Date: 20090401

Docket: IMM-3244-08

Citation: 2009 FC 338

Ottawa, Ontario, April 1, 2009

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

SHERLOCK ALBERTSON HARDWARE

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of a decision by the Immigration and Refugee Board, Appeal Division (IAD) dated July 2, 2008 (Decision), refusing the Applicant's request to continue the stay of his deportation order.

BACKGROUND

[2] The Applicant is a citizen of Jamaica who has a biological child (Olivia) with Justina Botano and a step-son (Joshua) who is the biological child of the Applicant's current wife, Patricia Gayadat.

[3] The Applicant became a permanent resident of Canada on June 14, 1986. He has returned to Jamaica for four brief visits since he was landed in Canada. The Applicant has amassed 15 criminal convictions during his time in Canada, 12 of which occurred prior to the Applicant being granted a stay of the removal order against him.

[4] From February 1992 until October 1999, the Applicant was twice convicted of assault with a weapon, failure to comply with a recognizance four times, assault twice, as well as escaping lawful custody, possession of a weapon, driving with over 80 mg, and failure to stop at the scene of an accident. One of the Applicant's assault convictions involved his former girlfriend as the victim.

[5] From March 1993 until November 2001, the Applicant was convicted of five provincial offences: three offences under the *Highway Traffic Act* and two offences under the *Liquor Licence Act.* Four of these convictions were made against the Applicant in absentia and he made arrangements to pay all the fines levied against him within 60 days.

[6] The Applicant was found criminally inadmissible to Canada under paragraph 36(1)(a) of the Act and was ordered deported from Canada after his July 31, 1996 conviction for assault with a weapon contrary to section 267 of the *Criminal Code* of Canada.

[7] However, the IAD granted the Applicant a stay of his deportation order for three years at a June 24, 2004 hearing, subject to his abiding by the following terms and conditions:

1. Inform the Department of Citizenship and Immigration (Department) and the Immigration Appeal Division in writing in advance of any change in your address.

   The address of the Department is:
   Citizenship and Immigration, The Greater Toronto Enforcement Centre,
   6900 Airport Road, P.O. Box 290, Mississauga, Ontario L4V 1E8.

   The address of Immigration Appeal Division is:
   74 Victoria Street, Suite 400, Toronto, Ontario, M5C 3C7.

2. Provide a copy of your passport or travel document to the Department or, if you do not have a passport or travel document, complete an application for a passport or a travel document and to provide the application to the Department.

3. Apply for an extension of the validity period of any passport or travel document before it expires, and provide a copy of the extended passport or document to the Department.

4. Not commit any criminal offences.

5. Respect all parole conditions and any court orders.

6. Keep the peace and be of good behaviour.

[8] The June 24, 2004 IAD decision stated that a key factor in granting the stay of removal was the possibility of rehabilitation and the non-likelihood of the Applicant re-offending. The IAD did not find that the Applicant's convictions were overly serious. As well, the IAD noted that the

Applicant's last criminal conviction occurred in 1999 and that it had been over four years since he had offended.

[9] The IAD sent the Applicant and the Minister a Notice of Interim Reconsideration of Appeal dated April 17, 2007, which indicated that a closed review of the stay granted to the Applicant would be considered on June 24, 2007. The Applicant was directed to provide the Minister with a written statement of his compliance with the terms and conditions of his stay order no later than 20 days prior to June 24, 2007, but the Applicant failed to provide a statement of compliance. Counsel for the Minister requested an oral review while noting that the Applicant had been charged and convicted of three subsequent criminal offences on May 24, 2007, which included impaired driving, assault (upon his wife) and a failure to comply with bail.

[10] The Minister alleged that the Applicant had failed to keep the peace and be of good behaviour, had failed to report a change of address to immigration officials, and had failed to provide an updated copy of his Jamaican passport, thus violating subsections 251(b) and (c) of the *Immigration and Refugee Protection Regulations*, SOR 2002-227 (Regulations). The Minister applied under paragraph 68(2)(*d*) of the Act to reconsider the IAD's earlier decision and to cancel the stay of execution of the removal order against the Applicant. The oral review of the Applicant's stay was held on June 9, 2008.

[11] The assault upon the Applicant's spouse involved the Applicant punching his wife on the right side of her face and throat. He then forced his way into the washroom where his wife was

hiding from him in fear, and began to strangle, kick and slap her. At the hearing, the Applicant and his wife indicated that they would like to reconcile in the future and the wife said that she regretted having reported the Applicant's criminal misconduct. The wife suffers from a health condition that necessitates the drainage of fluid from her brain two to three times each year, after which procedure she is disabled for about three days. The Applicant is precluded from contacting his wife as part of his current probation order.

[12] The Applicant was injured in a car accident in November 2001 and has had a history of lower back pain for the past 12 years. He was able to work on a part-time basis as a personal care worker and as a glass worker from 2002 until September 2006, until he was injured on the job. He received benefits from the Workplace Safety and Insurance Board (WSIB) from October 2006 until January 2008, when his benefits ceased. He appealed the denial of his WSIB benefits. He is currently not working and resides with his parents while being supported by several of his five sisters who are in Canada. The Applicant has acquired no assets in Canada and is not in debt.

[13] The Applicant desires to resume his work as a personal care giver. His family wishes him to remain in Canada and has filed letters of support.

[14] At the June 9, 2008 hearing, the Applicant intended to call his wife and his father as witnesses. However, his father did not attend the hearing, but provided letters of support. The Applicant's former counsel requested an adjournment during the hearing to permit the Applicant's father's testimony. However, that request was objected to and the hearing went ahead.

