Date: 20090130

Docket: IMM-2081-08

Citation: 2009 FC 100

Vancouver, British-Columbia, January 30, 2009

PRESENT: The Honourable Justice Johanne Gauthier

BETWEEN:

SIMARDEEP SINGH KAINTH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] The applicant, Mr. Kainth, seeks judicial review of the decision of the *Immigration Appeal Division* (IAD) confirming the order for his removal to India, pursuant to a breach of his residency obligation set out at section 28[1] of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA).

[2] For the reasons that follow, the Court finds that the IAD did not commit any reviewable error in its determination of Mr. Kainth's rights under subsection 10(b) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act*

1982 (U.K.), 1982, c. 11 (the Charter), or in finding that the port of entry (POE) officer who interviewed him had not breached her duty of fairness.

Background[2]

[3] The applicant is a citizen of India. He immigrated to Canada with his parents as permanent residents in June 2000 after being sponsored by his sister. He remained in Canada for about a year after which he eloped with an Indian woman he met over the internet, who lived in the United States. He married her in India in August 2001. The family of his bride objected to the marriage on the basis of caste difference and the applicant alleges that the couple feared reprisal from her brothers in India and that they lived in hiding with his own relatives for a few months while there. The couple returned to the United States towards the end of 2001, where his wife was studying under a student visa and her parents had refugee status. Shortly thereafter, the applicant made a refugee claim under a false name[3], pretending to be an Indian activist who had been tortured in his country. He was granted asylum in the United States in 2002.

[4] In January 2003, Mr. Kainth was arrested for aggravated battery on his six month old daughter and in May 2003 was convicted after pleading guilty. He was sentenced to a little over three and a half years of incarceration but was released on the basis of good conduct on December 15, 2005. By that time, he was divorced from his first wife. During the police investigation of the assault charges, his true name and some Canadian identity documentation came to light. Thus, his

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[1] The most relevant provisions are reproduced in Annex 1.
[2] Given that the certified record is over 1000 pages, only a brief summary of the facts and the evidence before the IAD is presented here.
[3] The Applicant claims that his U.S. lawyer suggested using a false name.

refugee status was cancelled after a hearing where he was represented by a lawyer appointed by his family in Canada. He was then offered the choice of appealing this decision or being expulsed to India or Canada. He chose to return to Canada. He remained in detention with the U.S. immigration authorities until such time as his expulsion could be executed.

[5] As it appears from the Appointment of counsel dated October 25, 2005, faxed to the POE officer, a Canadian immigration lawyer was retained by his family to represent him in respect of his immigration matters in Canada.

[6] On January 31, 2006, he was escorted by two U.S. immigration officers to the Vancouver International Airport, where after a brief examination at the counter, he underwent what the parties referred to before the IAD as a secondary examination by Immigration Canada to determine his identity and status.

[7] The POE officer, having been advised by the applicant that he had immediate family in the Vancouver area and while the applicant was undergoing a secondary examination by Customs, contacted his sister and his brother-in-law to confirm his identity and that they were indeed waiting for him.

[8] Shortly after this conversation, Mr. Kainth's counsel contacted the POE officer directly. Upon being advised that Mr. Kainth was not with the Immigration Officer at the time of his call and that his appointment would need to be confirmed, said counsel indicated that he had an

Appointment of counsel duly signed by the applicant, which he offered to fax to the POE officer. Here we should note that although the evidence of the applicant and the officer are not exactly the same, both say that the applicant advised the POE officer of the fact that a lawyer had been appointed to represent him early in the process.

[9] According to the POE officer, shortly after receiving this document, she called counsel back to advise him that she had concerns about his client meeting his residency obligation (he had been outside of Canada for more than 730 days within the 5 year period immediately preceding his arrival in Canada). In addition, she also indicated that the applicant might be inadmissible because of his criminal conviction in the United States, but this aspect of the file will not be discussed in any detail given that it is not the subject of the decision of the IAD presently before the Court. It appears that said counsel did not seek an adjournment of this interview, nor did he ask to be present. He did not ask to speak to Mr. Kainth. In fact, according to the POE officer's affidavit dated May 29, 2006 (para. 17), which was not contradicted, counsel indicated that he had anticipated that this might be the case and had advised the applicant's family that they might be required to post a bond[4].

[10] The examination of Mr. Kainth in respect of his residency obligation was not very long given that the calculation of his absences in this case was rather straightforward on account of his incarceration and the fact that the POE officer had received a red folder from the U.S. authorities containing relevant documentation in relation thereto. However, in accordance with subs. 28(2) of

[4] The POE officer also testified to this effect before the IAD (Certified Record, p. 227), specifying that applicant's counsel indicated in two of the telephone conversations she had with him (one prior to Mr. Kainth's interview as well as another after it), that the applicant's family was willing to post such a bond.

IRPA, she reviewed with him various issues in respect of his history in the United States, his former wife and his child, as well as his family in India and in Canada. She also asked about his refugee claim in the United States. His answer (this evidence is not contested) was that he did not know the basis of such claim, as his former wife and her family had taken care of it.

[11] There is conflicting evidence (between the testimony of the applicant and that of the POE officer) as to whether early in his interview Mr. Kainth told said officer about having experienced problems with his former wife's brothers in India. However, it is acknowledged by the applicant that he did not mention that as of January 2006, he feared returning to India. Rather, his position is that the POE officer should have inquired about it. There is also conflicting evidence as to whether or not the applicant requested to speak to his lawyer. Mr. Kainth alleges that he requested this on three separate occasions during the entire process, while this is specifically denied by the POE officer.

