so-called public information sought by the FSB about the THP and its Canadian

> participants had been readily available to the FSB, it is reasonable to assume that they could have obtained it by other means, without the respondent. However, the respondent was most likely approached because of her strategic role as interpreter for the THP and her access to Canadians. Whether or not the FSB had been able to obtain the information it sought or of value to it through the respondent is of no relevance and it would be unreasonable to require such a burden of proof in order to reach a conclusion of espionage. As soon as the information transmitted deals with Canadians or a project involving Canada, Canada's interests come into play.
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> [31] In the case of the respondent, the method used to gather the information, either through her interpreting work, and the method of transmitting it, namely by meeting several times with the intelligence agent, are covert as a rule, unknown to the people directly involved in the project, which is highly problematic in this case. In that sense, I come to the conclusion that the respondent's acts meet the second part of the definition of espionage since they were done secretly.
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> [32] Finally, I do not believe that the principles set out in *Peer* can be applied so strictly as to conclude that, in the absence of any infiltration by the respondent in the THP project, her acts do not constitute-espionage. The respondent's situation is easily distinguishable from the facts of this decision because the respondent is not directly an employee Of the Russian state or the FSB as was the case in Peer, and her ideologies are not at issue as was the case in *Qu*. Nor did she act primarily and actively for the FSB. She collaborated with the FSB at the request of an agent, and her motives for collaboration are irrelevant. This was confirmed by the Federal Court of Appeal in *Peer* when it ruled on a certified question that evidence of hostile intent is not required to characterize acts as espionage.

IV. Issue

[56] While a number of issues were argued, in my respectful view the determinative issue is the reasonableness of the IAD's finding that there were reasonable grounds to believe the acts of the Applicant constituted an act or acts of "espionage" as per paragraph 34(1)(a) of *IRPA*. With respect, this is a matter to be assessed on the reasonableness standard.

[57] I have concluded the Applicant's actions may not reasonably be considered acts of espionage given constraining facts and law applicable in this case. Whatever the Applicant disclosed to the FSB she disclosed as a result of instructions issued by her superior, Mr. Crenna. Her acts were done with the knowledge and consent of the Canadian in charge. As found by the IAD itself, and not disputed, Mr. Crenna was the THP field manager and THP project co-director. The IAD itself found Mr. Crenna was both the Applicant's immediate superior, and the person authorized to give her instructions.

[58] And that is what he did: Mr. Crenna gave the Applicant instructions. The only reasonable construction of this record is that Mr. Crenna instructed (or requested, which is the same thing) the Applicant to cooperate with the FSB and tell them anything the FSB asked about the THP. The Applicant followed her employer's instructions.

[59] In my respectful view, in these circumstances, and given the constraining legal and indeed common dictionary definitions of "espionage," the Applicant's actions do not reasonably give rise to reasonable grounds to believe what the Applicant did was espionage. I reach this conclusion because the Court has concluded what the Applicant did was neither secret, clandestine, surreptitious nor covert. Therefore, her actions could not reasonably constitute espionage and the Applicant may not reasonably be found inadmissible pursuant to paragraph 34(1)(a) of the *IRPA*. The analysis below will address this issue and conclusion.

V. Standard of Review

[60] The Applicant submits the applicable standard of review of this decision is correctness. She relies on *Peer v Canada (Citizenship and Immigration)*, 2010 FC 752, per Zinn J [*Peer* FC], where the Court interpreted the word "espionage" as it appears in subsection 34(1) of the *IRPA*:

> [30] The question of whether lawful domestic "intelligence gathering" amounts to "espionage" is a question of pure law reviewable on the correctness standard. The question of whether the visa officer could find that there are reasonable grounds to believe that the applicant engaged in espionage, without also finding that the activities in question were taken with a certain level of hostile intent, is also a pure question of law reviewable on the correctness standard.

[61] I note the Court's comments do not say the standard of review of a decision as a whole under paragraph 34(1)(a) of *IRPA* is correctness. In addition, as I read the decision, the Court was not looking at the standard of review of the decision as a whole, but rather, at the interpretation of a specific provision in *IRPA*. In any event, the Supreme Court of Canada recently reiterated that the standard of review of such a decision as a whole is reasonableness. In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 majority reasons by Chief Justice Wagner [*Vavilov*], our highest Court specifically directs that on judicial review, the interpretation of provisions of *IRPA* by the IAD is presumptively decided on the standard of reasonableness:

> [10] This process has led us to conclude that a reconsideration of this Court's approach is necessary in order to bring greater coherence and predictability to this area of law. We have therefore adopted a revised framework for determining the standard of review where a court reviews the merits of an administrative decision. The analysis begins with a presumption that reasonableness is the applicable standard in all cases. Reviewing

> courts should derogate from this presumption only where required by a clear indication of legislative intent or by the rule of law.

[62] The judicial review in the case at bar involves the interpretation of legislation, as was the case in *Vavilov*, albeit in that case a different piece of legislation namely the *Citizenship Act*, RSC, 1985, c C-29. I am not persuaded the case at bar in this respect is distinguishable from *Vavilov*, because the Supreme Court instructs in *Vavilov* that matters of statutory interpretation "are not treated uniquely and, as with other questions of law, may be evaluated on a reasonableness standard":

> [115] Matters of statutory interpretation are not treated uniquely and, as with other questions of law, may be evaluated on a reasonableness standard. Although the general approach to reasonableness review described above applies in such cases, we recognize that it is necessary to provide additional guidance to reviewing courts on this point. This is because reviewing courts are accustomed to resolving questions of statutory interpretation in a context in which the issue is before them at first instance or on appeal, and where they are expected to perform their own independent analysis and come to their own conclusions.