DECISION UNDER REVIEW

[15] The Officer found that the Applicant's account of the incidents leading up to his conviction of impaired driving were implausible and that the Applicant had assaulted his wife knowing that she suffers from a medical condition. The Officer concluded that the Applicant could not control his temper, had not benefited from his previous anger management courses, and had violated his bail.

[16] The Officer found that the Applicant had been given a chance by the IAD to prove that he could be a law-abiding citizen and obey the terms and conditions imposed upon him, but he had not done these things. The Officer found that the Applicant's criminal conduct outweighed the positive aspects of his case, including his close relationship with his family, daughter and stepson. Therefore, the Officer quashed the stay order and dismissed the Applicant's appeal.

ISSUES

[17] The Applicant raises the following issues:

1) Whether the IAD made reviewable errors by engaging in a "microscopic" assessment of issues that were peripheral to the claim, and arrived at unreasonable inferences on credibility that were not supported by facts or logic;
2) Whether the IAD breached the principles of fairness in failing to adequately assess the best interests of the Applicant's children, Joshua and Olivia;
3) Whether the IAD erred in law in failing to provide adequate reasons for its decision;

4) Whether the IAD breached the principles of natural justice by denying the Applicant's request for an adjournment to admit his father's oral testimony in support of his appeal.

STATUTORY PROVISIONS

[18] The following provisions of the Act are applicable in these proceedings:

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;
Enforceable removal order	**Mesure de renvoi**
48. (1) A removal order is enforceable if it has come into force and is not stayed.	**48.** (1) La mesure de renvoi est exécutoire depuis sa prise d'effet dès lors qu'elle ne fait pas l'objet d'un sursis.
Effect	**Conséquence**
(2) If a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and it must be	(2) L'étranger visé par la mesure de renvoi exécutoire doit immédiatement quitter le territoire du Canada, la mesure devant être appliquée dès que

enforced as soon as is reasonably practicable.	les circonstances le permettent.
68. (1) To stay a removal order, the Immigration Appeal Division must be satisfied, taking into account the best interests of a child directly affected by the decision, that sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.	**68.** (1) Il est sursis à la mesure de renvoi sur preuve qu'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) Where the Immigration Appeal Division stays the removal order …	(2) La section impose les conditions prévues par règlement et celles qu'elle estime indiquées, celles imposées par la Section de l'immigration étant alors annulées; les conditions non réglementaires peuvent être modifiées ou levées; le sursis est révocable d'office ou sur demande.
(*d*) it may cancel the stay, on application or on its own initiative.	

[19] The following provision of the Regulations is applicable in this proceeding:

251. If the Immigration Appeal Division stays a removal order under paragraph 66(*b*) of the Act, that Division shall impose the following conditions on the person against whom the order was made:	**251.** Si la Section d'appel de l'immigration sursoit à une mesure de renvoi au titre de l'alinéa 66*b*) de la Loi, elle impose les conditions suivantes à l'intéressé :
(*a*) to inform the Department and the Immigration Appeal Division in writing in advance of any change in the person's address;	*a*) informer le ministère et la Section d'appel de l'immigration par écrit et au préalable de tout changement d'adresse;

(*b*) to provide a copy of their passport or travel document to the Department or, if they do not hold a passport or travel document, to complete an application for a passport or a travel document and to provide the application to the Department;	*b*) fournir une copie de son passeport ou titre de voyage au ministère ou, à défaut, remplir une demande de passeport ou de titre de voyage et la fournir au ministère;
(*c*) to apply for an extension of the validity period of any passport or travel document before it expires, and to provide a copy of the extended passport or document to the Department;	*c*) demander la prolongation de la validité de tout passeport ou titre de voyage avant qu'il ne vienne à expiration, et en fournir subséquemment copie au ministère;

STANDARD OF REVIEW

[20] In *Dunsmuir v. New Brunswick*, 2008 SCC 9 (*Dunsmuir*), the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review": *Dunsmuir* at paragraph 44. Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of "reasonableness" review.

[21] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may

adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[22] The Applicant's first issue involves a negative credibility finding. In the past, it has been held that the standard of patent unreasonableness should apply to issues of credibility: *Perera v. Canada (Minister of Citizenship and Immigration)* 2005 FC 1069 (*Perera*). As long as the inferences drawn by the tribunal are not so unreasonable as to warrant the intervention of the court, its findings are not open to judicial review: *Aguebor v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 732 (F.C.A.) (*Aguebor).*

[23] The Applicant's second issue involves the consideration of the best interests of the child. In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraph 61 (*Baker*), the Supreme Court of Canada said that reasonableness *simpliciter* is the appropriate standard for such considerations.

[24] In light of the Supreme Court of Canada's decision in *Dunsmuir* and the previous jurisprudence of this Court, I find the standard of review applicable to issues one and two raised by the Applicant to be reasonableness. When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir* at paragraph 47. Put another way, the Court should only intervene if the Decision was unreasonable in

the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[25] The Applicant has also raised procedural fairness issues to which the standard of review is correctness: *Suresh v. Canada (Minister of Citizenship and Immigration)* 2002 SCC 1.

