Date: 20070706

Docket: IMM-6266-06
IMM-6267-06

Citation: 2007 FC 725

Toronto, Ontario, July 06, 2007

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

ERIC HERNANDEZ

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, Eric Hernandez is an adult male citizen of the Philippines. He arrived in Canada when he was twelve (12) years old and was granted landed immigrant status on June 14, 1989. He is classified as a permanent resident. On September 3, 2003, the Applicant was convicted of an indictable offence, trafficking drugs and was sentence to thirty (30) months imprisonment.

[2] On August 10, 2004, the Applicant was deported to the Philippines. The decision to deport him involved the provisions of sections 44(1) and 44(2) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 (IRPA). Judicial review of the decision involving section 44(1) was taken. As a

result the section 44(1) report was set aside by a determination of this Court in *Hernandez v. Canada (MCI)*, 2005 FC 429. The Applicant returned to Canada on November 1, 2005 and was given a permanent resident interview by the Canada Border Security Agency on December 6, 2005. Further submissions were made by the Applicant's lawyer on December 28, 2005. Yet further submissions from the Applicant were received shortly thereafter.

[3] On February 1, 2006, an Enforcement Officer of Canada Border Services Agency made what the Respondent characterizes as a report under section 44(1) of IRPA stating that the Applicant was inadmissible to Canada pursuant to section 36(1)(a) of *IRPA.* The "report" said:

> *In accordance with subsection 44(1) of the Immigration and Refugee Protection Act, I hereby report that:*
> *Eric Hagpantay Hernandez Born 06 Jan 1973 in Philippines*
> *Is a person who is:*
> *A permanent resident*
> *And who, in my opinion is inadmissible pursuant to:*
> *Paragraph 36(1)(a)*
> *Paragraph 36(1)(a) in that there are reasonable grounds to believe is a permanent resident or a foreign national who is inadmissible on grounds of serious criminality for having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.*
>
> *This report is based on the following information:*
> *That Eric Magpantay Hernandez*
> *That Eric Magpantay Hernandez:*
> *- Is a permanent resident in that he was granted landed immigrant status on 14 June 1985 at Winnipeg International Airport;*
> *- Was convicted by indictment on 08 September 2003 at Winnipeg, Manitoba of possession for purpose of trafficking contrary to section 5(2) of the*

> *Controlled Drugs and Substance Act for which a term of imprisonment of 30 months was imposed and for which a term of life imprisonment may be imposed*

[4] This "report" was not sent to the Applicant or his lawyer until October 23, 2006 at which time a "disclosure package" was sent to the Applicant and his lawyer which package contained among other things, the section 44(1) "report" of February 7, 2006. The reason for delivering the disclosure package to the Applicant was that on June 19, 2007 the Minister's delegate had made a decision under section 44(2) of *IRPA* that an admissibility hearing should be held to determine if the Applicant is a person described in section 36 (1)(a) of the *IRPA*. This section 44(2) decision, printed on a one page standard form, was also part of the package sent to the Applicant in October 23, 2006. Thus, about a month and a half prior to the admissibility hearing the Applicant and his lawyer had a package of documents containing both the section 44(1) "report" and the section 44(2) decision.

[5] On November 24, 2006 the Applicant's counsel wrote to the "Officer in Charge" at the Respondent's office saying'

> *"I request reasons for the decision to report Eric Hernandez under section 44(1) of the Immigration and Refugee Protection Act and to refer Mr. Hernandez for an admissibility hearing attached."*

[6] On December 5, 2006 the Enforcement Officer replied:

> *"As per your letter dated 24 November 2006.*
> *Please be advised that we will not be proving (sic) the reasons for the decision at this time."*

[7] An admissibility hearing was held on December 8, 2006 and a removal order was issued requiring that the Applicant be deported. An application for leave to seek judicial review of that order is still pending at the time of this hearing.

[8] The Applicant brings two applications for judicial review in respect of the forgoing to be heard at this time. The first, IMM-6266-06, seeks review of the decision of the Enforcement Officer dated February 7, 2006 to report the Applicant under section 44(1) of *IRPA*. The second, IMM-6267-06, seeks review of the decision of the Minister delegate dated July 19, 2006 to refer the Applicant to an admissibility hearing under section 44(2) of *IRPA*.