[63] I agree *Vavilov* sets out a revised framework for determining the applicable standard of review for administrative decisions. The starting point is the presumption the reasonableness standard of review applies. This presumption may be rebutted in certain situations. The Applicant submits the issue is whether the IAD rendered a legally incorrect decision and did so in the context of the definition of "engaging in an act of espionage that is against Canada or that is contrary to Canada's interests" as set out in paragraph 34(1)(a) of *IRPA*. She submits this is an issue of "central importance to the legal system" and outside the administrative decision maker's "specialized area of expertise."

[64] I have concluded the determinative issue is narrower and different, namely whether the acts of the Applicant constituted an act or acts of "espionage" as per paragraph 34(1)(a) of *IRPA*. Therefore and with respect, none of the exceptions to the presumption of reasonableness summarized in *Vavilov* at para 69 apply in this case:

> [69] In these reasons, we have identified five situations in which a derogation from the presumption of reasonableness review is warranted either on the basis of legislative intent (i.e., legislated standards of review and statutory appeal mechanisms) or because correctness review is required by the rule of law (i.e., constitutional questions, general questions of law of central importance to the legal system as a whole, and questions regarding jurisdictional boundaries between administrative bodies). This framework is the product of careful consideration undertaken following extensive submissions and based on a thorough review of the relevant jurisprudence. We are of the view, at this time, that these reasons address all of the situations in which a reviewing court should derogate from the presumption of reasonableness review. As previously indicated, courts should no longer engage in a contextual inquiry to determine the standard of review or to rebut the presumption of reasonableness review. Letting go of this contextual approach will, we hope, "get the parties away from arguing about the tests and back to arguing about the substantive merits of their case": *Alberta Teachers*, at para. 36, quoting *Dunsmuir*, at para. 145, per Binnie J., concurring.

[65] Thus, both the Decision as a whole, and the meaning of espionage in particular, are reviewable on a standard of reasonableness.

[66] Reasonableness review is both robust and responsive to context: *Vavilov* at para 67. Applying the *Vavilov* framework in *Canada Post,* Justice Rowe explains what is required for a reasonable decision and what is required of a court reviewing on the reasonableness standard of review. Reasonableness review proceeds on a reasons first basis. It entails both a review of the ***reasons*** themselves, and of the ***outcome***. The reasons must be based on an internally coherent

and rational chain of analysis. And, in addition, the reasons must be justified in relation to the facts and law that constrain the decision maker. As stated in *Canada Post*:

> [31] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
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> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).

[67] Reasonableness review per *Vavilov* also looks at whether there is an internally coherent and rational chain of analysis, and a reasonable decision requires an absence of fatal flaws:

> [102] To be reasonable, a decision must be based on reasoning that is both rational and logical. It follows that a failure in this respect may lead a reviewing court to conclude that a decision must be set aside. Reasonableness review is not a "line-by-line treasure hunt for error": *Irving Pulp & Paper*, at para. 54, citing *Newfoundland Nurses*, at para. 14. However, the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that "there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived": *Ryan*, at para. 55; *Southam*, at para. 56. Reasons that "simply repeat statutory language,

summarize arguments made, and then state a peremptory conclusion" will rarely assist a reviewing court in understanding the rationale underlying a decision and "are no substitute for statements of fact, analysis, inference and judgment": R. A. Macdonald and D. Lametti, *"Reasons for Decision in Administrative Law"* (1990), 3 C.J.A.L.P. 123, at p. 139; see also *Gonzalez v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 750, 27 Imm. L.R. (4th) 151, at paras. 57-59.

[103] While, as we indicated earlier (at paras. 89-96), formal reasons should be read in light of the record and with due sensitivity to the administrative regime in which they were given, a decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis: see *Wright v. Nova Scotia (Human Rights Commission)*,2017 NSSC 11, 23 Admin. L.R. (6th) 110; *Southam*, at para. 56. A decision will also be unreasonable where the conclusion reached cannot follow from the analysis undertaken (see *Sangmo v. Canada (Citizenship and Immigration)*, 2016 FC 17, at para. 21 (CanLII)) or if the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point (see *Blas v. Canada (Citizenship and Immigration)*, 2014 FC 629, 26 Imm. L.R. (4th) 92, at paras. 54-66; *Reid v. Criminal Injuries Compensation Board*, 2015 ONSC 6578; *Lloyd v. Canada (Attorney General)*, 2016 FCA 115, 2016 D.T.C. 5051; *Taman v. Canada (Attorney General)*, 2017 FCA 1, [2017] 3 F.C.R. 520, at para. 47).

[Emphasis added]

VI. Analysis

[68] The starting point is paragraph 34(1)(a) of the *IRPA* which provides:

Security	**Sécurité**
34 (1) A permanent resident or a foreign national is inadmissible on security grounds for	**34 (1)** Emportent interdiction de territoire pour raison de sécurité les faits suivants:
(a) engaging in an act of espionage that is against	**a)** être l'auteur de tout acte d'espionnage dirigé contre

Canada or that is contrary to Canada's interests;	le Canada ou contraire aux intérêts du Canada;
…	…

[69] The plain text of paragraph 34(l)(a) provides two requirements for inadmissibility (1) the foreign national engaged in an act of espionage; (2) the acts of espionage were against Canada or contrary to Canada's interests.

[70] In this case, and in my respectful view, the determinative issue concerns the first requirement which engages the definition of "espionage." Having decided this issue it is not necessary to consider the issue of Canada's interests.

