Date: 20080122

Docket: IMM-6078-06

Citation: 2008 FC 77

Ottawa, Ontario, January 22, 2008

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

ASHLEY FRANCISCO RODRIGUES

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] Four issues arise out of this judicial review application by Ashley Francisco Rodrigues (the "applicant"), a 24 year old citizen of India and a permanent resident of Canada since June 22, 1997 when he came to this country at the age of 14 with his family. He seeks to set aside the October 27, 2006 decision of the Immigration Appeal Division (the "IAD" or the "tribunal") who dismissed his appeal from a deportation order made against him on April 7, 2005 pursuant to paragraph 36(1)(a)

of the *Immigration and Refugee Protection Act* (IRPA). Specifically the IAD refused to stay the execution of the deportation order.

[2] Before the IAD, Mr. Rodrigues did not contest the legal validity of his deportation order. His appeal to the tribunal engaged its discretionary authority under section 68 of the *IRPA* to stay the deportation order "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". As will be seen, the tribunal refused to exercise its humanitarian and compassionate (H&C) jurisdiction in favour of the applicant.

[3] Paragraph 67(1)(c) and subsection 68(1) of *IRPA* read:

67. (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,	67. (1) Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :
…	…
(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.	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.
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	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.

circumstances of the case.

[4] The issues raised are:

- A preliminary issue raised by counsel for the respondent to the effect the Court should not hear the applicant's argument the tribunal's decision should be set aside because his former representative at the tribunal's hearing was incompetent. His representative was an immigration consultant apparently retained by his solicitor for the purpose of his appeal to the IAD. Counsel for the respondent states this issue had not been raised for consideration in the applicant's material seeking leave to appeal the tribunal's decision;

- If the Court decides to hear the issue, whether the tribunal's decision should be set aside because is his former representative before the tribunal was incompetent on the basis of the Supreme Court of Canada's decisions in *R. v. G.D.B.*, [2000] 1 S.C.R. 520 coupled with its recent decision in *Charkaoui v. Minister of Citizenship and Immigration*, [2007] S.C.J. 9 at paragraphs 53, 63 and 64;

- Whether the tribunal itself breached the principle of procedural fairness or natural justice in the manner it handled the hearings; and

- Whether the tribunal erred in law in failing to properly consider all of the evidence before it, especially the evidence on foreign hardship.

Facts

[5] The applicant was born in Kuwait in 1983. He is not a citizen of Kuwait but of India. He immigrated to Canada on June 22, 1997 with his parents. Aside from having lived for two years at an English boarding school in India, he has had no contact with Indian culture, has no relatives or friends there and does not speak the languages spoken in India except English. He has a younger brother aged 16 at the time of the hearing before the IAD.

[6] On January 18, 2002, before *IRPA* came into force, he was convicted of two counts of breaking and entering a dwelling house, an offence under the *Criminal Code of Canada* punishable by a maximum term of imprisonment of at least 10 years. For this offence, he received a 4 months conditional sentence on each count and 12 months of probation. This crime led to an admissibility hearing and a deportation order in April 2004.

[7] The applicant's other conviction arose from an incident in October 2003. On June 19, 2006, he was convicted of aggravated assault and possession of a weapon for which he was sentenced to a period of 2 years less 40 days. He has now served that sentence and has been released from detention.

The tribunal's decision

[8] In reaching its decision, the tribunal stated the onus was on the applicant to show why he should not be removed from Canada. It held, in addition to the best interest of a child directly affected, the I.A.D.'s decision in *Ribic* as confirmed in the Supreme Court of Canada's decision in

Chieu v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 84 outlined the following number of non exhaustive factors which should be considered in the exercise of its discretionary H&C jurisdiction namely:

(a) the seriousness of the offence or offences leading to the removal order;

(b) the possibility of rehabilitation or, alternatively, the circumstances surrounding the failure to meet the conditions of admission;

(c) the length of time spent, and the degree to which the appellant is established in Canada;

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

(e) the family and community support available to the appellant;

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

[9] The tribunal wrote: "Weight given to each of these factors can vary depending on the circumstances of the case. In deciding this appeal, I have considered all of these factors, the best interests of a child [his brother] directly affected by the decision, and have taken into account all of the circumstances of this case. I have also considered all of the testimony and documentary evidence, and the submissions of the parties".