[9] What was not disclosed to the Applicant or his lawyer until applications for judicial review were taken was that, in addition to the "report" of February 1, 2006 the Enforcement Officer provided to the Minister's delegate a further document entitled "Recommendation". This document comprised five typewritten pages that began:

> *Recommendation:*
>
> *I have written a 44 report for the above noted subject. I also recommend a referral for admissibility hearing be forwarded to Case Management Branch NHQ for final determination as subject is a long term permanent resident of Canada. I have considered Appendix A-X and the following:*

[10] The "following" considered of detailed consideration of the Applicant's circumstances under these headings:

- Seriousness of the offence

- Possibility of Rehabilitation
- Length of Time spent in Canada and Degree of Establishment
- Family in Canada and the Dislocation to the Family that Deportation of the Subject Would Cause.
- The Family and Community Support for Subject
- The Degree of Hardship that Would be Caused to Subject by Returning the His Country of Nationality
- Best Interest of Child

[11] For brevity I have not reproduced the whole of this document. Suffice it to say that detailed consideration was given by the Officer to each of these matters with reference on occasion to some of the materials provided at Appendixes A to X.

[12] Counsel for the Respondent was asked at the hearing as to why the "Recommendation" was not given to the Applicant with the package of documents delivered to the Applicant and his lawyer on October 23, 2006 or why it was not delivered when the Applicants lawyers specifically requested such material by the letter of November 24, 2006. Respondent's counsel replied that the "Recommendation" was not the "report" contemplated by section 44(1) and that there was no obligation in law for the Respondent to disclose the "Recommendation" prior to or at the admissibility hearing.

[13] For the reasons that follows, I find that the application in IMM-6266-06 is allowed and the section 44(1) report must be set aside.

[14] Section 44(1) of *IRPA* provides, in the case a permanent resident such as the Applicant here, that an officer who finds such person to be inadmissible, may prepare a report setting out the relevant facts and transmit the report to the Minister. One of the grounds for inadmissibility is that described in section 36(1)(a) namely, one where a permanent resident has committed an offence in Canada for which a sentence of more than six months has been imposed. Section 44(2) of *IRPA* provides, among other things that, if the Minister is of the opinion that the report is well founded, an admissibility hearing may be held. In particular these sections say:

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 :*
(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;	*a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;*
. . .	. . .
44. *(1) An officer who is of the opinion that a permanent*	***44.*** *(1) S'il estime que le résident permanent ou l'étranger qui se trouve au*

resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.	*Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.*
(2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.	*(2) S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi.*

[15] Once an admissibility hearing is held and it is determined that the person is within the provisions of section 36(1)(a), section 45(d) of *IRPA* makes it mandatory that a removal order shall be made. That section says:

45. *The Immigration Division, at the conclusion of an admissibility hearing, shall make one of the following decisions:*	***45.*** *Après avoir procédé à une enquête, la Section de l'immigration rend telles des décisions suivantes:*
(d) make the applicable removal order against a	*d) prendre la mesure de*

foreign national who has not been authorized to enter Canada, if it is not satisfied that the foreign national is not inadmissible, or against a foreign national who has been authorized to enter Canada or a permanent resident, if it is satisfied that the foreign national or the permanent resident is inadmissible.	*renvoi applicable contre l'étranger non autorisé à entrer au Canada et dont il n'est pas prouvé qu'il n'est pas interdit de territoire, ou contre l'étranger autorisé à y entrer ou le résident permanent sur preuve qu'il est interdit de territoire.*

[16] These provisions, taken together and read on their face therefore provide, in the case of a permanent resident such as the Applicant.

> 44 (1) An officer "may" provide a report setting out the relevant facts which report "shall" be transmitted to the Minister
>
> 44(2) If the Minister is of the opinion that the report is well founded, the Minister "may" refer the report for an admissibility hearing.
>
> 45(d) If the person is inadmissible for having been convicted of an indictable offence punishable by imprisonment of six months or more, that person "shall" be removed from Canada.

[17] The effect of these provisions were considered by Justice Snider of this Court in the first proceeding involving this same Applicant, Hernandez in *Hernandez v. Canada (MCI)* supra. I repeat paragraph 27, 38, 39, 41 and 42 of her Reasons to show that the use of the word "may" in sections 44(1) and (2) import some level of discretion in the Officer and Minister and that, to some extent, humanitarian and compassionate considerations may come into play.