A. *Definition of espionage: secret, clandestine, surreptitious or covert information gathering*

[71] All the case law referred to defines espionage variously as information gathering that is secret, clandestine, surreptitious or covert. As stated by Justice O'Reilly in *Sumaida v Canada (Citizenship and Immigration)*, 2018 FC 256:

> [21] Espionage is defined in the case law as surreptitious or covert information gathering (*Qu v Canada (Minister of Citizenship and Immigration)* [2000] FCJ No 518 at para 48). The officer had no obligation to provide a more specific definition (*Afanasyev v Canada (Minister of Citizenship and Immigration)* 2012 FC 1270 at para 20). While s 34(1)(a) was amended somewhat in 2013, the change in wording does not suggest a departure from previous case law.
>
> [Emphasis added]

[72] As stated by Justice Barnes in *Afanasyev v Canada (Citizenship and Immigration)*, 2012 FC 1270, per Barnes J [*Afanasyev*]:

> [19] Counsel for Mr. Afanasyev described this work as a form of military intelligence and not espionage; but this is a semantic distinction that was rejected by Justice Russel Zinn in *Peer v Canada*, 2010 FC 752, [2010] FCJ no 916, affirmed in *Peer v Canada*, 2011 FCA 91, [2011] FCJ no 338. In that decision Justice Zinn held that espionage was simply the covert or surreptitious act of gathering information. Espionage does not require any element of hostile intent and can be occasioned even when carried out lawfully on behalf of a foreign government or agency. I would add to this that it does not require a detailed appreciation of how the information may be put to later use by higher authorities.
>
> [Emphasis added]

[73] The Applicant notes and I agree that "surreptitiously" has been defined as "secretly, without someone's knowledge", "clandestinely", "covertly". As stated in *R v Larouche*, 2014 CMAC 6, per Cournoyer, Boivin, Doyon JJA:

> [166] The interpretation of the word "surreptitiously", which can be defined as [TRANSLATION] "secretly, without someone's knowledge", "clandestinely", "covertly", was unlikely to pose a major issue of interpretation during the investigation. Indeed, according to the military judge's findings which are binding upon us, the police officer *knew* that the photos had been taken by the appellant *with the consent* of the complainants. Only the keeping of the photos was not authorized by them.
>
> [Emphasis added]

[74] Expert witness for the Applicant, Professor Wesley Wark, an intelligence specialist, gave evidence before the IAD. Professor Wark identified three key characteristics of espionage: control, direction and clandestine means:

> When I address issues of HUMINT, I generally describe this particular discipline of intelligence gathering as 'a form of

> espionage in which a state actor uses an agent under its control and direction to acquire information deemed useful to it using clandestine means.' The key characteristics here are three-fold: control and direction of an agent and clandestine means.
>
> [Emphasis added]

[75] Further, the *Oxford English Dictionary* (online) defines espionage as "[t]he practice of playing the spy, or of employing spies." The definition of espionage in *Black's Law Dictionary* (11th ed 2019) is "[t]he activity of using spies to collect information about what another government or company is doing or plans to do."

[76] In this connection, the definition of "spy" in the *Oxford English Dictionary* (online) is "[o]ne who spies upon or watches a person or persons secretly" or "a secret agent whose business it is to keep a person, place, etc., under close observation" [emphasis added]. Similarly, *Black's Law Dictionary* (11th ed 2019) defines a spy as "[s]omeone who secretly observes and collects secret information or intelligence about what another government or company is doing or plans to do; one who commits espionage" [emphasis added].

[77] In *Qu v Canada (Minister of Citizenship and Immigration)* [2000] FCJ No 518 (FC), reversed but not on this point in *Qu v Canada (Minister of Citizenship and Immigration)*, [2001] FCJ No 1945 (FCA), Justice Lemieux of this Court defined espionage as "simply a method of information gathering – by spying, by acting in a covert way" [emphasis added].

[78] The common thread running throughout these authorities is that espionage entails information gathering that is secret, clandestine, surreptitious or covert.

B. *The acts of the Applicant do not reasonably give rise to a reason to believe the definition of espionage is satisfied because they were not secret, clandestine, surreptitious or covert*

[79] As noted above, Mr. Crenna hired the Applicant. As the IAD reasonably found, he was her "immediate superior and therefore authorized to give her instructions." The record is important and establishes without contradiction that (a) the Applicant dutifully told Mr. Crenna of the FSB Agent's approach, and that (b) Mr. Crenna instructed her to cooperate and tell the FSB Agent anything he wanted to know. Because it is central to my determination, I will set out the testimony of the Applicant and Mr. Crenna in this respect.

[80] The uncontested evidence is that pretty soon after she was contacted in June, 1994 by the FSB Agent (she referred to him as a KGB agent), the Applicant reported the approach to Mr. Crenna as Canadian field manager in charge, and as the person who had hired her. In response, the Applicant – found credible by the IAD – testified Mr. Crenna told her to tell the FSB Agent anything that he wanted to know and that the THP had nothing to hide:

> Q. Do you remember what you told David when you informed him that the officer came to see you?
>
> A. Yes. I told him, "Guess what? I had a visit from" — I'm sorry, I referred to him as KGB.
>
> Q. So you said, "I had a visit from the KGB"?
>
> A. Yeah, "from the KGB guy, and he wanted to know about Canadians and you".
>
> Q. And what did David say?
>
> A. David said, "<u>Okay. If he comes again, tell them anything he wants to know. We have nothing to hide.</u>"
>
> [Emphasis added]