[10] The tribunal also held in deciding the appeal, “I have an obligation to consider the objectives of *IRPA* which include an objective “to protect the health and safety of Canadians and to maintain the security of Canadian society.” It noted in addition to the crime that led to the deportation order, the applicant was also convicted of aggravated assault and weapons dangerous observing these two crimes post-dated the crime which led to the deportation and arose out of an incident in which a victim was assaulted with a baseball bat and a hammer by a number of individuals including the applicant. The victim was hospitalized with a fractured skull. The tribunal found because of the length of that sentence and the number of the applicant’s crimes: “the overall criminality in this appeal to be very serious. Serious criminality always weighs the negative factor in the H&C balance … I assign this particular negative factor very heavy weight”.

[11] The tribunal then analysed the rehabilitation factor holding despite the remorse expressed at the hearing and his parents’ written supporting statements, it was not persuaded he was advancing towards rehabilitation and this was particularly worrisome given the very serious criminality present. The tribunal ruled while his counsel submitted he was in counselling, “there is no actual evidence before me of any counselling”. The tribunal then referred to a report of March 15, 2004 concluding the applicant did not realize the seriousness of the crime which led to his deportation and did not accept responsibility for it. The tribunal observed, both in the applicant’s testimony and statements and in the statements of his parents: “a tendency for all of them to blame the appellant’s criminality on others – e.g. the “wrong crowd.” I find that to be a tell-tale indication that none of them truly accept that the appellant himself is responsible for his own crimes. For these reasons, I find that the appellant remains at substantial risk of re-offending.”

[12] In terms of the establishment factor, the tribunal mentioned he was studying liberal arts at the University of Toronto but was not persuaded he was established in Canada. It wrote: “He has not been in Canada all that long – less then ten years, and I have no documentary evidence before me to persuasively establish any sort of work history.”

[13] The tribunal then found there were no interests of a child that are directly affected by its decision. It noted he had a 16-year old younger brother which he was not supporting financially. It stated the applicant claimed his brother’s best interests were affected on the basis he is a “role model”. It ruled: “My finding in response: given criminal history, the appellant is, in my view, a bad role model. I therefore find that it would be, at best, neutral, or, more probably even better for the appellant’s brother’s best interests for this appeal to be dismissed.”

[14] It concluded that all factors analyzed up to this point in its reasons: “weighs negative in the humanitarian and compassionate balance.” Looking at “the other side of the scales”, the tribunal said: “I do find several significant positive factors.” It then referred to his family’s support and to the fact his parents both gave statements in support and appeared at the hearing prepared to testify. It recognized there will be significant family dislocation which seemed clear from the parents’ statements and that of the appellant there is mutual love between the applicant, his parents and his brother. It also recognized that: “There will also be significant hardship to the appellant.” It accepted the fact, while he is a citizen, he had not been to India for a long time. It accepted the fact he had no relatives in India and English was his only language. Having said this, the tribunal wrote:

"However, I note that this hardship is ameliorated somewhat by the fact that the appellant did go to boarding school in Madras when he was a child."

[15] Before expressing its conclusion, the tribunal stated: "No other factor or circumstance was alleged that would merit my consideration in deciding this appeal." Its conclusion is expressed at paragraphs 19 and 20 of its decision as follows:

> [19] Weighing all of the factors above in the balance, while I find the positive factors significant, I also find that they are outnumbered by the negative factors and that their combined positive weight is insufficient to counter the heavy combined weight of the negative factors found, particularly in light of the deleterious combination of very serious criminality and a substantial risk of re-offence. I therefore find that the overall humanitarian and compassionate balance tilts substantially negative. [Emphasis mine.]
>
> [20] Stays of deportation are, by their very nature, special relief. However, I find the overall humanitarian and compassionate balance to weigh negative enough as not to merit any kind of special relief. If the criminality in this appeal were less serious or the rehabilitation evidence more persuasive, I might have found the scales to balance close enough as to merit the granting of a stay. However, with those two factors, both tilting negative as discussed, the stay outcome clearly carries far too much risk for me to find that disposition appropriate. I therefore do not grant a stay of deportation." [Emphasis mine.]