[27] Section 44(1) involves a two-step process; first the officer must form an opinion as to admissibility and, second, he or she must decide whether to prepare a report.

. . .

[38] The result, when an officer determines that he or she is not going to prepare a report, does not change the fact that the person is inadmissible, as defined by the IRPA; it does not mean the person is "admissible". The practical effect of a decision by the officer not to prepare a report is that, in spite of being "inadmissible", as defined in IRPA, there are compelling reasons to allow that person to remain in Canada.

[39] My reasoning is the same with respect to the decision to be made by the Minister's delegate as to whether a report is well-founded, pursuant to s. 44(2).

. . .

[41] It is one side of the delicate balance to argue that all the individual circumstances must be considered before a removal. However, the other side is the consequence flowing from the CIC interpretation that persons convicted of serious crimes may be allowed to stay in Canada with only a notation in the CIC file.

[42] While acknowledging this concern, I conclude that the scope of the discretion of an immigration officer under s. 44(1) and of the Minister's delegate under s. 44(2) is broad enough for them to consider the factors outlined in the relevant sections of the CIC Procedural Manual. To the extent that some of these factors may touch upon humanitarian and compassionate considerations, I see no issue.

[18] Next, Justice Snider considered what level of procedural fairness is owed to an applicant. She said at paragraph 43:

> *[43] Having concluded that the scope of the officer's or Minister's delegate's discretion extends beyond considering the fact of a conviction, the next question is one of the extent of the procedural fairness owed to an Applicant as the officials carry out their functions under s. 44(1) and 44(2).*

[19] After reviewing the matter, with considerable emphasis put on the Supreme Court of Canada decision in *Baker v. Canada (MCI)*, [1999] 2 SCR 817, she concluded that a "more relaxed duty of fairness" was owed to an applicant. That duty, however did extend to providing a copy of the report to the applicant, not for the purposes of making further submissions, but for the purpose of determining whether to seek judicial review. She said in paragraphs 70 and 72:

> *[70] Balancing all of these factors, I find that they point toward a more relaxed duty of fairness, similar to that found by the Supreme Court in Baker. In my view, the duty of fairness implicitly adopted by CIC for purposes of the s. 44(1) report is appropriate. Although these are administrative decisions (rather than quasi-judicial) and although the person affected has some other rights to seek to remain in Canada, these are serious decisions affecting his rights. CIC, whose choice of procedures should be respected, has elected to give the affected person a right to make submissions, either orally or in writing and to obtain a copy of the report. Having a copy of the report would allow the affected person to decide whether he wishes to seek judicial review of the immigration officer's report to this Court. This, I conclude is the duty of fairness owed the Applicant and others in his position with respect to the Officer's Report.*
>
> . . .

> *[72] Given my conclusion that the duty of fairness is "relaxed", there are a number of procedures that are not essential. As was concluded in Baker, I would agree that an oral interview by the immigration officer is not always required, as long as the affected person is given an opportunity to make submissions and to know the case against him. Nor do I believe that the duty requires that the Officer's Report be put to the Applicant for a further opportunity to respond prior to the s. 44(2) Referral. The duty of fairness in this case does not reach the same level as in Bhagwandass v. Canada(Minister of Citizenship and Immigration), [2001] 3 F.C. 3 (F.C.A.).*

[20] She concluded that there were three errors committed in the circumstances before her at paragraph 76:

> *[76] On the basis of the evidence before me, I am not satisfied that the immigration officer provided the Applicant with the appropriate level of procedure fairness. There were three errors:*
>
> *1. The Applicant was not advised of the purpose of the interview;*
> *2. He was not allowed to make submissions; and*
> *3. He was not given a copy of the Officer's Report.*

[21] Of these, only the third error, failure to provide a copy of the report, is at issue in the present proceedings.

[22] Justice Snider's determination that the provision of the report is required has been considered in at least two subsequent decisions of this Court. In *Lee v. Canada (MCI*) 2006 FC 158 Justice Shore at paragraph 32 concluded that the section 44(1) report does not need to be put to the applicant prior to a section 44(2) referral.