ARGUMENT

The Applicant

Failure to Consider the Totality of the Evidence

[26] The Applicant says that the IAD had an obligation to consider all aspects of his case: *Immigration Appeal Divisions Online Manual*, section 9.2. He says that the following non-exhaustive factors from *Ribic v. Canada (Minister of Employment and Immigration)*, [1985] I.A.B.D. No. 4 are relevant:

(a) The seriousness of the offence leading to the Deportation Order: If the offences are of a serious nature and there is a concern that the person is a danger to the public, the Board will often consider a psychological report dealing with the reasons for the behavior, and will examine whether the person has in fact rehabilitated himself and the likelihood of the further commission of offences;

(b) The possibility of rehabilitation and the risk of re-offending;

(c) The length of time spent in Canada and the degree to which the applicant is established here;

(d) The family in Canada and the dislocation to the family that deportation will cause;

(e) The support available to the applicant within the family and the community; and

(f) The degree of hardship that would be caused to the applicant by his or her return to the country of nationality.

[27] The Applicant submits that the IAD focused on the Applicant's criminality and failed to consider the totality of the evidence concerning his circumstances. The IAD is entitled to conclude that an applicant is not credible because of implausibilities in the evidence, as long as its inferences are not unreasonable and its reasons are set out in "clear and unmistakable terms": *Hilo v. Canada (Minister of Employment and Immigration)*, [1991] F.C.J. No. 228 (F.C.A.) and *Aguebor*; *Zhou v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 1087 (F.C.A.). As well, the IAD is entitled to make reasonable findings based on implausibilities, common sense and rationality: *Shahamati v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 415 (F.C.A.) at paragraph 2.

[28] The Applicant says, however, that not every kind of inconsistency or implausibility in the evidence can support a negative finding of credibility and it is improper for the IAD to base its findings on extensive "microscopic" examination of issues irrelevant or peripheral to an applicant's claim: *Attakora v. Canada (Minister of Employment and Immigration)*, [1989] F.C.J. No. 444 (F.C.A.) (*Attakora*) at paragraph 9 and *Owusu-Ansah v. Canada (Minister of Employment and Immigration)*, [1989] F.C.J. No. 442 (F.C.A.) (*Owusu-Ansah*).

[29] Adverse plausibility findings should only be made in the clearest of cases, where the facts are inherently implausible: *Fok v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 800 (F.C.A.). As well, a tribunal cannot base credibility findings on irrelevant considerations: *Attakora* and *Owusu-Ansah.* Also, the inconsistencies must be serious and related to matters that are sufficiently relevant to the issues being adjudicated in order to make an adverse credibility finding: Lorne Waldman, *Immigration Law and Practice* (Toronto: Butterworths Canada Ltd., 1992) at p. 814 and *Djama v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 531.

[30] The Applicant says it is an error in law for the IAD to make a decision without having regard to the totality of the evidence: *Owusu-Ansah; Toro v. Canada (Minister of Employment and Immigration)*, [1981] 1 F.C. 652 (F.C.A.) and *Irarrazabal-Olmedo v. Canada (Minister of Employment and Immigration)*, [1982] 1 F.C. 125 at 126 (F.C.A.). The Applicant alleges that, in the present case, the following evidence was ignored:

1) The extensive period of time that the Applicant has been in Canada;
2) The Applicant's establishment in Canada including, but not limited to, his family in Canada (mother, father and five (5) sisters) and the hardships they would suffer if the Applicant was removed from Canada;
3) The extent of the support that is available to the Applicant in his community in Canada. His father's letter indicates that he has had discussions with criminality; and his mother's letter details the Applicant's involvement in her life and how he assisted her in locating employment and taking her around the city;

4) The reliance which the Applicant's wife, Patricia, places on the emotional and physical support that the Applicant provides. The wife provided oral evidence during the hearing that the Applicant does everything for her as if "she was a baby";

5) The intent of the parties (the Applicant and his wife) to reconcile in order to keep their family together;

6) The lack of ties that the Applicant has in Jamaica. The Applicant indicated that he had only been back to Jamaica on four (4) previous occasions when his mother was living in that country and that he had no remaining family members in Jamaica;

7) The hardship associated with the Applicant's injuries as set out in correspondence from Dr. Klein. The Applicant has sustained serious injuries that have thwarted his ability to work as a personal support worker;

8) The Applicant's oral evidence regarding his remorse and rehabilitation. In particular, the Applicant stated that he was embarrassed about the assault that he committed against his wife and that he had lost control. The Applicant stated that he had turned himself in to the authorities once it had come to his attention that there was a warrant for his arrest. He undertook an anger management course and a course on domestic violence wherein he learnt the following tools to assist him with his anger management issues: self control, time outs, and conflict resolution… . The Applicant's wife, Patricia, also stated that she was not concerned about the Applicant assaulting her again. She indicated in her oral evidence that if counseling was necessary, she would engage in it and do "whatever is necessary" to put her family

back together again. This was evidence that related to the issue of rehabilitation and recidivism which was ignored by the IAD;

9) The evidence that related to the best interests of the affected children. The Applicant led the following evidence which was ignored by the IAD:

   a. Olivia's mother, Justina…stated that she and the Applicant have joint custody of Olivia, that he is actively involved with Olivia's schooling, Olivia and Mr. Hardware do a number of recreational activities together, and that "Olivia has cried many times when she heard that her father was leaving the country";

   b. The letters from Olivia's school teachers/principals from Silverthorn Junior Public School.

10) The Applicant's wife, Patricia, also described the Applicant's relationship to Olivia as follows: "[I]t is a very loving relationship…they go rollerblading, we would cook dinner…do the traditional family thing and he sees her every other weekend." Patricia also stated that the Applicant cares for his nieces and nephews over the weekends.

[31] The Applicant submits that the IAD made perverse and capricious findings without evidence, ignored evidence, misstated evidence and denied him procedural rights so that the Decision ought to be set aside.