Analysis

(a) The Standard of Review

[16] The standard of review of a decision of the IAD to refuse to grant a stay pursuant to its H&C jurisdiction has recently been settled by the Federal Court of Appeal in *Khosa v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 24. The standard of review is reasonableness. This standard would apply to the fourth issue.

[17] A decision is an unreasonable one if it is a decision, to use the words of Justice Iacobucci in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997], 1 S.C.R. 748: "that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination."

[18] The other issues raised in this case touch on questions of fairness, jurisdiction and law are to be gauged on the correctness standard because no deference is owed to the tribunal.

(b) Discussion and Conclusions

Issue no. 1 – The preliminary issue

[19] I deal briefly with the preliminary issue raised by counsel for the Minister. She urged I not entertain the applicant's argument on the incompetency of the consultant who represented him before the IAD because that issue was not raised as a ground in the applicant's application for leave from this Court. The leave application was prepared by Max Chaudhary, a barrister and solicitor. The issue of the consultant's incompetency was raised for the first time by Lorne Waldman in the applicant's further memorandum of fact and law. Counsel for the Minister relied upon Justice Gibson's decision in *Arora v. Canada (Minister of Citizenship and Immigration)*, IMM-5901-99, January 10, 2001 followed by the Chief Justice's decision in *Garcia v. the Minister of Citizenship and Immigration*, 2006 FC 645.

[20] As I read both of these cases and I conclude it is a matter of discretion whether the Court will allow a party to raise an issue for the first time in a further memorandum. Both of my colleagues held that, in the particular circumstances before them, it would be inappropriate to do so.

[21] The discretion in this Court to hear such an issue is analogous to the power which the Federal Court of Appeal has to hear on appeal an issue raised for the first time. In *Benitez v. the Minister of Citizenship and Immigration*, 2007 FCA 199, Justice Evans ruled that an appellant may not normally raise issues for the first time on an appeal, because that would put the appellate court in the position of having to decide an issue without the benefit of the opinion of the lower court. He added the role of an appellate court is generally confined to examining the decision of the court below for reversible error. However, he noted there were exceptions referring to the Federal Court of Appeal's decision in *Stumf v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 148. The Federal Court of Appeal focused on two factors: lack of prejudice to the Minister and whether the designation of a representative in the case could have affected the outcome. It was satisfied there was a lack of prejudice and the outcome of the case could have been affected.

[22] In this case, the issue of the consultant's competence is central to the question whether the applicant had a fair hearing. Moreover, there was no prejudice to the Minister; the Minister's counsel fully addressed the issue in her further memorandum of argument. Counsel for the Minister did not request any adjournment in the circumstances to address the issue which had not been raised on leave.

[23] My analysis of the Court's discretionary power to hear argument on a point not raised in an applicant's leave application is similar to Justice Dawson's reasoning in *Al Mansuri v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 22 concluding the Court had a discretionary power in the circumstances and listing a number of non exhaustive factors which

should be considered recognizing that relevancy and weight will vary in the circumstances of each case.

[24] In the circumstances, I reject the Minister's preliminary objection and will deal with the issue of the consultant's competency.