> *[32] Madam Justice Snider also held that the duty of fairness does not require that the subsection 44(1) report be put to the applicant prior to the subsection 44(2) referral nor does it require an oral interview by an immigration officer. (Hernandez above, at para. 72)*

[23] Justice Blais made the same determination in *Spencer v. Canada (MCI) 2006* FC 990 at paragraph 20:

> *[20] The applicant asserts a breach in the duty of fairness because she did not receive a copy of the report until her admissibility hearing. I disagree with this position. Justice Snider held that the duty of fairness does not require that the subsection 44(1) report be put to the applicant prior to the subsection 44(2) referral (Hernandez above at paragragh 72). The applicant received the report on September 29, 2005, at the first sitting of her admissibility hearing. Her right to seek judicial review of the report was not lost. Furthermore, as far as the admissibility hearing was concerned, the member adjourned the hearing, in order to provide the applicant with the opportunity to be represented by counsel. At the next sitting, the member once again adjourned the hearing in order to accommodate counsel's request to prepare for the case. There has been no breach regarding the applicant's right to receive a copy of the report.*

[24] Applicant's counsel in these proceedings attempted to distinguish Justice Snider's findings at paragraph 72 of *Hernandez* by limiting her finding to provisions of the report "for a further opportunity to respond". He argued that the report must nonetheless be provided before a section 44(2) determination is made, just that there is no further opportunity to respond. I do not accept this interpretation. Provision of the report would be pointless except to afford an early opportunity to

seek judicial review. That opportunity is still available after a section 44(2) determination, if unfavourable to the applicant. There is no procedural unfairness in failing to affording an even earlier opportunity to seek judicial review. I agree with the interpretation given by Justices Shore and Blais.

[25] The next consideration is as to when exactly must the report be provided. The evidence before this Court as set out in the affidavits of Hernandez and Horoshok is that the "report", made February 1, 2006 was sent out to the Applicant Hernandez in a package of documents on October 23, 2006 that is, about six weeks before the admissibility hearing and after the section 44(2) decision had been made. The Hernandez affidavit, paragraph 8, states that this was done "in exactly the same manner I had received the same sort of documents for my previous admissibility hearing".

[26] I find that the timing of the provision of the materials, after the section 44(2) determination and several weeks before the admissibility hearing is not a ground for setting the section 44(1) or section 44(2) determination aside. The timing is consistent with the determination of Justice Shore and Blais previously referred to. Reference must also be made to the unanimous decision of the Federal Court of Appeal in *Cha v. Canada (MCI)* 2006 FCA 126. I fully appreciate that only Counsel for the Minister filed submissions and opposed to argue that case on appeal and that the person in that case was not a permanent resident but only present in Canada under a temporary student visa. Nonetheless the reasons are instructive, the decision of Justice Snider in *Hernandez* was considered, and the circumstances including a criminal conviction are similar. At paragraphs 23 to 25 the Court of Appeal emphasises that immigration is a privilege, not a right, that criminality

of non-citizens is a major concern and that one of the conditions that Parliament has imposed on a non-citizen's right to remain in Canada is that he or she not be convicted of certain criminal offences. At paragraphs 61 to 66 the Court of Appeal agreed with the Trial Judge that failure to notify the person as to the purpose of an interview amounted to breach of a duty of fairness. However, at paragraph 67, the Court emphasised that the matter do not end there, breaches of the duty of fairness does not automatically lead to the setting side of the decision:

> *[67] This is not, however, the end of the matter. Breaches of the duty of fairness do not automatically lead to the setting aside of an administrative decision. (see Mobil Oil Canada Ltd. v. Canada Newfoundland Offshore Petroleum Board, [1994] 1 S.C.R. 202, at 228; Correia, supra, at paragraph 36). Mr. Cha was represented by counsel in the Federal Court. In the affidavit he filed in support of his application for judicial review, he recognized that he had been convicted because he "was over the legal limit for alcohol" (Appeal Book p. 13). He or his counsel did not suggest that he had been pardoned, that the offence fell under the Young Offenders Act or that he was under 18 years of age or unable to appreciate the nature of the proceeding. As a new hearing before a different Minister's delegate could only result, again, in the issuance of a deportation order, to order a new hearing would be an exercise in futility.*

[27] The pertinence of the *Cha* decision to the present circumstance is that in the present case the Officer making a determination under section 44(1) prepared and delivered to the Minister not only a "report" which consisted of the few paragraphs as reproduced at the beginning of these reasons, but also prepared and delivered what was characterized as a "Recommendation" comprising five typewritten pages together with appendixes A to X. This Recommendation with appendixes was

never given to the Applicant or his lawyer prior to or at the hearing despite the request of his lawyer for “reasons”.