Best Interests of the Child

[32] The Applicant submits that there was no analysis in the Decision of the best interests of Olivia or Joshua. Also, there was no analysis of how the Applicant's deportation would affect Olivia's mother, Justina, as well as Olivia and Joshua, if the Applicant was uprooted from their lives. The Applicant says that the IAD did not provide detailed and cogent explanations, which were alive, alert and attentive to the best interests of the children.

[33] The Applicant notes that there are immigration guidelines available to officers to assist them in rendering their decisions. The Applicant also relies upon *Baker* regarding section 25 of the Act and the analysis of the best interests of the children.

[34] The Applicant cites and relies upon *Love v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 1904 at paragraphs 12-18:

> The result on this application for judicial review will turn solely on the Counsellor's evaluation of the best interests of the children although a number of other issues are raised on the material before the Court.
>
> In *Hawthorne v. Canada (Minister of Citizenship and Immigration)*, Justice Décary, for the majority, wrote at paragraph [4]:
>
> > The "best interests of the child" are determined by considering the benefit to the child of the parent's non-removal from Canada as well as the hardship the child would suffer from either her parent's removal from Canada or her own voluntary departure should she wish to accompany her parent abroad. Such benefits and hardship are two sides of the same coin, the coin being the best interests of the child.

Justice Décary continued at paragraph [6]:

> To simply require that the officer determine whether the child's best interests favour non-removal is somewhat artificial -- such a finding will be a given in all but a very few, unusual cases. For all practical purposes, the officer's task is to determine, in the circumstances of each case, the likely degree of hardship to the child caused by the removal of the parent and to weigh this degree of hardship together with other factors, including public policy considerations, that militate in favour of or against the removal of the parent.

Justice Evans, concurring in the result, and adopting the phrase "alert, alive and sensitive" from the majority reasons of the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration),* wrote at paragraph [32] of the reasons in Hawthorne:

> ... Rather, the interests of the child must be "well identified and defined" ... and "examined ... with a great deal of attention" ... . For, as the Supreme Court has made clear, the best interests of the child are "an important factor" and must be given "substantial weight" ... in the exercise of discretion under subsection 114(2).[citations omitted]

Justice Evans' reference to subsection 114(2) is of course to that provision of the Immigration Act. That provision has been superceded by subsection 25(1) of the *Immigration and Refugee Protection Act* which, while carrying forward the discretionary authority of the Minister to grant landing from within Canada on humanitarian and compassionate grounds, specifically incorporates an obligation to take into account the best interests of a child directly affected by the considerations there before the Minister.

At paragraph [44] of Hawthorne, Justice Evans concluded that, on the facts before him, the Officer's, here the Counsellor's, treatment of the issues concerning the child, here the children, satisfied him that the Officer was not "alert, alive and sensitive" to the child's best interests. I reach the same conclusion here. The Applicant's and Ms. Williams' four (4) children have not lived for long in their relatively short lives without some positive influence from the Applicant. The only evidence from the children themselves is that, at least in the years following the Applicant's incarceration in

> 1997, that incarceration flowing from his last criminal conviction, his positive influence has been substantially more than minimal. That evidence is confirmed by Ms. Williams who attests that, in the absence of the Applicant, she could not support their four (4) children and her fifth child and that she would have to resort to welfare.
>
> I am satisfied that a substantially more thorough-going analysis on the part of the Counsellor than is demonstrated by the materials before the Court would be required to meet the "best interests of the children" requirement on the facts of this matter.
>
> Counsel for the Respondent noted the burden that conclusions such as the one that I have reached here places on the Respondent. Once again, In *Hawthorne*, Justice Evans responded succinctly to this concern. He wrote at paragraph [52]:
>
> > The requirement that officers' reasons clearly demonstrate that the best interests of an affected child have received careful attention no doubt imposes an administrative burden. But this is as it should be. Rigorous process requirements are fully justified for the determination of subsection 114(2) applications that may adversely affect the welfare of children with the right to reside in Canada: vital interests of the vulnerable are at stake and opportunities for substantive judicial review are limited.

[35] The Applicant submits that a more thoroughgoing analysis was required by the IAD in this matter in order to comply with the standard set by the Court in the assessment of the best interests of the child: *Jack v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1189 (F.C.T.D.). The Applicant concludes on this issue by stating that the IAD's Decision was unreasonable.

Failure to Provide Adequate Reasons

[36] The Applicant also submits that the IAD decided that the factors against the Applicant outweighed those in his favour. However, the IAD does not explain why one set of factors outweighs the other. The Applicant submits that such an explanation is required because there is so much at stake for him. The reasons are inadequate and constitute an error in law. The Applicant relies upon *R. v. Sheppard*, [2002] 1 S.C.R. 869 (QL) which sets out 10 factors for consideration by an Appellate Court in deciding the sufficiency of a trial judge's reasons. The Applicant finds the following three relevant:

> …An accused person should not be left in doubt about why a conviction has been entered. Reasons for judgment may be important to clarify the basis for the conviction but, on the other hand, the basis may be clear from the record. The question is whether, in all the circumstances, the functional need to know has been met.
>
> The lawyers for the parties may require reasons to assist them in considering and advising with respect to a potential appeal. On the other hand, they may know all that is required to be known for that purpose on the basis of the rest of the record.
>
> …
>
> Reasons perform an important function in the appellate process. Where the functional needs are not satisfied, the appellate court may conclude that it is a case of unreasonable verdict, an error of law, or a miscarriage of justice within the scope of s. 686(1)(a) of the Criminal Code, depending on the circumstances of the case and the nature and importance of the trial decision being rendered.