[81] Mr. Crenna in his testimony corroborated the fact that the Applicant told him of the FSB's approach. Mr. Crenna's evidence – also found credible by the IAD – is that upon learning of the FSB Agent's approach to the Application, he told her to please go ahead and cooperate with them:

> Q. Excellent. So I was just starting on the FSB contact with Elena. So when you learned that the FSB had contacted her, what was your reaction?
>
> A. I felt oddly reassured, I guess, basically because I wanted the security authorities locally to be comfortable with our work. Honestly, I didn't give it more than a minute's thought to say to her, "Well, you should cooperate with them". I mean, maybe it was too speedy, but it was basically —it seemed to me like something that would be helpful to the security of our project and for carrying on our work.
>
> Q. Okay. So you told her to cooperate.
>
> A. Yeah. Well, I didn't order her, but I said, 'Yes, please go ahead and cooperate with them'".
>
> [Emphasis added]

[82] At this point, having reviewed the uncontradicted record, I find the Applicant made Mr. Crenna fully aware of the FSB's requests for information on the THP, and not only authorized the Applicant to cooperate with the FSB, but instructed her to do so. The Applicant had approached him as her immediate superior, as the Canadian field manager in charge, as the person who had hired her, as the person authorized to instruct her, and in this capacity he told her to cooperate with them. There is no other reasonable conclusion on this record than that Mr. Crenna instructed the Applicant to cooperate with the FSB Agent.

[83] While the Respondent suggests Mr. Crenna was not in a position to sanction or permit the sharing of information related to the THP with Russian intelligence, it is irrelevant whether Mr. Crenna had actual or apparent authority to instruct the Applicant to cooperate with the FSB. The Applicant was an employee. Effectively, Mr. Crenna was her employer. As such the Applicant at all material times was subject to the direction and control of her employer.

[84] Canada, through the CMHC, had put Mr. Crenna in charge of the THP project as co-director and project field manager. In doing so, it put him in charge of the Applicant effectively as her employer and immediate supervisor, and gave him the authority to give her instructions. The Applicant in this employer-employee relationship was obliged to follow Mr. Crenna's instructions. She did what she was instructed and obliged to do. Her actions were authorized and consented to, and again, were neither secret, clandestine, surreptitious nor covert. There is no other reasonable conclusion from the evidence in this case.

[85] In any event, in my respectful consideration, Mr. Crenna had the ostensible or apparent authority to instruct the Applicant to cooperate because of his status as the Applicant's immediate superior and his very important role as the effective manager of the THP. The common law rules of ostensible authority, apparent authority and holding out were outlined by the Supreme Court of Canada in *Dominion Gresham Guarantee & Casualty Co v The Bank of Montreal* , [1929] SCR 572:

> The bank, of course, seeks to bring its case within the principle of article 1730 of the. Civil Code,
>
> > the mandator is liable to third parties, who in goad faith contract with a person not his mandatory, under the belief that he is so, when the mandator has given reasonable cause for such belief.

> This principle does not in substance differ from that of the rules of the common law under the heads of "ostensible" authority, "apparent" authority and "holding out," and the decisions under those rules may usefully be referred to, as illustrating the application of the principle. In *Russo-Chinese Bank* v. *Li Yau Sam*, Lord Atkinson in delivering the judgment of the Privy Council says:
>
> > the several authorities cited by Mr. Scrutton, from *Grant* v. *Norway*, down to *Ruben* v. *Great Fingall Consolidated*, establish, in their Lordships' opinion, the proposition that, in order that the principle of "holding out" should in any given case of agency apply, the act done by the agent, and relied upon to bind the principal, must be an act of that particular class of acts which the agent is held out as having a general authority on behalf of his principal to do; and, of course, the party prejudiced must have believed in the existence of that general authority and been thereby misled.
>
> [Emphasis added]

[86] These rules are informative in the present context. On this record, it was reasonable for the Applicant to believe Mr. Crenna had the authority to instruct her to cooperate with the FSB, or at the very least, to believe that Mr. Crenna would communicate with people who did have that authority. There is no evidence to suggest the Applicant did not believe in the existence of Mr. Crenna's general authority over her; such a suggestion is purely speculative and not based in the record. And there is no doubt she relied on and followed his instructions.

[87] Further, in my respectful view, it makes no reasonable difference whether Mr. Crenna directed the Applicant to tell the FSB anything it asked (the Applicant's evidence), or whether he asked her to please cooperate with them (Mr. Crenna's evidence).

[88] Given he was her immediate superior and authorized to give her instructions, the point is what she did was not secret, clandestine, surreptitious or covert. Rather what she did was known, consented to and authorized by CMHC. As the Minister's Senior Immigration Officer (the IRCC Officer) found in 2016 the Applicant "was a known conduit" about the THP. I emphasize the finding that the Applicant was a "known conduit."

[89] I am unable to reasonably find any reason to believe the Applicant was engaged in anything secret, clandestine, surreptitious or covert in cooperating with the FSB as instructed, and telling them what they asked. Instead, I conclude what the Applicant did in the context of a central legal constraint in this matter, namely the definition of espionage, may not reasonably be considered to be espionage. To hold otherwise is to allow the IAD to operate outside its legal constraints, which is not permitted by *Vavilov* at para 101. With respect I see no other reasonable interpretation of the facts and law in the circumstances of this case.