[12] As mentioned, the POE officer denies that Mr. Kainth advised her of any problem having occurred in India in 2001. Her evidence is that she specifically recalls that, after explaining her concerns to him concerning his criminality**,** she told him that a breach of his residency obligation might well result in his removal to India. She says that she also explained to him that she was not convinced that he had raised sufficient humanitarian considerations to warrant the exercise of her discretion not to report him. She testified that she specifically asked if he had anything else to add for her consideration, in answer to which he only referred to his desire to stay in Canada.

[13] While the POE officer reviewed the relevant documents in her possession, finalized her assessment, typed her report and prepared other documentation, Mr. Kainth was left in a waiting room with sliding doors inside the secure area where the immigration officers have their offices and cubicles for private interviews. That room had sliding doors that could not be opened from the inside. He remained there for several hours while the following events were taking place.

[14] The POE officer gave evidence that before reporting to the Minister's delegate, she spoke with Mr. Kainth's lawyer to advise him that she would be issuing a report under subs. 44(1) of IRPA recommending the issuance of a removal order as she had found Mr. Kainth to be inadmissible (subss. 41(b) and 44(1) of IRPA). The uncontradicted evidence is that said counsel simply asked her to fax him a copy of her report after its issuance. He made no submissions whatsoever.

[15] It also appears that at that stage, the POE officer discussed with the applicant's counsel the conditions that she would have to consider pursuant to subs. 44(3) of IRPA. He reiterated that the possibility of having to file a $10,000 security bond had already been envisaged and that the family was able and willing to do so. Thus, after the Minister's representative issued the removal order on the basis of a breach of Mr. Kainth's residency obligation and ordered that an admissibility hearing be scheduled at a later stage to address the second report of the POE officer dealing with his criminality[5], the POE officer called Mr. Maghera, the applicant's brother-in-law, to confirm the

[5] A notice of appeal was filed with the IAD to contest the removal order on February 14, 2006. Although an admissibility hearing was later scheduled, said hearing was suspended.

need for a $10,000 security bond. She indicated that whenever he was ready, he could come to pick Mr. Kainth up at the airport. Mr. Maghera simply answered that he would shortly be on his way to the airport to file the bond.

[16] According to the POE officer, it is only at this point in time[6] that she was advised that Mr. Kainth wanted to talk to her. She proceeded to the "waiting room" and he advised her that he wanted to call his family and his lawyer. However, it is not disputed that upon being advised that Mr. Maghera was on his way to file his bond and pick him up and that she had spoken with his lawyer, Mr. Kainth did not pursue his request to call and appeared content to wait for his brother-in-law. It is also not contested that Mr. Kainth was then advised of the issuance of the removal order, given a copy of the POE officer's report and other relevant documentation and informed of his right of appeal. Mr. Maghera arrived at the airport a few hours later. The POE officer, having completed her shift, had already left. After the filing of the bond and fingerprinting, the applicant left the airport.

[17] In addition to his notice of appeal, the applicant also filed, on February 15, 2006, an Application for leave and judicial review of the removal order, alleging a breach of his rights under subs. 10(b) of the Charter and of the duty of procedural fairness of the POE officer for having: i) failed to advise him that unless he made a refugee claim before the removal order was issued, he would lose his right to do so; and, ii) failed to respect his right to counsel during his interview in respect of his residency obligation.

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[6] The evidence of the applicant was that the POE officer repeatedly ignored his requests to call his lawyer.

[18] Upon a motion by the Minister, the Federal Court found on September 13, 2006 that the application was premature as Mr. Kainth had not exhausted his right to appeal to the IAD. At this stage, it is worth noting that pursuant to subs. 67(2) of IRPA, the IAD has jurisdiction to hear such a matter "*de novo*", and to consider humanitarian considerations arising from circumstances up to the date of the hearing before it[7]. Thus, at the hearing in March 2008, the applicant relied on his own testimony, on the testimony of his Canadian wife whom he had married in January 2008, a psychologist's report, as well as other documentary evidence. This included all the material filed in respect to his earlier application before the Federal Court, particularly his memorandum of fact and law to which the IAD was expressly asked to refer in order to supplement the oral submissions made before it.

[19] During that hearing, it was acknowledged by both sides that even if the original removal order was found to be void, because of an alleged breach of procedural fairness and of subs. 10(b) of the Charter, the IAD could decide the original issues in finality without returning the matter before the original decision-maker and confirm the removal of Mr. Kainth. However, the applicant's counsel submitted to the IAD that it should exercise its discretion to return the matter to the Minister's representative to allow the applicant to file a refugee claim.

[20] In effect, it was clear that by then, the issue was not so much that additional information could have been provided to the POE officer in respect of the residency obligation or the

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[7] See *Mendoza* v. *Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 934, (2007), 160 A.C.W.S. (3d) 681 at paras. 17 to 20.

humanitarian considerations but rather that the prejudice relied upon by the applicant was that the issuance of the removal order immediately after the issuance of the subs. 44(1) report prevented him from filing a refugee claim based on an alleged fear of reprisal from the brothers of his first wife in India (subs. 99(3) of IRPA).