[37] The Applicant also cites and relies upon *Canada (Minister of Citizenship and Immigration) v. Mann*, [2004] F.C.J. No. 1611, citing *Via Rail v. National Transportation Agency*, [2001] 2 F.C. 25 at paragraph 63:

> …The duty to give reasons is only fulfilled if the reasons provided are adequate. What constitutes adequate reasons is a matter to be determined in light of the particular circumstances of each case. However, as a general rule, adequate reasons are those that serve the functions for which the duty to provide them was imposed. In the words of my learned colleague Evans J.A., "[a]ny attempt to formulate a standard of adequacy that must be met before a tribunal can be said to have discharged its duty to give reasons must ultimately reflect the purposes served by a duty to give reasons."
>
> The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion. Rather, the decision maker must set out its findings of fact and the principal evidence upon which those findings were based. The reasons must address the major points in issue. The reasoning process followed by the decision maker must be set out and must reflect consideration of the main relevant factors.

[38] The Applicant concludes that the IAD's reasons in the present case were inadequate.

Breach of Principles of Natural Justice

[39] On this issue the Applicant submits that there was a breach of natural justice because the IAD did not allow an adjournment to admit his father's oral testimony in support of his appeal. The Applicant cites Rule 48 of the *Immigration Appeal Division Rules* which states as follows:

CHANGING THE DATE OR TIME OF A PROCEEDING	CHANGEMENT DE LA DATE OU DE L'HEURE DE LA PROCÉDURE
Application to change the date or time of a proceeding	Demande de changement de la date ou de l'heure d'une procédure
48. (1) A party may make an application to the Division to	**48.** (1) Toute partie peut demander à la Section de

change the date or time of a proceeding.	changer la date ou l'heure d'une procédure.
Form and content of application	Forme et contenu de la demande
(2) The party must	(2) La partie :
(*a*) follow rule 43, but is not required to give evidence in an affidavit or statutory declaration; and	*a*) fait sa demande selon la règle 43, mais n'a pas à y joindre d'affidavit ou de déclaration solennelle;
(*b*) give at least six dates, within the period specified by the Division, on which the party is available to start or continue the proceeding.	*b*) indique dans sa demande au moins six dates, comprises dans la période fixée par la Section, auxquelles elle est disponible pour commencer ou poursuivre la procédure.
Application received two days or less before proceeding	Procédure dans deux jours ouvrables ou moins
(3) If the party's application is received by the recipients two working days or less before the date of a proceeding, the party must appear at the proceeding and make the request orally.	(3) Dans le cas où les destinataires reçoivent la demande deux jours ouvrables ou moins avant la procédure, la partie doit se présenter à la procédure et faire sa demande oralement.
Factors	Éléments à considérer
(4) In deciding the application, the Division must consider any relevant factors, including	(4) Pour statuer sur la demande, la Section prend en considération tout élément pertinent. Elle examine notamment :
(*a*) in the case of a date and time that was fixed after the Division consulted or tried to consult the party, any exceptional circumstances for allowing the application;	*a*) dans le cas où elle a fixé la date et l'heure de la procédure après avoir consulté ou tenté de consulter la partie, toute circonstance exceptionnelle qui justifie le changement;

(*b*) when the party made the application;

b) le moment auquel la demande a été faite;

(*c*) the time the party has had to prepare for the proceeding;

c) le temps dont la partie a disposé pour se préparer;

(*d*) the efforts made by the party to be ready to start or continue the proceeding;

d) les efforts qu'elle a faits pour être prête à commencer ou à poursuivre la procédure;

(*e*) in the case of a party who wants more time to obtain information in support of the party's arguments, the ability of the Division to proceed in the absence of that information without causing an injustice;

e) dans le cas où la partie a besoin d'un délai supplémentaire pour obtenir des renseignements appuyant ses arguments, la possibilité d'aller de l'avant en l'absence de ces renseignements sans causer une injustice;

(*f*) the knowledge and experience of any counsel who represents the party;

f) dans le cas où la partie est représentée, les connaissances et l'expérience de son conseil;

(*g*) any previous delays and the reasons for them;

g) tout report antérieur et sa justification;

(*h*) whether the time and date fixed for the proceeding were peremptory;

h) si la date et l'heure qui avaient été fixées étaient péremptoires;

(*i*) whether allowing the application would unreasonably delay the proceedings; and

i) si le fait d'accueillir la demande ralentirait l'affaire de manière déraisonnable;

(*j*) the nature and complexity of the matter to be heard.

j) la nature et la complexité de l'affaire.

Duty to appear at the proceeding

Obligation de se présenter aux date et heure fixées

(5) Unless a party receives a decision from the Division allowing the application, the

(5) Sauf si elle reçoit une décision accueillant sa demande, la partie doit se

party must appear for the proceeding at the date and time fixed and be ready to start or continue the proceeding.	présenter à la date et à l'heure qui avaient été fixées et être prête à commencer ou à poursuivre la procédure.

[40] The Applicant submits that his father's evidence was necessary and may have changed the outcome of the Appeal. He says, therefore, that the adjournment should have been granted.

The Respondent

[41] The Respondent submits that, when considering a cancellation of a stay of a removal order, the IAD must be satisfied, taking into account the best interests of any child directly affected by the decision, that sufficient humanitarian and compassionate considerations warrant special relief in light of all of the circumstances in the case. The IAD must also consider the *Ribic* factors. These factors are questions of fact. In *Chieu v. Canada (Minister of Citizenship and Immigration)* 2002 SCC 3 at paragraphs 40-41, 46-49 and 66 it was held that the IAD has considerable expertise in determining the weight to be given to all of the factors it considers when exercising its discretionary jurisdiction. The Supreme Court of Canada also recognized in *Chieu* that it was Parliament's intention that the IAD should have a broad discretion to allow permanent residents facing removal to remain in Canada if it would be equitable to do so.