[90] I also take issue with an important criticism the IAD made of the Applicant and Mr. Crenna in connection with his instruction to cooperate with the FSB. The IAD suggested Mr. Crenna's instructions or request that she cooperate was severely undermined because the two were intimately involved "throughout the THP." This is reviewable unreasonableness because it is contrary to the factual constraints, that is the evidence in this case. The IAD said:

> [29] Lastly, I am of the opinion that the intimate relationship between the respondent and David Crenna throughout the THP severely undermines the validity of the consent that Mr. Crenna gave to the respondent in answering the FSB agent's questions. Although he was her immediate superior, and therefore authorized to give her instructions, the fact that they had started an intimate relationship changes the perception and content of the actual hierarchy in light of their mutual personal interests. The evidence

> shows that it was certainly a consensual relationship, but again this relationship was generally kept under wraps given the marital situation of David Crenna. For the panel, the close relationship between David Crenna and the respondent posed a clear conflict of interest in his position of authority over the respondent and vice versa. For this reason, and those stated previously, I cannot accept the argument of consent to authorize what the respondent did and conclude that she did not act secretly or covertly.

[91] In my respectful view, the record does not support the IAD's conclusion that the two were in an intimate relationship at the time he instructed her to cooperate with the FSB which was in June, 1994. With respect, the critical time at which their relationship must be examined is when she reported the FSB Agent's approach and Mr. Crenna instructed her to cooperate with them, that is, in June, 1994.

[92] Because this is a very damaging ('severely undermining') finding against the Applicant in this respect, I will once again review the record. I will review four aspects of the record: the agreed facts admitted before the IAD, the Applicant's affidavit filed on judicial review with which the Respondent agreed, and the testimonies of both the Applicant and Mr. Crenna, both of whom the IAD found credible.

[93] The IAD set out an agreed statement of facts admitted before it in following chronology:

> Uncontested facts
>
> [8] The parties agreed the following facts which are essentially reproduced in the reasons for decision of the ID:
>
> …
>
> - The respondent and David Crenna met in May 1994, and David Crenna hired the respondent as a senior interpreter for time duration of the THP.

> - The respondent did not sign any confidentiality agreement with respect to her mandates with the THP.
>
> - Shortly after the respondent was hired, she was approached by A.D., a Russian intelligence agent with the FSB.
>
> - The respondent had give to seven meetings with the same agent throughout the THP and she answered his questions.
>
> - In August 1994, the respondent and David Crenna began a romantic relationship.
>
> …

[94] The consented to and agreed upon facts in the Applicant's affidavit deposed, unreservedly accepted at the hearing, state:

> 20. In June 1994, I received a call from a man who said he was interested to learn about the Portland school of business administration. He was responding to an advertisement for the Portland State University School. I asked him to come to meet me at my house. I assumed he was a student but in fact I learned that he was an agent named Aleksander Dyomin from Russia's Federal Security Service [Exhibit 'I': IAD Transcript, December 6, 2018, p 21]. Mr. Dyomin worked for the *Federal'naya sluzhba kontrrazvedki* ('FSK') at that time, but in April 1995, the FSK was renamed the *Federal'naya sluzhba kontrrazvedki* (FSB). I was surprised by the encounter and I was curious why he wanted to talk to me.
>
> …
>
> 26. In August of 1994, David and I fell in love and developed an intimate relationship which lasted until July 1996. We had so much in common, passion for life, curiosity, and a sense of humor. We spent quite a bit of time together and talked about life and everything else. That's how I fell in love with him [Exhibit 'I': IAD Transcript, December 6, 2018, p. 35].

[95] At the outset of the hearing before the IAD, the Applicant also made clear that the romantic relationship started in August, 1994. I find this because the IAD Member asked the

Applicant as part of uncontested facts: “So your intimate relationship with Mr. Crenna started around August 1994.” The Applicant took no objection to this fact.

[96] Finally, Mr. Crenna’s testimony before the IAD was:

> Q. After how long did you and Elena have a relationship in the sense of going from —
>
> A. It began in August of ’94 and ended in July of ’96. We saw each other again once in September, I think, of ’96, but I mean, we just basically had broken off and didn’t talk that way anymore.
>
> …
>
> Q. Okay. How did the relationship develop from the professional one to the personal one?
>
> A. Essentially, we kind of had in August a kind of a semi-date in town on the weekend. And there she invited me to her country – her *dacha* – her country cottage, kind of thing. And then I went - - so I went to that the following weekend. I can't exactly remember the details, but I went probably the following weekend. You go on a train.

[97] Given there was no intimate relationship until August, 1994, the following and central finding by the IAD is not supported by the evidence: “Lastly, I am of the opinion that the intimate relationship between the respondent and David Crenna throughout the THP severely undermines the validity of the consent that Mr. Crenna gave to the respondent in answering the FSB agent's questions” [emphasis added].

[98] *Vavilov* at para 90 tells us that the findings of a tribunal are constrained by the facts before it. With respect, there is no evidence that the two were in an intimate relationship “throughout the THP” which started in May, 1994 and ended in July 1996. In fact, the record is

to the contrary: they were not in a relationship between May and August, 1994. Importantly, they were not in a relationship when the Applicant reported the contact by the FSB and Mr. Crenna instructed her to cooperate with them.

[99] *Vavilov* further instructs that a decision may be unreasonable where it entails a fatal flaw. The reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that "there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived" [Citations deleted, emphasis added]: *Vavilov* at para 102.

[100] In my respectful view, the tribunal's unsupported view of the evidence concerning the relationship constitutes a fatal flaw. In addition, and with respect, it also precludes this Court from finding there is a line of analysis within the reasons that could reasonably lead the tribunal from the evidence before it to its conclusion. The conclusion does not reasonably lead from the evidence; it is contrary to the evidence.

[101] These determinations, coupled with my earlier findings, are perhaps enough to set aside the Decision. However, I am also of the view that the IAD's additional finding regarding the relationship are unreasonable.