Issue no. 2 – The consultant's incompetency

[25] Both counsel agreed the test for the consultant's incompetency governing the matter before me was as set out by Justice Major on behalf of the Supreme Court of Canada in *R. v. G.D.B.*, [2000] 1 S.C.R. 520 at paragraphs 26 to 29:

> 26 The approach to an ineffectiveness claim is explained in Strickland v. Washington, 466 U.S. 668 (1984), per O'Connor J. The reasons contain a performance component and a prejudice component. For an appeal to succeed, it must be established, first, that counsel's acts or omissions constituted incompetence and second, that a miscarriage of justice resulted.
>
> 27 Incompetence is determined by a reasonableness standard. The analysis proceeds upon a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. The onus is on the appellant to establish the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The wisdom of hindsight has no place in this assessment.
>
> 28 Miscarriages of justice may take many forms in this context. In some instances, counsel's performance may have resulted in procedural unfairness. In others, the reliability of the trial's result may have been compromised.
>
> 29 In those cases where it is apparent that no prejudice has occurred, it will usually be undesirable for appellate courts to consider the performance component of the analysis. The object of an ineffectiveness claim is not to grade counsel's performance or professional conduct. The latter is left to the profession's self-governing body. If it is appropriate to dispose of an ineffectiveness claim on the

> ground of no prejudice having occurred, that is the course to follow (Strickland, supra, at p. 697). [Emphasis mine.]

[26] In *G.D.B.*, above, the Court came to the conclusion there was no miscarriage of justice or prejudice to the convicted appellant because he had been acquitted on the most serious charge by the tactical decision of his defense counsel not to use a particular piece of exculpatory evidence because such use would incriminate his principal witness who was the accused's spouse.

[27] In the case before me, the badges of the incompetence of the consultant, Mr. Aaron Vuppal, were set out in the affidavit of Max Chaudhary dated September 13, 2007; the affidavit of the applicant's father who expressed his surprise that he and his wife were not called as witness to support his son's appeal and the affidavit of Ms. Faruk who detailed Mr. Vuppal's membership in the Canadian Society of Immigration Consultants (CSIC) and his subsequent revocation on October 3, 2006 on the grounds that he did not meet the Society's membership criteria. None of the deponents were cross-examined.

[28] Mr. Chaudhary outlined the following factors which he said shows the applicant did not receive a fair hearing on his appeal to the IAD:

- The lack of documentary evidence disclosure prior to or during the hearing on February 23, 2006. The only documentary disclosure consisted of two short statements from the applicant's parents. In particular, Mr. Vuppal did not provide copies of any of the courses that the applicant had undertaken as part of the rehabilitation process while in prison. He did not provide copies of the anger

management courses or any of the other rehabilitation courses. He did not obtain a psychological assessment dealing with the likelihood of the applicant committing further offences. Mr. Chaudhary states that: "All of this disclosure is routine in these cases and is essential to a proper representation by counsel and is what I would do routinely and would expect from any lawyer working as an employee with me." Mr. Chaudhary states that he had discussed these matters with Mr. Vuppal and believed that he too was complying with the normal practices before the IAD and only learned of his failure in this case when the matter was brought to his attention by the new counsel retained to represent him; [Emphasis mine.]

- The fact Mr. Vuppal, in chief, only asked the applicant three questions, they were:

(1) "Sir, would you please describe your feelings about all of your previous convictions." to which the applicant answered: "I completely regret getting involved in these situations. I am really sorry."

(2) "And are you, would you tell us something about your breach, how the breach occurred in?" [The breach was a breach of his bail conditions not to associate with certain persons.] and,

(3) "And so did you show good behavior if the panel (inaudible) conditions?" to which the applicant answered: "Definitely, I will do anything."