[42] The Respondent submits that, in the case at bar, the IAD set out the relevant factors and considered them in relation to the Applicant's circumstances.

Reasons for Decision

[43] The Respondent submits that the conclusion that the IAD came to was reasonably open to it: *Olaso v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1265 at paragraph 17 (F.C.T.D.). No evidence was ignored by the IAD and the IAD discussed the length of time the Applicant had been in Canada and his establishment and ties to Canada.

Best Interests of the Child

[44] The Respondent submits that the IAD's Decision and reasons have to be looked at cumulatively, and in the context of the previous decision of the IAD regarding the stay of the deportation order: *Gittens v. Canada (Minister of Public Safety and Emergency Preparedness)* 2008 FC 373 and *Legault v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 457 (F.C.A.). The IAD previously considered the best interests of the children in staying the Applicant's deportation. The IAD also considered the best interests of the Applicant's children when they made the proposition for the Applicant to remain in Canada. The IAD weighed the "positive aspects" of the Applicant's application, including his close relationships with his daughter and stepson.

[45] The Respondent submits that while the IAD is required to consider the best interests of the child, this duty arises when it is sufficiently clear from the material submitted that the application relies on that factor: *Owusu-Ansah* at paragraph 5. However, in the present case the Applicant failed to raise the impact of his potential deportation on his children.

Adequate Reasons

[46] The Respondent submits that perfection is not the standard to be applied on a judicial review of the adequacy of reasons: *Lara v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 264 (F.C.T.D.) at paragraph 9. The Respondent submits that the reasons provided by the IAD were adequate.

Denial of the Adjournment Request

[47] On this point, the Respondent submits that the IAD reasonably declined the Applicant's request for an adjournment for his father to attend the hearing. The Respondent relies upon *Tripathi v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1232 which held that it was not a breach of natural justice to deny an adjournment of an appeal to permit the attendance of two witnesses. It was within the discretion of the IAD to refuse the adjournment: *Prassad v. Canada (Minister of Employment and Immigration)*, [1989] 1 S.C.R. 560 and *Howard v. Stoney Mountain Institution*, [1984] 2 F.C. 642.

ANALYSIS

The Wife and Child

[48] The Applicant says that the IAD's reasons and conclusions with regard to the best interests of Olivia and hardship to the Applicant's wife were both unreasonable and inadequate.

[49] It is clear from the Decision that the IAD was alert, alive and sensitive to Olivia's interests because the IAD addressed the relevant evidence at paragraph 28 and found that "the best interests of the appellant's daughter would be directly affected by the decision." At paragraph 39, however, the IAD concludes that "the appellant's criminal conduct outweighs the positive aspects of his case including his close relationship with his family, daughter and stepson."

[50] Clearly then, the IAD considered the impact of the Applicant's removal upon Olivia but concluded that her interests could not outweigh the Applicant's criminal conduct. The Applicant says this was not enough and that the IAD should have explained why it chose to strike the balance in the way it did.

[51] The Federal Court of Appeal in *Legault v. Canada (Minister of Citizenship and Immigration)* 2002, 212 DLR (4th) 139 at paragraph 12 has provided the following guidance:

> **12** In short, the immigration officer must be "alert, alive and sensitive" (*Baker*, para. 75) to the interests of the children, but once she has well identified and defined this factor, it is up to her to determine what weight, in her view, it must be given in the circumstances. The presence of children, contrary to the conclusion of Justice Nadon, does not call for a certain result. It is not because the interests of the children favour the fact that a parent residing illegally in Canada should remain in Canada (which, as justly stated by Justice Nadon, will generally be the case), that the Minister must exercise his discretion in favour of said parent. Parliament has not decided, as of yet, that the presence of children in Canada constitutes in itself an impediment to any "refoulement" of a parent illegally residing in Canada (see *Langner v. Minister of Employment and Immigration* (1995), 184 N.R. 230 (F.C.A.), leave to appeal refused, [1995] S.C.C.A. No. 241, SCC 24740, August 17, 1995).

[52] It is well established that the duty to give reasons is only fulfilled if the reasons provided are adequate. Once again, the Federal Court of Appeal has provided comprehensive guidance on this issue in *VIA Rail Canada Inc. v. National Transportation Agency*, [2001] 2 F.C. 25 at paragraphs 17-22:

> **17** The duty to provide reasons is a salutary one. Reasons serve a number of beneficial purposes including that of focussing the decision maker on the relevant factors and evidence. In the words of the Supreme Court of Canada:
>
> > Reasons, it has been argued, foster better decision making by ensuring that issues and reasoning are well articulated and, therefore, more carefully thought out. The process of writing reasons for decision by itself may be a guarantee of a better decision.
>
> **18** Reasons also provide the parties with the assurance that their representations have been considered.
>
> **19** In addition, reasons allow the parties to effectuate any right of appeal or judicial review that they might have. They provide a basis for an assessment of possible grounds for appeal or review. They allow the appellate or reviewing body to determine whether the decision maker erred and thereby render him or her accountable to that body. This is particularly important when the decision is subject to a deferential standard of review.
>
> **20** Finally, in the case of a regulated industry, the regulator's reasons for making a particular decision provide guidance to others who are subject to the regulator's jurisdiction. They provide a standard by which future activities of those affected by the decision can be measured.
>
> **21** The duty to give reasons is only fulfilled if the reasons provided are adequate. What constitutes adequate reasons is a matter to be determined in light of the particular circumstances of each case. However, as a general rule, adequate reasons are those that serve the functions for which the duty to provide them was imposed. In the words of my learned colleague Evans J.A., "[a]ny attempt to formulate a standard of adequacy that must be met

> before a tribunal can be said to have discharged its duty to give reasons must [page36] ultimately reflect the purposes served by a duty to give reasons."
>
> **22** The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion. Rather, the decision maker must set out its findings of fact and the principal evidence upon which those findings were based. The reasons must address the major points in issue. The reasoning process followed by the decision maker must be set out and must reflect consideration of the main relevant factors.