[102] The IAD stated:

> [29] ….The evidence shows that it was certainly a consensual relationship, but again this relationship was generally kept under wraps given the marital situation of David Crenna. For the panel, the close relationship between David Crenna and the respondent posed a clear conflict of interest in his position of authority over the respondent and vice versa. For this reason, and those stated previously, I cannot accept the argument of consent to authorize what the respondent did and conclude that she did not act secretly or covertly.

[103] I agree with the last proposition, which implies there is no espionage if there is no acting secretly or covertly. In looking for secrecy or covertness to establish espionage, the IAD was acting within its legal constraints; that indeed is the basis on which judicial review will be granted. But the balance of the passage cited is flawed by the same error as the finding that the Applicant and Mr. Crenna were in a relationship "throughout the THP." While no doubt the relationship was kept under wraps, the point not assessed by the IAD because of its unreasonable fact finding, was that they were not intimately involved when the Applicant sought and received instructions to cooperate with the FSB Agent. The reference to reasons stated "previously" deal with arguments to the effect the Applicant did not share secret information, which need not be considered given my findings on the determinative issue.

[104] I also agree with the Applicant's submission there was no evidence Mr. Crenna's consent and authorization was undermined by their relationship. I also agree with her submission that the Applicant had no reason to question Mr. Crenna's judgment in instructing her as he did, given his extensive experience on the ground in dealing with the Russians, and I would add his background in CMHC and the Government of Canada, and the fact he was the Applicant's immediate superior with ample authority to give her instructions as found by the IAD itself.

[105] There is no merit in the suggestion the Applicant should have gone around Mr. Crenna to speak either to his superior in Moscow or others perhaps in Canada. I say this because there is no evidence on this finding which is entirely speculative, i.e. unreasonable. I also note that Mr. Crenna provided several reasons why he did not report to his superiors, which evidence was uncontradicted and not challenged by the IAD.

[106] I fail to see any difference between the Applicant reporting what she saw or heard while in Russia and what she saw or heard in Canada: she was either instructed to cooperate or she was not. By Mr. Crenna's own evidence the Applicant was instructed by her immediate superior to cooperate with the FSB, which she did. He did not ask for further reports, and it appears none were provided. I am unable to see how Mr. Crenna's non-reporting vitiated his uncontradicted and indeed corroborated instructions that the Applicant cooperate with the FSB.

VII. Appropriate Remedy

[107] The Applicant requests an order setting aside the IAD decision. She also asks the Court to find that Mrs. Crenna is not inadmissible under paragraph 34(1)(a) of the *IRPA*.

[108] In *Vavilov*, the Supreme Court noted that to avoid an "endless merry-go-round judicial reviews", a decision maker may decline to remit a matter but decide the matter at hand, where it becomes evident that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose (para 42). The Court's discretion in this respect may be influenced by elements such as concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the

administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and the efficient use of public resources:

> G. A Note on Remedial Discretion
>
> …
>
> [140] Where the reasonableness standard is applied in conducting a judicial review, the choice of remedy must be guided by the rationale for applying that standard to begin with, including the recognition by the reviewing court that the legislature has entrusted the matter to the administrative decision maker, and not to the court, to decide: see *Delta Air Lines*, at para. 31. However, the question of remedy must also be guided by concerns related to the proper administration of the justice system, the need to ensure access to justice and "the goal of expedient and cost-efficient decision making, which often motivates the creation of specialized administrative tribunals in the first place": *Alberta Teachers*, at para. 55.
>
> [141] Giving effect to these principles in the remedial context means that where a decision reviewed by applying the reasonableness standard cannot be upheld, it will most often be appropriate to remit the matter to the decision maker to have it reconsider the decision, this time with the benefit of the court's reasons. In reconsidering its decision, the decision maker may arrive at the same, or a different, outcome: see *Delta Air Lines*, at paras. 30-31.
>
> [142] However, while courts should, as a general rule, respect the legislature's intention to entrust the matter to the administrative decision maker, there are limited scenarios in which remitting the matter would stymie the timely and effective resolution of matters in a manner that no legislature could have intended: *D'Errico v. Canada (Attorney General)*, 2014 FCA 95, at paras. 18-19 (CanLII). An intention that the administrative decision maker decide the matter at first instance cannot give rise to an endless merry-go-round of judicial reviews and subsequent reconsiderations. Declining to remit a matter to the decision maker may be appropriate where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose: see *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202, at pp. 228-30; *Renaud v. Quebec (Commission des affaires sociales)*, [1999] 3 S.C.R. 855; *Groia v. Law Society of Upper Canada*, 2018 SCC 27, [2018] 1

> S.C.R. 772, at para. 161; *Sharif v. Canada (Attorney General)*, 2018 FCA 205, 50 C.R. (7th) 1, at paras. 53-54; *Maple Lodge Farms Ltd. v. Canadian Food Inspection Agency*, 2017 FCA 45, 411 D.L.R. (4th) 175, at paras. 51-56 and 84; *Gehl v. Canada (Attorney General)*, 2017 ONCA 319, at paras. 54 and 88 (CanLII). Elements like concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and the efficient use of public resources may also influence the exercise of a court's discretion to remit a matter, just as they may influence the exercise of its discretion to quash a decision that is flawed: see *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6, at paras. 45-51; *Alberta Teachers*, at para. 55.
>
> [Emphasis added]

[109] In *Canada (Citizenship and Immigration) v Tennant*, 2019 FCA 206, per Webb, Laskin JJA, Near JA dissenting [*Tennant*], the majority of the Federal Court of Appeal likewise held the law of judicial review recognizes the reviewing court has the power to substitute its view for that of the administrative decision-maker, provided certain conditions are met.

