Federal Court  Cour fédérale

**Date: 20090728**

**Docket: IMM-276-09**

**Citation: 2009 FC 762**

**Ottawa, Ontario, July 28, 2009**

**PRESENT: The Honourable Mr. Justice Beaudry**

**BETWEEN:**

**ASHIQUR RAHAMAN KHAN**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Act*, S.C. 2001, c. 27 (the Act), by the Applicant, of a decision by the Immigration Appeal Division of the Immigration and Refugee Board (the Board) dated December 30, 2008, where the Board dismissed the Applicant's appeal brought under subsection 63(3) of the Act with respect to a deportation order issued against him on September 20, 2007.

**Issue**

[2] The only issue in the case at bar is whether the Board committed a reviewable error in failing to consider relevant factors in determining whether there were sufficient humanitarian grounds to warrant special relief.

[3] The judicial review application shall be allowed for the following reasons.

**Factual Background**

[4] The Applicant is a 53 year old citizen of Bangladesh who had worked as a civil engineer in the army for 25 years. He has been married since 1984 to Nasima Ashiq, a 43 year old permanent resident of Canada. The Applicant and his wife have two sons: Shafiqur, a 22 year old Canadian citizen who is a student at the University of Ottawa and Abidur, an 18 year old permanent resident who has applied for citizenship and who was finishing high school at the time of the hearing.

[5] Although the Applicant never worked as an engineer outside the army, his engineering diploma is recognized in his country. Prior to his arrival to Canada, the Applicant retired from the Armed Forces.

[6] On October 10, 2003, the Applicant landed in Canada as a permanent resident. He went back to Bangladesh in December 2003 and brought his family to Canada on February 2, 2004. The Applicant has no other family in Canada.

[7] On September 7, 2005, the Applicant was convicted of sexual assault perpetrated in August 2004 while he was on duty as a security guard in charge of a woman who was hospitalized following a suicide attempt.

[8] Following his conviction, the Applicant could no longer work as a security guard and had different odd jobs. While living in Ontario, he was required to register himself in the Ontario Sex Offender registry.

[9] In September 2006, the Applicant moved to Quebec with his wife and younger son and started a full time program at Concordia University to pursue a Masters degree in engineering, which he predicted would be completed in August 2008.

[10] On September 20, 2007, a deportation order was issued against the Applicant following an admissibility hearing held pursuant to a referral under subsection 44(2) of the Act dated June 28, 2006 and a report made under subsection 44(1) and paragraph 36(1)a) of the Act, dated May 11, 2006. The report was made following the Applicant's conviction for sexual assault pursuant to section 271 of the *Criminal Code*. The Applicant filed an appeal from the deportation order to the Immigration Appeal Division on September 20, 2007.

[11] Before the Board, the Applicant conceded that the removal order made against him was valid in law.

**Impugned Decision**

[12] On December 30, 3008, the Board dismissed the Applicant's appeal on the ground that he did not meet his burden of proof to demonstrate that there were sufficient humanitarian and compassionate grounds to grant him special relief.

[13] The Applicant contended that there were sufficient humanitarian and compassionate grounds to allow the appeal or grant a stay with conditions. The Minister did not agree and since the Applicant did not take issue with the legal validity of the removal order, the Board found that the deportation order was valid in law.

[14] The Applicant based his appeal to the Board on the grounds that, taking into account the best interests of the children directly affected by the decision, sufficient compassionate and humanitarian considerations warrant relief in light of all the circumstances of the case, as provided in subsection 67(1)c) of the Act.

[15] The criteria identified in the Board's decision in *Ribic v. Canada (Minister of Employment and Immigration)*, No. T84-09623, [1985] I.A.B.D. No. 4 (QL) have been approved by the Supreme Court of Canada in *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84 and more recently in *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, 385 N.R. 206 at paras. 7 and 65, as the proper guides in determining whether the Board should exercise its discretionary relief under subsection 67(1)c) of the Act. These factors

are not exhaustive and the weight given to each of them will vary depending on the circumstances of the case. They are as follows:

a) the seriousness of the offences leading to the removal order;

b) the possibility of rehabilitation;

c) the length of time spent and the degree to which the individual facing removal is established, in Canada;

d) the family and community support available to the individual facing removal;

e) the family in Canada and the dislocation to the family that the removal would cause; and

f) the degree of hardship that would be caused to the individual facing removal to his country of nationality.

[16] The Board analyzed each *Ribic* factor and found the Applicant's testimony to be vague and imprecise. There were inconsistencies to which the Applicant did not provide satisfactory explanations, particularly in relation to his rehabilitation.

**Relevant Legislation**

[17] The relevant legislation can be found at Annex A at the end of this document.

**Standard of Review**

[18] The Applicant proposes that the Court adopt the standard of review set out in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 but cites *Marte v. Canada (Minister of*

*Citizenship and Immigration)*, 2009 FC 155 at para. 11, [2009] F.C.J. No. 200 (QL) to add: "But, on the other hand, a breach of procedural fairness is cause to set the resultant decision aside, unless there is no possible way that another outcome could have been reached.".

[19] In *Chieu* at paras. 90-91, the Supreme Court confirmed that the factors set out in *Ribic* remain the proper ones for the Board to consider. The Applicant submits that the Board must consider any hardships the Applicant could potentially face if returned to his country and determine if they are sufficient to alter the previous balance of relevant factors and thereby permit the Applicant to remain in Canada.