[53] In the present case, the Applicant's complaint is that the reasoning process followed by the IAD in deciding that his criminality outweighed the interests of Olivia is not set out and does not show how the relevant factors were balanced.

[54] In my view, however, the reasoning process for the IAD's conclusions is easily understood from a reading of the Decision as a whole in the context of the Applicant's history. This was a review of an earlier decision to grant the Applicant a stay of removal upon certain conditions. It had been made clear to the Applicant that the positive factors in his case warranted giving him a chance to stay in Canada, but only if he fulfilled the stated conditions and, in particular, avoided further criminality. The Applicant subsequently breached the conditions upon which the stay was based and engaged in serious criminal conduct. The IAD reviewed the stay and all of the *Ribic* factors and decided that the positive factors, including Olivia's interests, could no longer be used by the Applicant to shield him from the consequences of his continued criminality.

[55] In this context, I do not think that anything further in the way of reasons was required. The Applicant fully understood that the stay he was granted was conditional upon his fulfilling the conditions. He understood that the positive factors, fully identified and assessed, could not be used to shield him a second time. The Decision re-examines the *Ribic* factors but it must be obvious to the Applicant that he has been given his chance and that he cannot remain in Canada and behave the way he has chosen to behave, even if that means that his daughter's interests, if considered in isolation, are a positive factor to keep him here.

Hardship to the Applicant's Wife

[56] Once again, the IAD identifies the hardship to the Applicant's wife and concludes that this is another "positive aspect" that cannot shield him from the consequences of his criminality. These matters are identified and addressed at paragraphs 14, 26 and 39 of the Decision. And, once again, in the context of the Decision as a whole and the history of this case, it is obvious why the IAD reached this conclusion. The reasoning is plain and the conclusion is reasonable.

Evidence Ignored

[57] The Applicant has provided a long list of evidence that he claims the IAD either ignored or misconstrued. My review of the Decision leads me to conclude that this evidence was not ignored. The IAD is careful to recite the full facts and to identify the "positive aspects" of the Applicant's claim. In my view, what the Applicant is really complaining about is that, in weighing all of the

evidence, and applying the *Ribic* criteria, the IAD decided that his recidivism meant that the stay of his deportation could no longer be justified.

Breach of Natural Justice

[58] The Applicant says that the IAD breached the principles of natural justice by failing to grant him an adjournment to admit his father's oral testimony.

[59] The Applicant says that his father's oral testimony was important and his father's letters of support were not sufficient because the IAD did not accept the information and the reasoning in the letters, or the IAD minimized the concerns raised in applying the *Ribic* factors, so that his father's oral testimony might have persuaded the IAD to come to different conclusions and strike a different balance.

[60] Rule 48(4)(*e*) from the IAD Rules of Procedure says that "in the case of a party who wants more time to obtain information in support of the party's arguments, the ability of the Division to proceed in the absence of that information without causing an injustice" is one of the factors that should be considered when a request for an adjournment is made.

[61] It is also well established that a refusal to grant an adjournment may amount to a denial of procedural fairness if the refusal is unreasonable in the circumstances. See Jones & De Villars, *Principles of Administrative Law,* 4th Edition, Thompson & Carswell, 2004 at page 309.

[62] However, there is no absolute right to an adjournment and the IAD clearly has the jurisdiction to grant or refuse an adjournment on proper grounds.

[63] The IAD gave its reasons for refusing the adjournment: “The appellant’s father knew of the hearing. He filed two letters in support of the appellant’s case. He chose not to attend the hearing.”

[64] No explanation was, or has been, offered as to why the father failed to appear to give oral evidence and left the IAD to consider his letters.

[65] In *Gittens v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 373 at paragraphs 7-10, Justice Strayer dealt with a refusal to adjourn to enable a psychologist to testify:

> **7** I think the only issue of substance raised by the Applicant is that the IAD might have denied him procedural fairness by refusing to grant the adjournment to enable the psychologist to testify *viva voce*. The authoritative factors for consideration by the IAD in deciding in whether or not to grant an adjournment are set out in the Immigration Appeal Division Rules, subsection 48(4) which states as follows:
>
> > 48(4) In deciding the application, the Division must consider any relevant factors, including
> > (*a*) in the case of a date and time that was fixed after the Division consulted or tried to consult the party, any exceptional circumstances for allowing the application;
> > (*b*) when the party made the application;
> > (*c*) the time the party has had to prepare for the proceeding;
> > (*d*) the efforts made by the party to be ready to start or continue the proceeding;

(*e*) in the case of a party who wants more time to obtain information in support of the party's arguments, the ability of the Division to proceed in the absence of that information without causing an injustice;
(*f*) the knowledge and experience of any counsel who represents the party;
(*g*) any previous delays and the reasons for them;
(*h*) whether the time and date fixed for the proceeding were peremptory;
(*i*) whether allowing the application would unreasonably delay the proceedings; and
(*j*) the nature and complexity of the matter to be heard.