[110] While there are aspects of this case that favour this Court stepping in and doing what the IAD should have done, I am not persuaded to do so because of the exceptional nature of such relief.

[111] However, as is done frequently the Court will direct the IAD in its redetermination in respect of two matters. First, the IAD must hear and decide the redetermination within six months from the issuance of these reasons. This is needed in this case because the original application for sponsorship was filed in 2013, some seven years ago. That is long enough, but here I note the Applicant is in her late fifties and Mr. Crenna is in his mid-seventies and as

husband and wife should not be separated further unduly. I also note the delay is largely attributable to the Respondent Minister's actions or of those acting on his or her behalf with the exception of CBSA.

[112] I also note CSIS, with its expertise in espionage, effectively cleared the Applicant, as had the FBI, and as did both the Minister Respondent's Senior Immigration IRCC Officer in 2016 and the ID in 2018. All three Canadian clearances were made well after the publication of the *Comrade J* novel in 2008.

[113] In addition, the reconsideration ordered is to take place in accordance with these reasons. In this connection, this Court is intervening to prevent the "endless merry-go-round judicial reviews" condemned by the Supreme Court of Canada in *Vavilov* at para 142.

VIII. Conclusion

[114] In summary, as outlined above, and in my respectful view the IAD reasons are not constrained as they ought to be by the legal definition of espionage in interpreting subsection 34(1)(a) of *IRPA*. Further, they are contrary to and thus do not respect the factual constraints in this case in terms of assessing the nature and timing and other aspects of the relationship said to vitiate Mr. Crenna's instructions to cooperate with the FSB. They are not rational and coherent because they contain a fatal flaw such that the conclusion does not lead from the evidence. Therefore I have concluded the reasons do not display the required internally coherent and rational chain of analysis which is justified in relation to the facts and law that constrain the IAD in this case. Therefore, judicial review must be granted.

IX. Certified Question

[115] At the hearing, the Applicant provided the Court with the following proposed questions of general importance for certification:

1. Does subsection 34(1)(a) of the *IRPA* require active planning and participation (*mens rea*), particularly considering that Parliament used the term “être l’auteur de tout acte d’espionnage” in the French version of the legislation?

2. In addition to clandestinity, does the definition of espionage in subsection 34(1)(a) of the *IRPA* require the elements of control and direction?

3. Does the term “against Canada” or “contrary to Canada’s interests” [Term] in subsection 34(1)(a) of the *IRPA* extend beyond national security and public safety considerations? Did Parliament intend “contrary to Canada’s interests” in subsection 34(1)(a) of the *IRPA* to be interpreted consistently with the term “contrary to the national interest” in subsection 42.1(1) and with 42.1(3) of the *IRPA*? Is the Term guided by the meaning of “prejudice to the safety or interest of the State” and “harm to Canadian interests” in subsection 3(1) and 3(2) of the *Security of Information Act*, RSC, 1985, c O-5, as well as “threats to security of Canada” (“espionage or sabotage that is against Canada or is detrimental to the interests of Canada …”) in section 2 of the *Canadian Security Intelligence Service Act*, RSC 1985, c C-23?

[116] The Respondent submits the proposed questions are not appropriate for certification because they are not serious questions of broad significance or general importance. All three

questions address solely the statutory interpretation of a single provision in the *IRPA*, which the Respondent says has either been settled by jurisprudence, in the case of Questions 1 and 2, or is highly fact-specific to the context of the case, in the case of Question 3.

[117] For question 1, the Respondent submits this question has been answered by the case law and thus does not fit the criteria for certification. Case law is consistent that there is no requirement for "hostile intent" in espionage: *Peer* FC at paras 34 and 40; *Afanasyev* at para 19.

[118] For question 2, the Respondent submits this question has been answered by the case law and is highly specific. The Respondent notes that case law has already defined espionage without reading in requirements of control and direction into paragraph 34(1)(a) of the *IRPA*: *Qu* FC at para 34; *Peer v Canada (Minister of Citizenship and Immigration)*, 2011 FCA 91.

[119] For question 3, the Respondent submits this question is highly fact specific, is not a serious question of broad significance or general importance and does not fit the criteria for certification. The assessment of what constitutes "Canada's interests" when deciding whether the alleged espionage of a permanent resident or foreign national harmed Canada's interests is an individualized determination. Further, the Respondent says the facts of this case are unique and as such this is not a question of general importance.

[120] In my respectful view, no question should be certified because among other things, the issues decided in this case are fact driven. In addition, the Courts have already been asked and defined espionage as covering, among other things, acts that are secret, clandestine, surreptitious

or covert; in other words, this question has been asked and answered. In addition, and for the most part, none of the questions proposed arise out of these reasons.

X. Costs

[121] As a rule, no costs are awarded in proceedings under *IRPA*. However, in this case, the Applicant requests costs because the Respondent Minister alleged she was a sex spy for the FSB, and did so in proceedings below the ID and the IAD.

[122] Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 [*Rules*] provides:

Costs	**Dépens**
22 No costs shall be awarded to or payable by any party in respect of an application for leave, an application for judicial review or an appeal under these Rules unless the Court, for special reasons, so orders.	**22** Sauf ordonnance contraire rendue par un juge pour des raisons spéciales, la demande d'autorisation, la demande de contrôle judiciaire ou l'appel introduit en application des présentes règles ne donnent pas lieu à des dépens.