- Mr. Chaudhary states, in his affidavit, Mr. Vuppal failed to ask questions about the central issues related to the case including whether or not the applicant would face hardship upon return to India, a country where the applicant had never lived except for three years when he was a child when he lived at the boarding school. Mr. Vuppal did not explore whether the applicant had feelings of remorse, his understanding of why he had committed the offences, his understanding of the seriousness of the offences or his appreciation of the harm these offences caused to society. He did not explore the issues related to the hardship on deportation, hardship at being separated from his parents and any of the other matters related to the humanitarian issues that were before the IAD. Mr. Chaudhary states: "This too is far short of what I would do or what I would expect a reasonably competent counsel before the IAD to do.";

- After the applicant's examination by the IAD member and by counsel for the Minister, Mr. Vuppal advised the tribunal he had no further questions;

- The fact he did not call the applicant's parents to expand on their very short written statement which Mr. Chaudhary states did not touch upon key aspects of the issues that were relevant for the issue of hardship. Mr. Chaudhary states: "Again, in my practice I would have called the parents to give extensive evidence on the prospects of rehabilitation, the impact of removal on the family here and on the applicant given that the family has absolutely no ties or relatives in India.";

- The lack of any substantive and relevant submissions particularly when he knew the Minister's position was that the applicant's appeal should be dismissed i.e. the applicant should not be granted a stay from his removal to India;

- The fact Mr. Vuppal did not attend the reconvened hearing of the tribunal fixed for June 6, 2006. The February 23, 2006 hearing had been adjourned to a date to be fixed because, while the applicant had been convicted of the October 2003 aggravated assault charge, he had not been sentenced. Nor had an outstanding charge against him for possession of marijuana been heard and disposed of;

- The fact Mr. Vuppal did not object to the procedure of written submissions on the sentence imposed for the aggravated assault conviction after he had initially insisted an oral hearing should take place on that sentence so that the applicant could testify. Mr. Chaudhary states, in his affidavit, Mr. Vuppal's written submissions were extremely poor and did nothing to resolve the issues related to the previous submissions. He states the additional submissions failed to deal with any of the central issues of the case such as removal to India, rehabilitation, remorse or the likelihood that the applicant would not commit further offences in the future. Mr. Chaudhary states that in his view these submissions and representation fell far below what would be reasonably expected of a competent counsel so as to result in the applicant being denied a fair hearing. He states: "Indeed the representation is so inadequate that in my view the applicant was denied a fair hearing."

[29] My review of the certified tribunal record reveals another badge of incompetence: Mr. Vuppal did not reply to the Minister's submissions on the sentencing for the aggravated assault conviction. The Minister's submissions focused on the gravity of the offence, the harm suffered by the victim, the applicant's lack of remorse and his central role in the assault leading to the Minister's central conclusion that to protect the Canadian society he should be deported. Mr. Vuppal also failed to file and deal with the sentencing decisions of the criminal courts following conviction. (See the discussion on this point in *G.D.B.*, above.)

[30] Counsel for the Minister argued a number of points to show the concerns raised regarding the adequacy of counsel did not rise to the level of breach of natural justice. She makes the point that in order to succeed the applicant must establish that his representative's conduct was incompetent, and that as a result, a miscarriage of justice occurred noting that general dissatisfaction with the quality of representation or regret over the litigation strategies pursued does not constitute incompetence rising to the level of a breach of fundamental justice.

[31] First, she states, in essence, the applicant is challenging the litigation strategy that he may or may not have endorsed. She observes his affidavit is silent on the issue of how instructed his counsel to proceed and that it was unclear if there was inadequacy of his counsel or whether the applicant was trying to correct his previous litigation choices. I cannot accept this argument. It is clear from Mr. Chaudhary's affidavit he had discussed the litigation strategy with Mr. Vuppal who had failed to carry it out (see paragraph 4 of his affidavit).

[32] Second, counsel for the Minister argued, while Mr. Vuppal may not have asked many questions, the gap was filled by the tribunal and by the representative of the Minister. For example, the IAD member asked the applicant questions related to his age, his place of birth, the number of years he had lived in India, the citizenship of his parents, his work history, his education, his plans for future education, whether he had been on social assistance, his relationship with his brother, his ability to speak local languages in India, the impact of his removal upon him and the impact of a removal on his family.

[33] Counsel for the Minister raised a number of questions such as what he would do if he was allowed to remain in Canada, his future career ambitions, questions about the seriousness of the offences, his remorse for the beatings, his parents' reactions to the crimes and his brother's reaction.