* * *

48(4) Pour statuer sur la demande, la Section prend en considération tout élément pertinent. Elle examine notamment :
a) dans le cas où elle a fixé la date et l'heure de la procédure après avoir consulté ou tenté de consulter la partie, toute circonstance exceptionnelle qui justifie le changement;
b) le moment auquel la demande a été faite;
c) le temps dont la partie a disposé pour se préparer;
d) les efforts qu'elle a faits pour être prête à commencer ou à poursuivre la procédure;
e) dans le cas où la partie a besoin d'un délai supplémentaire pour obtenir des renseignements appuyant ses arguments, la possibilité d'aller de l'avant en l'absence de ces renseignements sans causer une injustice;
f) dans le cas où la partie est représentée, les connaissances et l'expérience de son conseil;
g) tout report antérieur et sa justification;
h) si la date et l'heure qui avaient été fixées étaient péremptoires;
i) si le fait d'accueillir la demande ralentirait l'affaire de manière déraisonnable;
j) la nature et la complexité de l'affaire.

I would first observe that the opening words of the subsection direct the Division to consider "relevant factors" including the ones

enumerated. This does not mean that the IAD must expressly consider each of the factors enumerated whether relevant or not to the particular case. I do not take that to be a direction to the IAD to recite in its reasons a formulaic consideration of each enumerated point whether relevant or not. The spirit of this exercise is, I think, described in *Siloch v. Canada (Minister of Employment and Immigration)* (FCA), [1993] F.C.J. No. 10 where Justice Décary in speaking of a similar situation not governed by the specific rules said that in exercising his discretion whether to grant an adjournment or not, an adjudicator should direct his attention to factors "such as" and then listed a number of factors similar to those in subsection 48(4) of the Immigration Appeal Division Rules.

8 I believe a careful reading of the IAD decision would indicate that attention was paid to the relevant factors referred to in the Appeal Division Rules, subsection 48(4). With respect to (a), the tentative date of December 19, 2006 was set in consultation with counsel. Thereafter counsel made several requests for an adjournment all for the same reason, namely that Dr. Russell could not be available on December 19th. It is apparent that the IAD did not think that was such an exceptional circumstance as to require an adjournment, having regarded to the fact that Dr. Russell's written opinion would be available. Factor (b) was therefore not important: the request for an adjournment was made in a timely fashion and was dismissed on the merits, the IAD feeling that the written report would suffice. Relevant to these considerations is the fact that the Applicant and his counsel knew since September that it was the intention of the IAD to go ahead and they therefore had ample time to prepare. Therefore factors (c), (d), and (e) were irrelevant. Factor (f) was also irrelevant: there was no question as to the knowledge and experience of counsel for the Applicant nor that she was in any way unavailable to represent her client at the time in question. Factors (g) and (i) were obviously considered by the IAD, having regard to the seven years that the Applicant had been under order of deportation subject to stays whose conditions he had not respected. Factor (h) is irrelevant on its terms. Factor (j) was obviously taken into account by the IAD in considering that the issues which the psychologist could usefully address could be adequately treated by the written report.

9 I believe it was open to the trier of fact to reach that conclusion, considering the nature of the Tribunal and the fact that it often receives evidence in writing. Counsel for the Applicant suggests that a quite different result might have flown from having the

> psychologist testifying in person. The fundamental issue was whether the Applicant's many breaches of the terms of his stay, involving criminal and quasi criminal acts, could simply be treated as a "relapse". It was certainly open to the IAD to come to an independent conclusion on that and it was not bound to follow the pronouncements of the psychologist whether written or oral. I am not satisfied that the Applicant suffered any injustice from not having the oral evidence of Dr. Russell placed before the IAD: see *Tripathi v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1232.
>
> **10** The Court owes no deference to the Tribunal in respect of questions of procedural fairness: *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539. However, I am satisfied that the hearing by the IAD was procedurally fair even though an adjournment was refused. It must be kept in mind that this was not a case where, by reason of refusal of an adjournment, the Applicant had no counsel. There are numerous cases where a refusal to adjourn because counsel is not available have been held to be procedurally unfair because the presence of counsel adds a quality to the whole presentation which may not be available otherwise. In the present case the issue had to do with one witness, a witness who had provided his opinion in writing, and which the Panel clearly considered seriously. I might add also that the Panel had before it Dr. Russell's *curriculum vitae* which disclosed that he was not an authority on recidivism of criminals but rather on family relations. This would be a factor to be considered if the matter were sent back for re-hearing and which suggests to me that there would be no point in sending it back.

[66] In the present case, the issue, once again had to do with one witness who had clearly articulated his support for the Applicant in writing, and that letter was considered by the IAD. The Applicant simply complains that his father might have been more persuasive in giving oral testimony and might have changed the IAD’s mind.

[67] Taking all of these factors into account, I do not think it can be said that the refusal was unreasonable on these facts. The Applicant has not shown that the refusal prevented him from

presenting his case adequately or that the hearing was rendered unfair. The father's position was clearly before the IAD in writing and was taken into account in the Decision. In the absence of affidavit evidence from the Applicant or his father explaining the situation and setting out what difference oral testimony would have made, there is nothing to suggest that the IAD might have been persuaded to strike a different balance if an adjournment had been allowed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. This application is dismissed.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:	Mr. David Kingwell APPLICANT Mr. Tamrat Gebeyehu RESPONDENT
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