[28] Two questions arise. The first is: what exactly constitutes the “report” contemplated by section 44(1)? The second is: does the failure to provide the “Recommendation and appendixes” constitute a breach of fairness that can provide a basis for setting aside the section 44(1) or 44(2) decisions?

[29] Neither *IRPA* nor its Regulations define what a “report” under section 44(1) is to comprise. No decision of which this Court is aware has considered the matter. The guidelines provided to those administrating *IRPA* and the Regulations, such as an Officer making a section 44(1) determination, section 12.1 of the 2007-04-12 version provides:

> ***12.1. Report requirements***
>
> *The authority of the Minister’s delegate to cause an admissibility hearing or issue a removal order cannot be exercised unless the form and content of a report under A44(1) are in accordance with the Act governing such procedures.*
>
> *When an officer is of the opinion that a permanent resident or foreign national in Canada is inadmissible, then that officer may prepare a report under the provisions of A44(1).*
>
> *The report shall then be transmitted to the Minister’s delegate, along with the officer’s disposition recommendation and rationale. This is most easily accomplished by preparing an A44(1) case highlights form. All A44(1) reports:*

• must be in writing and must indicate the place and date of issue;
• must be addressed to the Minister of PS or the Minister of CIC and be signed by the officer who conducted the examination or is otherwise making the report;
• must contain the complete name (correctly spelled) of the person who is being reported;
• must contain the exact section and particulars of the Act upon which the officer based the opinion that the person, who is the subject of the report, is inadmissible;
• must in all cases, and especially in those cases where the sections of the Act are not specific in themselves, indicate the exact grounds for applying the particular inadmissibility section(s). These grounds are to be explained in the narrative section of the report below the words "THIS REPORT IS BASED ON THE FOLLOWING INFORMATION."

ENF 5 Writing 44(1) Reports

All A44(1) reports must include a narrative that justifies the inadmissibility opinion and cites the facts upon which that opinion is based.

For example, in applying A36(2)(b), it is not sufficient to state that the person has been convicted of an offence. The report must fully specify the grounds of inadmissibility in the following manner: THIS REPORT IS BASED ON THE FOLLOWING INFORMATION:

That [person's name]:

• has been convicted of an offence; namely, [Possession of Cocaine] on or about [22 November 1982] at or near [Pontiac, Michigan, USA]. This offence, if committed in Canada, would constitute an offence that may be punishable by way of indictment under paragraph 4(3)(a) of the Controlled Drugs and Substances Act and for which

> *a maximum term of imprisonment [not exceeding seven years] may be imposed; and*
>
> *• has not obtained the authorization of the Minister for entry to Canada.*
>
> *See also ENF 1, Inadmissibility, and ENF 2 Evaluating inadmissibility.*

[30] Section 44(1) of *IRPA* requires that the report shall set out "the relevant" facts and in the French language shall be "un rapport circonstanciel" that is, as set out in *Le Petit Robert* "qui comporte de nombreux détails". Section 12.1 of the guidelines requires that all reports "must include a narrative that justifies the inadmissibility opinion and cites the facts upon which the opinion is based". Following this statement there is in the guidelines an example as to what a "report" is to comprise. I find that the "report" recited at the beginning of these reasons is in conformity with that example.

[31] A unanimous decision of the Saskatchewan Court of Appeal in *Casavant v. Professional Ethics Committee of the Saskatchewan Teachers Federation*, 2005 SKCA 52 provides some useful instruction. That Court was considering a provision of the *Teachers' Federation Act* R.S.S.1978, c. T-7 dealing with a disciplinary hearing and the requirement that a "report" be provided. Section 37(c) of that *Act* requires that the committee hearing the matter shall:

> *(c) report to the executive its findings and such recommendations as it may deem advisable in a written report, signed by the members taking part in the hearing and concurring in the report, together with minutes of the proceedings before the committee and of the evidence adduced and all exhibits produced or copies thereof; and such report if signed by a majority of the members taking part of the*

> *hearing shall be deemed to be the report of the committee.*

[32] The committee issued a "report" which is set out at paragraph 18 of the reasons which will not be repeated. It was more fulsome than the "report" in this case.