[21] It is also evident from the memorandum of fact and law before the IAD that although the applicant expected to be interviewed on his residency obligation (see para. 92 of the memorandum of fact and law), he (or his counsel) did not expect that a removal order would be issued by the Minister's representative immediately at the POE, upon receipt of the subs. 44(1) report from the POE officer.

The IAD Decision

[22] In its 18 page decision, The IAD held that:

1) Mr. Kainth had breached his obligation of residency, this much having been admitted to the beginning of the hearing.

2) There were insufficient humanitarian and compassionate circumstances to warrant the granting of special discretionary relief. Before coming to this conclusion the IAD reviewed in some detail the evidence and made various findings in respect of Mr. Kainth's credibility, or lack thereof, such as:

- That the applicant had a history of lying whenever it suits him. For example, apart from making a refugee claim under a false name, when his true identity documents were found by the police investigator, he denied that they were his and said that they were for his cousin. When this was not accepted, he indicated that they were prepared for him but only to have papers enabling him to look older.

- In addition to falsely stating to the POE officer that he knew nothing about his refugee claim, he also testified before the IAD that he did not know what happened with his American refugee status. This was not found credible, in light of the evidence that he attended a hearing on that very issue by videoconference and had signed documents related thereto, all while duly represented by a lawyer.

- To explain his guilty plea to the charges of aggravated battery on his infant daughter, he testified that in fact, it was not battery as the injury occurred by accident. The IAD rejected that explanation based on the investigation report on file which referred to the doctor's report showing that the baby had suffered several types of injuries which were at different stages of healing and concluding that there was evidence of repeated abuse. Mr. Kainth then proposed as an explanation that his parents-in-law could have been the perpetrators. Once again, the IAD reviews the evidence in that respect and finds that this explanation was not credible because of contradictory statements and assertions on issues related thereto.

- That his testimony in respect of his alleged fear that he would be under threat from his former wife's brothers if returned to India was not credible.

- Because of Hong Yan Zhang's testimony (his second wife), which was found to be "strikingly divergent" on key issues and demonstrated a lack of knowledge of each other that one would expect in a marital relationship, the IAD even concluded that this relationship was not genuine.

3) In the present context, the POE officer had no duty to inquire into his refugee status. In that respect, the IAD notes among other things that the applicant had the duty to assert his refugee status at the first opportunity, that is at the POE. He spoke English, was familiar with the refugee process from his experience in the United States, had indicated at the hearing that he fully understood the reason for the inquiry at the airport, particularly that he understood the possibility of being removed to India. There was also uncontradicted evidence that he disavowed any knowledge of the basis of his refugee claim in

the U.S. The IAD adds that even if Mr. Kainth's testimony was preferred over that of the POE officer (which it clearly was not on my reading of the decision), he only mentioned his fear of his former wife's brothers while they lived in India in 2001 and there was enough circumstantial evidence for the POE officer to reasonably infer that he had no fear of danger or that he faced no danger in India in the eventuality of a removal, as of January 2006.

4) In respect of subs. 10(b) of the Charter, "there [was] insufficient evidence to conclude that his examination was anything other than routine" (para. 42 of the decision) and it did not constitute "detention" within the meaning of that subsection. Before coming to this conclusion, the IAD expressly refers to the most pertinent authorities cited by the applicant, such as *Dehghani v. Canada (Minister of Employment and Immigration.)*, [1993] 1 S.C.R. 1053 (*Dehghani*), *R. v. Simmons*, [1988] 2 S.C.R. 495 and *R. v. Jacoy*, [1988] 2 S.C.R. 548. It also expressly refers to the fact that Mr. Kainth had gone through a basic search (as opposed to a more intrusive search such as a strip search) before the secondary examination started, that is upon entering the area for his interview (private cubicle). It also deals with the fact that he had been locked in a waiting room for several hours. It discusses the applicant's as well as the POE officer's state of mind throughout the events.

5) The POE officer had not breached her duty of fairness. Under that heading, the IAD refers to the various criteria set out in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (*Baker*) (which were fully discussed in the oral and written arguments before it), reviews what it considers the most relevant case law presented by the applicant and how the factual matrix before it compares with those in such cases. For example, it notes that contrary to what happened in the matter before the Federal Court of Appeal in *Ha v. Canada (Minister of Citizenship and Immigration.)*, 2004 FCA 49, [2004] 3 F.C.R. 195 (*Ha*), here the applicant's counsel did not request to speak with him or to make submissions to the POE officer and there was no evidence suggesting that counsel asked to attend at any stage of the process. It also considered that the nature of the decision itself was different than in *Hernandez v. Canada (Minister of Citizenship and Immigration.)*, 2005 FC 429, [2006] 1 F.C.R. 3 (*Hernandez*) in that it was not final in any respect. The applicant could not lose his permanent resident status until he had exhausted his right of appeal, which was quite different in respect of the subs. 44(1) report issued on the basis of breach of residential obligation.

> 6) It is also worth noting that the IAD specifically mentioned at para. 34 that it had full authority to decide all the issues on the appeal and that it had not been persuaded to decline to exercise that jurisdiction and return the matter to the Minister's representative even if it had found a breach of procedural fairness or Charter rights.

[23] The IAD's findings in respect to credibility, breach of subs. 28(1) of IRPA and its determination in respect of subs. 28(2) of IRPA are not in dispute.

Analysis

[24] At the hearing, the applicant was represented by a new counsel (because of illness) who had, about 3 days before the hearing, served a motion seeking permission to file a further memorandum and some additional evidence. The motion was heard the morning of the hearing of this application.