[123] The Federal Court of Appeal provides guidance on the meaning of "special reasons" in Rule 22 of the *Rules* in *Ndungu v Canada (Citizenship and Immigration)*, 2011 FCA 208 per Sharlow, Dawson, Layden-Stevenson JJA:

> [7] However, the cases involving the application of Rule 22 provide some examples of the circumstances that have been held to comprise "special reasons", as well as circumstances that have been held to fall short of that standard. I summarize as follows the conclusions reached in some of the cases, based on a non-comprehensive survey:

The nature of the case

1) An appeal based on a certified question generally will be presumed to have been appropriately brought (*Rahaman v. Canada (Minister of Citizenship and Immigration)*, [2003] 3 F.C.R. 537, 2002 FCA 89).

2 "Special reasons" justifying costs on a solicitor and client basis may be found where the Minister has applied for judicial review of an immigration decision which then takes on the nature of a test case as to the interpretation of a fundamental provision of the statute (for example, where the issues are whether "Trinidadian women subject to spousal abuse" comprise a particular social group and whether fear of that abuse, given the indifference of authorities, amounts to persecution: *Canada (Minister of Employment and Immigration) v. Mayers*, [1993] 1 F.C.R. 154 (C.A.)).

3) After an unsuccessful judicial review application by refugee claimants challenging the establishment of a "lead case" format for determining refugee claims, the Federal Court found "special reasons" justifying an award of costs to the applicants on the basis of "the novel and recognized contentious nature of the lead case at the time it was brought" (*Geza v. Canada (Minister of Citizenship and Immigration)*, [2005] 3 F.C.R. 3, 2004 FC 1039). That costs award was upheld on appeal. The applicant's appeal on the merits was allowed, and costs were granted on the appeal for the reasons given by the Federal Court judge, and also because of the extra-record material obtained by counsel for the applicant establishing that the process culminating in the decisions in the lead cases was flawed (*Kozak v. Canada (Minister of Citizenship and Immigration)*, [2006] 4 F.C.R. 377, 2006 FCA 124).

Behaviour of the applicant

4) "Special reasons" justifying an award of costs against an applicant may be found where the applicant has unreasonably opposed the Minister's motion to allow the application for judicial review, thereby prolonging the proceedings (*Chan v. Canada (Minister of Employment and Immigration)* (1994), 83 F.TR. 158 (T.D.); *D'Almeida v. Canada (Minister of Citizenship and Immigration)* (1999), 1 Imm. L.R. (3d) 309 (F.C.T.D.)).

Behaviour of the Minister or an immigration official

5) An award of costs against the Minister for "special reasons" cannot be justified merely because:

i) an immigration official has made an erroneous decision (*Sapru v. Canada (Minister of Citizenship and Immigration)*, 2011 FCA 35);

ii) the Minister seeks summary dismissal of an immigration appeal for mootness after the appellant has expended resources to perfect the appeal, rather than applying at the earliest opportunity (*Jones v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 279); or

iii) the Minister discontinues an appeal on the eve of the hearing as a result of new legislation undermining the basis of the appeal (*Harkat v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 179).

6) "Special reasons" justifying costs against the Minister may be found where:

i) the Minister causes an applicant to suffer a significant waste of time and resources by taking inconsistent positions in the Federal Court and the Federal Court of Appeal (*Geza v. Canada (Minister of Citizenship and Immigration)* (2001), 266 N.R. 158 (F.C.A.));

ii) an immigration official circumvents an order of the Court (*Bageerathan v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 513);

iii) an immigration official engages in conduct that is misleading or abusive (*Sandhu v. Canada (Minister of Citizenship and Immigration*), 2006 FC 941); *Said v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 663 (FCA));

iv) an immigration official issues a decision only after an unreasonable and unjustified delay (*Nalbandian v. Canada (Minister of Citizenship and Immmigration*), 2006 FC 1128; *Doe v. Canada (Minister of Citizenship and Immigration)*, 2006 FC

> 535; *Jaballah v. Canada (Minister of Citzenship and Immigration)*, 2003 FC 1182);
>
> v) the Minister unreasonably opposes an obviously meritorious application for judicial review (*Ayala-Barriere v. Canada (Minister of Citizenship and Immigration)* (1995), 101 F.T.R. 310 (T.D.); *Ndererehe v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 880; *Dhoot v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1295).
>
> Behaviour of counsel
>
> 7) "Special reasons" justifying an award of costs personally against counsel may be found where counsel has repeatedly failed to appear at scheduled hearings (*Ferguson v. Canada (Minister of Employment and Immigration)*, [1986] F.C.J. No. 172 (F.C.A.)).

[124] While the Respondent Minister did allege the Applicant was a sex spy both before the ID and the IAD, it is important to note the Minister did not advance this argument in this Court in written or oral submissions.

[125] I presume the Minister has seen the error of his ways, and now agrees with both the ID and the IAD who rejected the sex spy allegations found in the *Comrade J* book. It is worth noting that CSIS in 2015, and both the Minister Respondent's Senior Immigration IRCC Officer in 2016, and the ID in 2018, expressly or impliedly rejected these allegations as well.

[126] In the circumstances, and in my discretion there will be no order as to costs.

JUDGMENT in IMM-4179-19

THIS COURT'S INTERIM JUDGMENT is that

1. Judicial review is granted.
2. The Decision of the IAD is set aside.
3. The matter is remanded for redetermination by a differently constituted decision-maker.
4. The redetermination shall be carried out in accordance with these reasons.
5. The decision-maker shall hear and decide the redetermination of this matter within six months from the date of these reasons.
6. There is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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