[34] Counsel for the Minister states, even if the applicant was inadequately represented, any inadequacy was cured by the questions put to him by the tribunal and by the Minister's representative. She submits, the applicant has failed to establish a miscarriage of justice rising to the level of a breach of natural justice.

[35] A review of the transcript shows the description by counsel for the Minister of the areas covered in questioning by the tribunal and by the Minister's representative is accurate. However, in my view, that questioning did not cure the consultant's deficiencies in: (1) not having prepared his case with the applicant and his parents (interview time with them was less than an hour); (2) not having covered in chief all of the relevant areas before questioning by others in order to put his best case forward before questioning by others; (3) not having asked any follow up questions after the

questioning by the tribunal and by the Minister's representative to clarify or emphasize answers which the applicant had given and, in particular, his role during the incident which led to his conviction of aggravated assault, a conviction which led the tribunal to conclude was so serious the applicant would likely re-offend and the need to protect Canadian society from his re-offending required his immediate removal from Canada without the possibility of a stay with conditions.

[36] Third, counsel for the Minister argued the lack of the psychological assessment on his likelihood to re-offend may not have been done by omission. She argued it was possible that a psychological assessment may not have assisted the applicant. In my view, her submission, on this point, is speculative.

[37] Fourth, she argues the fact that Mr. Vuppal did not appear for the June 6, 2006 hearing had no impact on the tribunal's decision because a reading of the transcript shows the purpose for the hearing was to discuss the applicant's sentencing and that the sentencing had not taken place by June 6, 2006. She adds, contrary to the applicant's assertion, no substantive evidence was heard on June 6, 2006 and that after the sentencing decision had occurred, his consultant addressed the issue in written submissions.

[38] My reading of the transcript does not accord with that of counsel for the Minister. My view is that the applicant was prejudiced by Mr. Vuppal's absence because the June 6, 2006 transcript shows:

- The tribunal and the Minister's representative discussed whether at the February 2006 hearing both he and Mr. Vuppal had made oral submissions on the merits except for sentencing. The tribunal concluded, after discussion with the Minister's representative, that both of them had completed oral submissions except on sentencing;

- Whether counsel for the Minister had asked, at the February 2006 hearing, for dismissal of the applicant's appeal before he had the results of the sentencing on the aggravated assault charge. The tribunal concluded counsel for the Minister had asked for such a dismissal;

- An exhibit (R-2) was entered on that day; and

- Whether oral submissions on sentencing should take place or whether written submissions might suffice was discussed.

[39] I conclude by finding the evidentiary record satisfies me the applicant's representative was incompetent in the handling of the applicant's appeal to the IAD and that there was a miscarriage of justice to the extent it could be said that the applicant had no meaningful hearing before the IAD which led to the dismissal of his appeal with the consequence that he could not remain in Canada under strict conditions of a stay. In my view, the consultant who represented him totally failed to lead any meaningful or persuasive evidence which might have convinced the tribunal, in its balancing of relevant factors, a stay was warranted.

[40] My reading of the jurisprudence suggests the case at hand is quite similar to Justice Denault's decision in *Shirwa v. Canada (Minister of Employment and Immigration)*, [1994] 2 F.C. 51 where he set aside a decision by the Convention Refugee Determination Division on the grounds of negligent/incompetent representation by an immigration consultant. Other comparable cases are *Osajie v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1368; *Gulishvili v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1200; *Masood v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1224; and *Taher v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 991.

Other issues

[41] Since I have decided that this judicial review application must be allowed and the matter sent back to a differently constituted tribunal, I need not and should not decide whether the tribunal erred on the merits of the applicant's appeal by giving undue weight to certain factors or by ignoring evidence.

[42] It is also unnecessary for me to decide whether the tribunal itself breached the principles of fairness.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this judicial review application is allowed, the tribunal's decision is quashed and the applicant's appeal is remitted to a differently constituted tribunal of the IAD for reconsideration. No certified question was proposed.

"François Lemieux"

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Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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