[25] The respondent opposed the motion on the basis that it raised arguments that were not presented to the IAD, as well as new evidence not in the Certified Record. Also, the Minister noted that it would be prejudiced as it was not in a position to present any new evidence that would be relevant to respond to this new theory of the case.

[26] It is trite law that new evidence is not admissible on judicial review and none of the few exceptions to this general principle apply here. As for the additional submissions, had it just been a question of extending the deadline for the filing of the further memorandum, given the special circumstances and the little time available for new counsel to review the file, the Court would have been inclined to grant an adjournment especially to enable the Minister to file additional

submissions in response. However, the issue raised by this motion is of another nature. In effect, it is well established that on a judicial review, a decision cannot be impugned on the basis of arguments not raised before the decision-maker unless the new issue is jurisdictional (which it is not here) (*34156 Alberta Limited v. M.N.R.*, 2006 FC 1133, [2007] 1 C.T.C. 110 at para. 16, confirmed on appeal, 2008 FCA 228, [2009] 1 C.T.C. 8 particularly at para. 6)

[27] In this case, not only is the argument new, it is in fact in direct contradiction with what was argued before the IAD. In effect, before the IAD, the applicant said that he expected to be interviewed by the POE officer on his residency obligation (para. 92 of the memorandum of fact and law) at the POE. It is also clear from the Certified Record that the parties generally used expressions such as “secondary examination” or “POE examination” to include in this particular case the examination in respect of the residency obligation and humanitarian considerations relevant only to the subs. 44(1) report based on subs. 41(b) and s. 28 of IRPA. The Court also understands that the new argument could impact on the *Baker* factors analysis, particularly in respect of the legitimate expectation of the parties’.

[28] For these reasons, the motion was dismissed. However, it should be clear that nothing in the present reasons should be understood to mean that had this argument been raised before the IAD, it would have had a real impact on the ultimate decision of the IAD or the determination of this application.

Breach of the applicant's rights under subs. 10(b) of the Charter

[29] Turning now to the first issue raised by the applicant – did the IAD err in finding that there was no breach in respect of subs. 10(b) of the Charter – there is some dispute between the parties at the hearing as to the applicable standard of review. Because it involves the Charter, the respondent simply referred the Court to paras. 50, 51, 55 and 58 in *Dunsmuir* v. *New Brunswick*, 2008 SCC 9, (2008), 329 N.B.R. (2d) 1 (*Dunsmuir*), which appear to call for correctness, whatever the issue raised by the applicant. The applicant's position was more nuanced and involved looking at the nature of the question before the Court.

[30] In his memorandum, the applicant does not per se challenge the legal test applied by the IAD. Rather, he challenges how the IAD applied the legal test set out in the various decisions of the Supreme Court of Canada to the particular circumstances of his case, including how it failed to properly weigh the evidence that established, in his view, that the secondary examination that took place was not "routine" because it went much further than the questioning in *Dehghani*, given that: i) it lasted for several hours; ii) it included the placement of Mr. Kainth in a locked cell (the waiting room); and, iii) his release was subject to a security bond. Reference was also made to allegations such as denial of access to a phone, etc.

[31] In his oral reply, the applicant added that the IAD had failed to appreciate that in *Dehghani*, the Supreme Court of Canada was dealing with a foreign national as opposed to a permanent resident and that part of the examination in the present case was not an examination to determine his right to enter into Canada. Again, here, this is not really an attack on the legal test or construction of

the words “detention” and “arrest” found in subs. 10(b), but on how the test should apply here in light of the differences with the factual matrixes of the precedents.

[32] There is no doubt that the interpretation of subs. 10(b) per se (the legal test) is to be reviewed on the standard of correctness. However, the threshold question here of whether there was “detention” in this particular case is essentially a question of mixed fact and law that is highly fact based and contextual. It should, in my view, be reviewed on the standard of reasonableness (*Lake v. Canada* 2008 SCC 23, [2008] 1 S.C.R. 761 at paras. 34 to 41 and *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3 at paras. 26-41). That said, this issue is not a determinative here for the Court is satisfied that the decision of the IAD was not only reasonable, it was also correct.

[33] First, a simple review of the decision indicates that the IAD clearly understood the legal test it had to apply. Second, the IAD did rely heavily on the decision of the Supreme Court of Canada in *Dehghani* but not because its facts were on all-fours with those in the present case, but because as was argued by both parties before it, it offers a review of the relevant case law, clarifies the applicable principles and sets out the contextual analysis that must be carried out to determine whether or not a particular situation falls within the ambit of subs. 10(b) of the Charter.

[34] It is worth noting that in *Dehghani*, the Supreme Court of Canada itself reached its decision by looking at cases with a fact pattern that could clearly be distinguished; for example it said at para. 40: “while the present case does not concern a search, but rather questioning, an analogy can be

drawn." It is on that basis that both sides were shaping an analogy with *Dehghani* and their arguments focused on whether the questioning that actually took place was "routine" or not.

[35] Even if a permanent resident can choose to be interviewed at a later stage, there is no evidence that it is not in fact usual to conduct the subs. 44(1) examination of permanent residents at the POE. As mentioned, this was never raised as an issue by the applicant. If the process followed is routine, it may be revealing that this is the first time that a breach of the rights afforded by subs. 10(b) of the Charter is alleged. The Court cannot conclude that applying the *Dehghani* reasoning of looking at whether or not the questioning at issue was routine in nature constitutes an error of the IAD in the present circumstances.