[20] In the case at bar, the Board's decision rests entirely on the exercise of its jurisdiction pursuant to paragraph 67(1)c) of the Act as to whether there were sufficient humanitarian and compassionate considerations to warrant special relief in light of all the circumstances of the case. The Respondent submits that this Court must determine whether the Board's decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law in the context of a humanitarian and compassionate application (*Dunsmuir* at para. 47; *Khosa* at para. 59; *Sharma v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 277, [2009] F.C.J. No. 339 (QL) at paras. 50-51; *Dudhnath v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 386, [2009] F.C.J. No. 458 (QL) at paras. 15-17).

[21] Recently, in *Khosa*, the Supreme Court of Canada held that the applicable standard of review when reviewing the equitable jurisdiction of the Immigration Appeal Division

(subsection 67(1)c) of the Act) is reasonableness. As a result, this Court should only intervene if the decision does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir* at para. 47).

[22] As reiterated by this Court, the Board is entitled to consider the list of factors set out in *Ribic* and may also consider other factors and the Board's findings regarding humanitarian and compassionate considerations merit curial deference (*Badhan v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1050, 132 A.C.W.S. (3d) 1164 at para. 11; *Mendiratta v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 293, 137 A.C.W.S. (3d) 1001 at para. 18). It is well recognized that the weight given to the evidence is within the Board's competence. In *Qiu v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 15, I wrote that: and it is not the role of this Court to second guess the decisions of the Board with respect to the weight assigned to the various factors considered by it (*Qiu v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 15, 226 F.T.R. 178 at para. 37; see also *Gliga v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1336, 134 A.C.W.S. (3d) 467).

[23] While it is true that the Court should not reweigh the evidence, it must intervene when reviewable errors are demonstrated. This attracts the reasonableness standard which will be applied here.

**Analysis**

**[24]** At paragraph 49 of its decision (page 12 tribunal's record), the Board writes "No evidence of hardship was submitted to demonstrate that the appellant would encounter following his deportation". The evidence is to the contrary. The Applicant provided details of the hardship for him, his wife and his family they would suffer if he was returned to his country.

**[25]** At paragraph 31 of the decision (page 9 of the tribunal's record) the Board states: "Because the psychological assessments or letters provided are inconclusive with regards to the appellant's problems and possibly of re-offending, the tribunal concludes that the appellant has not demonstrated, on a balance of probabilities, that he has taken the necessary steps to ensure that he is on a rehabilitation path" (my underlining). Again, this is not supported by the evidence, especially the psychological report from Dr. Valenzuela (page 147 to 153 of the tribunal's record).

[26] This report indicates: "He realizes that he has committed an irresponsible act, one which had the potential to put his life in disarray" (page 149). At page 152, it can be read: "When asked whether he realized the inappropriateness of his behaviour he stated that "it was absolutely his fault". One of the conclusion of the psychologists at page 153 is "On the basis of Mr. Khan profound regret at his thoughtless act and, considering he has no other antecedent of having infringed the law anywhere either in Canada or Bangladesh he is unlikely to be a danger to Canadian society in the sense that it is improbable that he would again infringe the law or commit a criminal act" (my underlining).

[27] The errors committed by the Board are determinative and the Court is of the opinion that its intervention is warranted.

[28] The parties did not submit any questions for certification and none arise.

## JUDGMENT

**THIS COURT ORDERS that** the application for judicial review be allowed. The matter is sent back for redetermination by a newly constituted Board. No question is certified.

"Michel Beaudry"
Judge

## ANNEX A

## Relevant Legislation

*Immigration and Refugee Protection Act*, S.C. 2001, c. 27

36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for

(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;

36. (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :

a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;

44. (1) An officer who is of the opinion that a permanent 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.

(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.

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) 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.

63. (3) A permanent resident or a protected person may appeal to the Immigration Appeal Division against a decision at an examination or admissibility hearing to make a removal order against them.

63. (3) Le résident permanent ou la personne protégée peut interjeter appel de la mesure de renvoi prise au contrôle ou à l'enquête.

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

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

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.

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.

Criminal Code, R.S., 1985, c. C-46

271. (1) Every one who commits a sexual assault is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding ten years; or

(b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

(2) [Repealed, R.S., 1985, c. 19 (3rd Supp.), s. 10]

271. (1) Quiconque commet une agression sexuelle est coupable :

a) soit d'un acte criminel et passible d'un emprisonnement maximal de dix ans;

b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire et passible d'un emprisonnement maximal de dix-huit mois.

(2) [Abrogé, L.R. (1985), ch. 19 (3e suppl.), art. 10]

**FEDERAL COURT**

**NAME OF COUNSEL AND SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | IMM-276-09 |
| **STYLE OF CAUSE:** | **ASHIQUR RAHAMAN KHAN and THE MINISTER OF CITIZENSHIP AND IMMIGRATION** |
| **PLACE OF HEARING:** | Montreal, Quebec |
| **DATE OF HEARING:** | July 21, 2009 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | Beaudry, J. |
| **DATED:** | July 28, 2009 |

**APPEARANCES:**

| | |
|---|---|
| Stephen Fogarty<br>(514) 726-4516 | FOR APPLICANT |
| Michèle Joubert<br>(514) 496-4071 | FOR RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Stephen Fogarty<br>Montreal, Quebec | FOR APPLICANT |
| John H. Sims, Q.C.<br>Deputy Attorney General of Canada | FOR RESPONDENT |