[33] At paragraph 23 the Court considered the "grammatical and ordinary" meaning of the word "report":

Grammatical and Ordinary Meaning

> *[23] The Conscise Oxford Dictionary defines "report" as inter alia, "account given or opinion formally expressed after investigation or consideration." Webster's Third New International Dictionary is to the same effect in that it describes "report" as meaning, inter alia, "formal account of the results of an investigation given by a person or group authorized or delegated to make the investigation." These definitions indicate, at minimum, that there is enough scope in the regular meaning of the term "report" to accommodate an interpretation which requires the Committee to provide an explanation of its decision. In this regard, the fact that s. 37(c) refers to a report of findings tends to suggest that the meaning of "report" involves more than just the statement of a conclusion.*

[34] The Court then proceeded to consider the word "report" in the legislative context and scheme of the *Act*. It concluded at paragraph 29:

> *[29] Accordingly, consideration of the scheme of the Act and the relevant statutory context suggests that the "report" contemplated by s. 37(c) must involve a meaningful explanation of the basis and rationale of the Committee's decision.*

[35] Next the Court considered the Object of the Act and Legislature Intent and concluded at paragraph 37:

> *[37] Thus, considering the working of s. 37(c) of the Act and the approach referred to in Rizzo Shoes, supra, it is apparent that a report prepared pursuant to s. 37(c) must involve something more than a recitation of the evidence and the statement of a conclusion. As explained more fully below, a report must provide a meaningful explanation of the Committee's decision and of the facts on which it is based.*

[36] Then the Court considered some of the case law including the Federal Court of Appeal decision in *Via Rail Canada Inc. v. National Transportation Agency* (2000), 193 DLR (4th) 357.

[37] The conclusion reached by the Court was set out at paragraphs 46 to 48:

> *[46] All of that said, a report written by the Committee pursuant to s. 37(c) must meet basic threshold requirements. Most fundamentally, it must be prepared with sufficient detail and clarity that the parties, the STF executive or a reviewing court can understand the basis and rational of the Committee's decision. The essential nature of a report should be explanatory.*
>
> *[47] In general terms, this means that a report should summarize the evidence which bears on the issues. This need not be done in elaborate detail but should capture the key features of what was presented to the Committee. As well, a report should set out the findings of fact necessary to resolve the complaint. In cases where there is contradictory evidence, the Committee should explain why it chose one version of events over another. If credibility is a factor, the report should indicate why the evidence of a particular witness was preferred or rejected as the case might be. This need not involve an expansive analysis. However, the Committee's reasoning should be presented in a manner which allows the parties and the Court to understand its assessment of the evidence and the facts on which its findings are based.*

> *[48] In terms of the decision itself, a report should reveal the reasoning employed by the Committee in sufficient detail and with sufficient clarity to allow the reader to understand how or why the conduct in issue was considered to be (or not to be) professional misconduct or conduct unbecoming to a teacher. In doing so, it is preferable that the report deal with the main lines of argument or key submissions of the parties. There is unlikely to be any case where it will be sufficient for the Committee to simply recite the evidence and state a conclusion.*

[38] Using the criteria established by Saskatchewan Court of Appeal the section 44(1) "report" provided to the Applicant in this case, as set out at the beginning of these Reasons would not meet the criteria. However that "report" together with the "Recommendation and appendixes" would meet the criteria.

[39] Is the scheme of section 44(1) of *IRPA* and the context of that *Act* as a whole such as to require a detailed "report" of the Saskatchewan type? The decision of Justice Shore in *Lee* previously cited, which dealt with section 44(2) said that a very "low level" of procedural fairness was owed in decision is under section 44(2), given that such decisions are administrative in nature. Notes of an Immigration Officer setting out a "narrative and recommendation" that was given to the Minister was sufficient in that case. Justice Shore said at paragraph 39 to 43 of the *Lee* decision:

> *[39] Written reasons are not required given that a low level of procedural fairness is owed in decisions under subsection 44(2) of IRPA and given that such decisions are administrative in nature. In any event, the narrative, prepared by the Immigration Officer and his recommendation to the Minister to refer Mr. Lee's case to an admissibility hearing, is sufficient to satisfy the reasons requirements.*