[36] Once Mr. Kainth had established his identity and status as a permanent resident he had the right to enter Canada (subs. 27(1) and s. 49 of IRPA). However, the officer was still entitled to voice her concerns about his failure to meet, among other things, his residency obligation and the applicant had to be questioned in that respect either at the airport or at a later stage. The evidence in this case is that she clearly signalled her desire to proceed with the examination at the airport to Mr. Kainth's counsel prior to doing so. No request for adjournment was made, nor was any indication given that counsel needed to consult with Mr. Kainth in this respect or at all. What the officer knew was that counsel had been appointed several months prior to Mr. Kainth's seeking entry into Canada. The calculation of the extent of his absence was quite straightforward and it was reasonable to infer that Mr. Kainth's counsel could not but appreciate that the humanitarian considerations set out in subs. 28(2) of IRPA would necessarily have to be discussed.

[37] There is also uncontradicted evidence that it is the practice of immigration officers to entertain submissions by counsel who have already been appointed and are available during the process – such was the case for applicant's counsel.

[38] One cannot lose sight of the fact that no evidence was filed on behalf of the applicant to contradict the POE officer's evidence as to the content of her conversations with the applicant's counsel. This, even though she had signed an affidavit containing the details of such exchanges and their timing more than a year prior to the hearing before the IAD. This is all part of the context that must be considered for, as noted by the Supreme Court of Canada in *R. v. Therens,* [1985] 1 S.C.R. 613 and in *Dehghani* at para. 21:

> [t]he purpose of s. 10 of the Charter is to ensure that in certain situations a person is made aware of the right to counsel and is permitted to retain and instruct counsel without delay. The situations specified by section 10 – arrest and detention – are obviously not the only ones in which a person may reasonably require the assistance of counsel, but they are situations in which the restraint of liberty might otherwise effectively prevent access to counsel or induce a person to assume that he or she is unable to retain and instruct counsel.

[39] That said, like the IAD, the Court must take a contextual approach to determine if Mr. Kainth was in such a situation. In doing so, again, like the IAD, the Court must weigh various factors and be guided by the existing case law from which analogies and distinctions can be drawn. In doing so, one should avoid focusing on a single factor (*R.* v. *Pomeroy*, 2008 ONCA 521, (2008), 173 C.R.R. (2d) 269 at paras. 22, 31 and 38).

[40] Many of the relevant issues have already been discussed while describing the IAD's decision and the questions put forward by the applicant in this application (see for example, para. 30, above). The difficulty with many of the applicant's arguments is that the evidence does not support several of his factual assertions.

[41] As noted, for the most part it is clear that the IAD preferred the evidence of the POE officer, which was closely cross-examined by the applicant's counsel, to that of the applicant. After a complete review of the Certified Record, the Court concludes that such a position was reasonable. In fact, in order to review this question on the basis of correctness, the Court independently found, on matters where there were contradictions between the evidence of the POE officer and the applicant's testimony, that the former was to be preferred as this evidence was more credible and plausible, taking into consideration all of the facts and documents on file.

[42] To give an example of an assertion where the applicant has not met his persuasive burden, the Court will discuss his allegation that the absence of telephones in the waiting room supports his view that this was a detention cell and that he was denied his requests to call his lawyer.

[43] The evidence is that there are no public phones available to anybody until one reaches the baggage claim area after completing the immigration formalities at the Vancouver Airport. However, the public, including Mr. Kainth, can use cellular phones, should they have one. There is

no policy[8] that would prevent any person sitting in the waiting room in the secondary examination area from using their own phone. The POE officer also testified that in general, during interviews, officers will also provide access to staff phones in order to facilitate the obtention of information relevant to their inquiry.

[44] The POE officer also categorically denied that Mr. Kainth was refused access to a phone or denied a request to call his family or lawyer. In that respect, quite apart from the severe lack of credibility arising from Mr. Kainth's propensity to lie throughout the process and in other contexts, it is not plausible that Mr. Kainth would not have been told during the interview in respect of his residency obligation that the officer had already spoken to his lawyer, if he had indeed asked her to contact said lawyer during that part of the examination. The Court finds that the applicant has simply not met his persuasive burden in that respect.

[45] The applicant relies heavily on the fact that he was put in a locked waiting room to say that his situation was not routine and amounted to something akin to detention. However, the Court understands from the POE officer's evidence during her cross-examination before the IAD that had Mr. Kainth expressed his discomfort of having to wait in such a waiting room, she would have had no objection to have him wait in the larger public area, given that he spoke English and there would have been no difficulty locating him once the administrative process resumed. In my view, it is also clear that the POE officer did not put him in the waiting room to prevent him from leaving the

[8] The POE officer noted however, in her testimony before the IAD, that in some instances where identity and status are in dispute, she would not want a person to warn his alleged contacts in advance of her calls as to what they should say to the officer.

airport, as she made it clear that no one can get through Customs without duly completed immigration papers. This is a fact so well known that the Court could almost have taken judicial notice of it.

[46] The Court is simply not satisfied that, based on the evidence on the record, which includes a floor plan of the premises where the actual detention cells and their configuration are represented, that as alleged Mr. Kainth was put in a "cell".

[47] It is easy to understand why the applicant's counsel took the position before the IAD that all that happened at the airport should be generally referred to as a "secondary examination at the port of entry" for this enabled him to argue that s. 8.4 of the Operation Manual (ENF 4) applied throughout. This also enabled him to bundle together facts such as the initial search he went through when entering the area where the immigration offices and private cubicles are located (prior to his secondary examination in respect of his identity and status) with his waiting in a locked room and the issuance of a security bond, events which took place well after the questioning of Mr. Kainth in respect of subss. 28(1) and (2) was completed, that is the period during which the applicant says he should have had the opportunity to have access to counsel.

[48] But however argued, the Court must consider all these events in their proper context including the fact that it is only after the subs. 44(1) report was actually issued that the POE officer became empowered to set conditions pursuant to subs. 44(3). This was well after the completion of

Mr. Kainth's interview and after his lawyer had confirmed that he expected that bail would be necessary and had advised Mr. Kainth's family accordingly.

[49] One should not trivialize constitutional rights, which are intended as shields for those in need of protection, and not as swords to be used as part of legal strategy. On the facts of this case, the applicant has simply not met his persuasive burden and the Court is not satisfied that a breach of his rights under subs. 10(b) of the Charter has been established.

Breach of the POE officer's duty of fairness

[50] The applicant argues that: i) the POE officer had the duty to actually tell the applicant or his counsel that counsel could attend the interview in person and/or make submissions orally or in writing before the issuance of her subs. 44(1) report; and, ii) that she also had to inquire about his fear of returning to his country of nationality before completing the said report.

[51] The extent of the duty of fairness, even if based on a particular circumstance of a given case, is indeed a question of law that must be reviewed on a standard of correctness (*Cha v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126, [2007] 1 F.C.R. 409 (*Cha*) at para. 16, *Dunsmuir*, at paras. 50, 51, 55 and 58).

[52] The Court is satisfied that the IAD's decision and analysis was correct and contains no reviewable error. In effect, the decision-maker properly came to its decision after considering the five factors set out in *Baker*, at paras. 21 to 28, and applying them to the facts, which included the

interactions that actually took place between the POE officer and Mr. Kainth's counsel prior to the issuance of the subs. 44(1) report and of the removal order.

[53] It is worth noting that the applicant relied heavily on the analysis carried out by Justice Judith Snider in *Hernandez*, but did not contest her findings at para. 72 of said decision that there is no duty on the Minister's representative charged with making a determination pursuant to subs. 44(2) of IRPA to refer a matter to an admissibility hearing (or issue a removal order when a breach of residency obligation is involved) to put the subs. 44(1) report to the applicant for a further opportunity to respond prior to making the decision. On that particular issue, the applicant has not presented any arguments that would justify coming to a different conclusion.

[54] The parties referred to a number of precedents, none of which are on all-fours with the present case. The Court will thus proceed with its own analysis of the *Baker* factors for, among other things, as mentioned by Justice Robert Décary in *Cha* (paras. 21 and 22), the duty of an officer under subs. 44(1) may well vary depending on the status of the person involved, the grounds being reviewed (for example, criminality vs. residency obligation) and the different recourse contemplated in the Act (different right of appeal).

A. The nature of the decision being made and the procedures followed in making it

[55] As mentioned in *Cha* at para. 43:

> [a]s was said by the Supreme Court in *Baker* at paragraph 23, the more the process provided for, the function of the decision-maker, the nature of the decision made and the determination that must be

> made to reach a decision resemble judicial decision making, the more likely it is that the procedural protection will be extensive.

Despite the fact that, pursuant to subs. 28(2) of IRPA, the POE officer had to consider humanitarian and compassionate grounds, her decision is a purely administrative decision that has no final effect and the interview is not a hearing. As noted earlier, the applicant can appeal the removal order that is issued by the Minister's representative who reviewed the POE officer's report before the IAD (subs. 63(3) of IRPA) and he will be entitled to argue his whole case *"de novo"* (subss. 67(1) and (2) of IRPA) with the assistance of counsel and the possibility of presenting new oral and documentary evidence.

[56] This points towards a minimal duty of fairness.

B. The nature of the statutory scheme and the importance of the decision

[57] The POE officer's decision to issue a report has little impact on the applicant unless it is acted upon by the Minister's delegate, pursuant to subs. 44(2). In this particular case, the evidence is that in respect of reports based on a breach of the residency obligations, the reports of this particular officer were acted upon in about 60% of the cases. And again, even when acted upon, the decision of the Minister's delegate to issue a removal order itself has no impact on Mr. Kainth's permanent resident status until his right of appeal has been exhausted (ss. 46-49 of IRPA). This points to a low duty of fairness.

[58] The applicant says that because, pursuant to s. 101 of IRPA [*sic*] (in fact subs. 99(3) of IRPA), he is precluded from making a refugee claim by the very issuance of the removal order, the

duty of fairness here should be greater. I disagree. When one considers the statutory scheme as a whole, the effect of the removal order is not to preclude proper consideration of any danger Mr. Kainth may face in India. Not only can the IAD consider that danger and send the matter back to the Minister's representative, if it so wishes, but also and more importantly, Mr. Kainth will be entitled to have a pre-removal risk assessment pursuant to subs. 112(1) of IRPA prior to his removal.