> *[40] When this application was commenced, the decision-maker indicated that "no reasons" were given for the decision, in its response to the Court's request under Rule 9 of the Federal Court Immigration Rules, SOR/2002-232. The Rule 9 letter is, in a sense, accurate - the Minister's Delegate did not issue written reasons for the decision.*
>
> *[41] In October 2005, in response to Mr. Lee's motion for a stay of the admissibility hearing, the Minister filed the notes of an Immigration Officer setting out the narrative report and a recommendation that was ultimately delivered to the Minister. The Minister indicated that it would rely on the notes as reasons for the decision. It is important to specify the in-depth nature of the notes which, actually, constitute a report; the extensive explanations of the situation of Mr. Lee in the recommendation of the Immigration Officer must, itself, be carefully examined for the detail that was submitted for consideration.*
>
> *[42] The Supreme Court of Canada has clearly indicated that this sort of recommending memorandum can be relied on by the Minister as reasons for the decision. The Court routinely treats this sort of recommending memorandum as reasons in various contexts. (Baker above; Hernandez above; Leong[11])*
>
> *[43] Mr. Lee was notified in October 2005 that the Minister is relying on the notes as the reasons for decision. There is no reason for this Court to treat these notes differently than the notes and recommending memoranda in numerous other cases.*

[40] In the circumstances of the present case the Officer prepared and delivered to the Minister not only the “report” but also a detailed “recommendation” with many appendixes. These latter

documents were undoubtedly intended to provide to the Minister detail as to what was contained in the report and substantiation as to its conclusions. Having been prepared, having been sent to the Minister, being pertinent to the "report" and substantiating what is in the "report", they must be considered to be part of the "report". The issue is not whether there was any requirement to create the "recommendation" and appendixes. Rather, the issue is having created them, having delivered them to the Minister, and given their pertinence to the "report", they should have been delivered to the Applicant. In particular when a clear and specific request for delivery of such material was made by the Applicant's lawyer before the admissibility hearing, there is no proper basis for withholding that material.

[41] I agree that there may have been no reason to create the material and that no "breach of fairness" would have occurred if such material was not created. However, once created and delivered to the Minister, it must be provided to the Applicant prior to the admissibility hearing. Particularly this is so when a specific request has been made.

[42] I am fully aware that the Applicant was well aware of the case to be put against him. He had been convicted of serious offences. While Applicant's counsel challenges some of the Officer's findings as set out in the "recommendation". I see no basis for setting the matter aside on that basis. Applicant's counsel agreed that the findings can only bet set aside if unreasonable. I find no patent unreasonableness in any of the findings challenged. That is not the critical issue.

[43] The issue here is not whether the Applicant is a “criminal” and “ought to be deported anyway”. The issue has to do with how Canada’s officials in the administration of *IRPA* carry out their duties. Here there was not a simple administrative task that, even if found to be unfair can be overlooked. Here we have a case where a relevant document was created and put before the Minister, yet withheld from the Applicant. This is sufficient so as to require that the section 44(1) determination be set aside and done again, this time properly.

[44] The Applicant’s counsel has asked that one or more questions be certified. I will certify the following question:

> *“What constitutes the report under section 44(1) of IRPA and when, if at all should that material be given to an applicant?”*

[45] There are no special circumstances that would warrant an award of costs.

[46] The parties are agreed that if the Applicant is successful in IMM-6266-06 it is unnecessary to consider IMM-6267-06.

JUDGMENT

THIS COURT ADJUDGES that:

1. The application in IMM-6266-06 is allowed and the matter is returned for re-determination by a different Officer under section 44(1) of *IRPA*;

2. It is not necessary to consider the application in IMM-6267-06;

3. There is no order as to costs;

4. The following question is certified: *"What constitutes the report under section 44(1) of IRPA and when, if at all should that material be given to an applicant?"*

"Roger T. Hughes"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-6266-06, IMM-6267-06
STYLE OF CAUSE:	ERIC HERNANDEZ v. MINISTER OF PUBLIC SAFETY AND EMERGENCY
PLACE OF HEARING:	WINNIPEG, MANITOBA
DATE OF HEARING:	JULY 4, 2007
REASONS FOR JUDGMENT AND JUDGMENT:	HUGHES J.
DATED:	JULY 6, 2007

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