C. Legitimate Expectation

[59] In his memorandum before the IAD at paras. 92-93, as well as his memorandum before this Court at paras. 96-97, the applicant states that:

> [u]pon being brought into Canada, the Applicant had the expectation of being subject to a permanent resident examination, with the possible consequence of loss of permanent residence.
>
> However, under the current scheme of IRPA, the Applicant was issued a removal order which has the added effect of barring the Applicant from a right to make a refugee claim in Canada. This latter result is an unexpected one for the Applicant in the case at bar (and one which his legal counsel could have explained him). Given this highly unexpected result and the interest of the Applicant in being able to seek Canada's protection, the duty of procedural fairness must be higher at examination hearings.

[60] Thus, the point here, although it is presented in a somewhat ambiguous fashion, is not so much expectations in respect of the issuance of the subs. 44(1) report but rather that the applicant did not expect that the removal order would be issued before he had the time to file his refugee claim.

[61] There is no evidence on file, nor was any argument presented, to explain on what basis the applicant or his counsel could expect a delay between the issuance of the subs. 44(1) report and the issuance of the removal order by the Minister's delegate. The POE officer was not cross-examined at all on this subject. Subs. 99(3) of IRPA is very clear and there is no minimum delay, set out in IRPA or in the *Immigration and Refugee Protection Regulations*, SOR/2002-227 issued thereunder, between the reception of a subs. 44(1) report and a decision by the Minister's delegate under subs. 44(2) of IRPA. For expectations to be legitimate, they must emanate in some way from Citizenship and Immigration Canada' conduct, representations, or the law itself. This factor is neutral in the present case.

D. Choice of procedure by Citizenship and Immigration Canada

[62] While this is not in itself determinative, the Court must take into account and respect the choice of procedures made by the agency itself. The only portion of the Operational Manual in the Certified Record is "ENF 4 – Port of Entry Examination". The right to counsel at the POE examination is only discussed in its s. 8.4. This section should normally be read in such a matter in conjunction with the section entitled "ENF 5 – Writing 44(1) Reports" which was not per se before the IAD except for some extracts which are quoted in *Hernandez* at paras. 64 and 65.

[63] According to this s. 8.4, generally, the policy is not to permit counsel at POE examinations if detention has not occurred. However, this is nuanced by the statement that the right to counsel depends on what transpires after the foreign national is first subject to examination and discusses a

series of potential situations. The applicant argued that the following paragraph directly applied to his situation:

> 1) if restraining devices are used or the foreign national is placed in a holding cell, even temporarily, then an officer should inform the foreign national of the reason for the detention and of their right to counsel;

As explained in these reasons, the Court is not satisfied that the applicant has established that this paragraph of the policy applies directly to his situation. In fact, none of the scenarios described fit directly here, except perhaps *a contrario*, the first note which states:

> - if a foreign national is being examined and the examination does not go beyond what is required to establish admissibility, the foreign national is not entitled to legal counsel;

[64] Obviously, this in and of itself is not sufficient to conclude that the agency's practice or policy in cases such as the one under review is to allow the right to counsel.

[65] In respect of the procedure followed before issuing a subs. 44(1) report, the section found in *Hernandez* at paras. 64 and 65 does not specifically refer to the right to counsel. As mentioned by Justice Snider, the policy appears to include two main elements: i) the right of all persons who are or may be subject to a report to make submissions, either orally during an interview or in writing; and, ii) the right to receive a copy of the report.

[66] The IAD clearly found that as a matter of fact, the POE officer in this case had properly explained the purpose of her inquiry, the concerns she had and the possible effects of her report,

which included removal to India. The IAD also found that she gave Mr. Kainth an opportunity to make any representations he wished to make and gave him a copy of her subs. 44(1) report.

[67] Obviously, here again, the Court must consider the fact that Mr. Kainth's counsel had the opportunity to speak with the POE officer before she issued her report. Clearly, he understood what was at stake, made no representations whatsoever, nor did he ask for an adjournment or to speak to his client. From his comments with respect to the issuance of a security bond, one can reasonably infer that he had no representations to make against the imposition of such a condition or as to the amount of the bond.

[68] Balancing all the factors, the Court finds that: i) there are minimal participatory rights included in the duty of fairness of the POE officer in this case; ii) those rights were respected on the facts of this case; and, iii) the Court is simply not willing to say that here, the duty of fairness incumbent on the officer included expressly confirming with counsel that he had no submissions to make and felt no need for an adjournment or to speak with his client prior to the issuance of the report.

[69] Keeping in mind the undisputed findings of the IAD that Mr. Kainth properly understood the reasons for the interview, the possibility of removal to India and his answers to the POE officer's questions in respect of his refugee claim in the United States (see above, paras. 10 and 22(3)), the Court also agrees with the IAD that the POE officer could, in this matter, reasonably infer that Mr. Kainth was not facing nor fearing any particular danger in India (see paras. 35, 36 and

37 of the decision). She simply had no duty to expressly ask him if he intended to make a refugee claim in Canada.

[70] In view of the foregoing, the Court is satisfied that the application must be dismissed.

[71] The parties have not submitted any questions for certification and the Court agrees that this decision turns on its own unique facts (*Ha*, at para. 40). Thus, no question will be certified.

ORDER

THIS COURT ORDERS that the application is dismissed.

"Johanne Gauthier"
Judge

ANNEX

***Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11**	***Charte canadienne des droits et libertés,* partie I de la *Loi constitutionnelle de 1982,* constituant l'annexe B de la *Loi de 1982 sur le Canada* (R.-U.), 1982, c. 11.**
10. Everyone has the right on arrest or detention	10. Chacun a le droit, en cas d'arrestation ou de détention :
b) to retain and instruct counsel without delay and to be informed of that right	*b*) d'avoir recours sans délai à l'assistance d'un avocat et d'être informé de ce droit
***Immigration and Refugee Protection Act,* S.C. 2001, c. 27**	***Loi sur l'immigration et la protection des réfugiés,* L.C. 2001, c. 27**
27. (1) A permanent resident of Canada has the right to enter and remain in Canada, subject to the provisions of this Act.	27. (1) Le résident permanent a, sous réserve des autres dispositions de la présente loi, le droit d'entrer au Canada et d'y séjourner.
(2) A permanent resident must comply with any conditions imposed under the regulations.	(2) Le résident permanent est assujetti aux conditions imposées par règlement.
28. (1) A permanent resident must comply with a residency obligation with respect to every five-year period.	28. (1) L'obligation de résidence est applicable à chaque période quinquennale.
(2) The following provisions govern the residency obligation under subsection (1):	(2) Les dispositions suivantes régissent l'obligation de résidence :
(*a*) a permanent resident complies with the residency obligation with respect to a five-year period if, on each of a total of at least 730 days in that five-year period, they are	*a*) le résident permanent se conforme à l'obligation dès lors que, pour au moins 730 jours pendant une période quinquennale, selon le cas :

(i) physically present in Canada,

(ii) outside Canada accompanying a Canadian citizen who is their spouse or common-law partner or, in the case of a child, their parent,

(iii) outside Canada employed on a full-time basis by a Canadian business or in the federal public administration or the public service of a province,

(iv) outside Canada accompanying a permanent resident who is their spouse or common-law partner or, in the case of a child, their parent and who is employed on a full-time basis by a Canadian business or in the federal public administration or the public service of a province, or

(v) referred to in regulations providing for other means of compliance;

(*b*) it is sufficient for a permanent resident to demonstrate at examination

(i) if they have been a permanent resident for less than five years, that they will be able to meet the residency obligation in respect of the five-year period immediately after they became a permanent resident;

(ii) if they have been a permanent resident for five years or more, that they have met the residency obligation in respect of the five-year period immediately before the

(i) il est effectivement présent au Canada,

(ii) il accompagne, hors du Canada, un citoyen canadien qui est son époux ou conjoint de fait ou, dans le cas d'un enfant, l'un de ses parents,

(iii) il travaille, hors du Canada, à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale,

(iv) il accompagne, hors du Canada, un résident permanent qui est son époux ou conjoint de fait ou, dans le cas d'un enfant, l'un de ses parents, et qui travaille à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale,

(v) il se conforme au mode d'exécution prévu par règlement;

b) il suffit au résident permanent de prouver, lors du contrôle, qu'il se conformera à l'obligation pour la période quinquennale suivant l'acquisition de son statut, s'il est résident permanent depuis moins de cinq ans, et, dans le cas contraire, qu'il s'y est conformé pour la période quinquennale précédant le contrôle;

examination; and

(*c*) a determination by an officer that humanitarian and compassionate considerations relating to a permanent resident, taking into account the best interests of a child directly affected by the determination, justify the retention of permanent resident status overcomes any breach of the residency obligation prior to the determination.

c) le constat par l'agent que des circonstances d'ordre humanitaire relatives au résident permanent — compte tenu de l'intérêt supérieur de l'enfant directement touché — justifient le maintien du statut rend inopposable l'inobservation de l'obligation précédant le contrôle.

41. A person is inadmissible for failing to comply with this Act

(*b*) in the case of a permanent resident, through failing to comply with subsection 27(2) or section 28.

41. S'agissant de l'étranger, emportent interdiction de territoire pour manquement à la présente loi tout fait — acte ou omission — commis directement ou indirectement en contravention avec la présente loi et, s'agissant du résident permanent, le manquement à l'obligation de résidence et aux conditions imposées.

44. (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.

44. (1) S'il estime que le résident permanent ou l'étranger qui se trouve au 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.

67. (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,

(*a*) the decision appealed is wrong in law or fact or mixed law and fact;

(*b*) a principle of natural justice has not been observed; or

(*c*) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.

67. (1) Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :

a) la décision attaquée est erronée en droit, en fait ou en droit et en fait;

b) il y a eu manquement à un principe de justice naturelle;

c) sauf dans le cas de l'appel du ministre, il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.

(2) If the Immigration Appeal Division allows the appeal, it shall set aside the original decision and substitute a determination that, in its opinion, should have been made, including the making of a removal order, or refer the matter to the appropriate decision-maker for reconsideration.

(2) La décision attaquée est cassée; y est substituée celle, accompagnée, le cas échéant, d'une mesure de renvoi, qui aurait dû être rendue, ou l'affaire est renvoyée devant l'instance compétente.

99. (3) A claim for refugee protection made by a person inside Canada must be made to an officer, may not be made by a person who is subject to a removal order, and is governed by this Part.

99. (3) Celle de la personne se trouvant au Canada se fait à l'agent et est régie par la présente partie; toutefois la personne visée par une mesure de renvoi n'est pas admise à la faire.

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-2081-08
STYLE OF CAUSE:	SIMARDEEP SINGH KAINTH V. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	January 13, 2009
REASONS FOR ORDER AND ORDER:	GAUTHIER J.
DATED:	January 30, 2009

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