

Date: 20070914

Docket: IMM-1139-06

Citation: 2007 FC 908

Ottawa, Ontario, September 14, 2007

PRESENT: The Honourable Madam Justice Dawson

BETWEEN:

**THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Applicant

and

LENNOX PHILIP

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Lennox Philip is a permanent resident of Canada. On April 3, 2000, a deportation order was made against him because he was convicted of criminal offences (sexual assault, sexual touching, and invitation to sexual touching) for which a term of imprisonment of more than six months was, or five years might have been, imposed. By a decision dated September 26, 2001, (2001 order) the Appeal Division of the Immigration and Refugee Board (IAD) granted a stay of Mr. Philip's removal for a period of four years on certain terms and conditions. The order was made pursuant to paragraph 70(1)(b) of the *Immigration Act*, R.S.C. 1985, c. I-2 (repealed by S.C. 2001, c. 27).

[2] Subsequently, by a decision dated February 14, 2006, the IAD ordered that the stay of removal be cancelled, that Mr. Philip's appeal be allowed, and that the removal order be set aside. The Minister of Public Safety and Emergency Preparedness brings this application for judicial review of that decision. For the reasons that follow, I have found that the IAD made findings of fact that were patently unreasonable and failed to have regard to the factors that were relevant to the exercise of its discretion. The application for judicial review is therefore allowed.

THE DECISION OF THE IAD

[3] In brief, oral reasons the IAD found that:

- Mr. Philip had breached a condition of the 2001 order, having been convicted of the offense of failing to report to the Ontario Sex Offender Registry as required. This conviction also breached the condition of the 2001 order that required Mr. Philip to keep the peace and to be of good behaviour.

- From 2001 to 2005, Mr. Philip had reported to the Ontario Sex Offender Registry, but in 2004 he was eight days late in reporting. This led to his conviction under subsection 11(1) of *Christopher's Law (Sex Offender Registry)*, 2000, S.O. 2000, c. 1. As a result of the conviction, Mr. Philip was sentenced to pay a fine in the amount of \$750.00.

- The IAD accepted Mr. Philip's evidence that he had tried to register as a sexual offender in 2004 but was late in reporting, and found that late reporting (as opposed to no reporting) lessened the seriousness of the offense.

- Mr. Philip had completed the programs he was ordered to take by the 2001 order (an anger management program and a program for sexual offenders), but he breached the condition of the 2001 order that required him to report the completion of those programs to the IAD.

- Mr. Philip had worked steadily, albeit seasonally, in the construction industry. He was not in a relationship and lived at home with his mother.

- Mr. Philip was unlikely to re-offend and "requiring him to continue on a stay is not necessary either in order to reinforce to the appellant the need to adhere to conditions set for him or to further protect the Canadian public".

STANDARD OF REVIEW

[4] The standard of review to be applied to the IAD's decision depends upon the particular question at issue in the decision. The IAD's findings of fact, including those with respect to credibility, may only be interfered with if made in a perverse or capricious manner or without regard to the material before it. See: *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100 at paragraph 38. Questions of law, such as whether the IAD considered the relevant factors when exercising its discretion, are reviewed on the standard of correctness. See: *Ivanov v. Canada (Minister of Citizenship and Immigration)*, [2007] 2 F.C.R. 384 (T.D.) at paragraph 19. The exercise of discretion by the IAD under paragraph 70(1)(b) and subsection 74(3)

of the *Immigration Act* is to be reviewed on the standard of reasonableness. See: *Khosa v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 24 at paragraphs 2 through 12.

APPLICATION OF THE STANDARD REVIEW OF THE DECISION

[5] Central to the decision of the IAD was its treatment of Mr. Philip's conviction under subsection 11(1) of *Christopher's Law (Sex Offender Registry)*. Mr. Philip testified that he believed he could report to the Registry at any time in May of 2004. The IAD found that Mr. Philip had tried to register on a timely basis and that late reporting (as opposed to no reporting) lessened the seriousness of the offense. However, in making those findings, the IAD ignored Mr. Philip's further testimony that each year he was given a document that told him where he was to report and gave him the specific dates when he was to report. Given this evidence, the finding of the IAD that Mr. Philip tried to register on a timely basis was made without regard to the evidence before it that Mr. Philip had been told when he was obliged to report and yet failed to do so. The finding of the IAD was therefore patently unreasonable. It follows that the IAD further erred when, in consequence, it found the seriousness of the offence of failure to register as a sex offender to be diminished because Mr. Philip had tried to register on a timely basis.

[6] Related to this finding is the IAD's further finding that Mr. Philip was, in its opinion, not likely to re-offend. No reasons were given for that finding, and such conclusion must be tainted by the IAD's failure to properly appreciate the circumstances surrounding Mr. Philip's conviction under *Christopher's Law (Sex Offender Registry)*. Moreover, missing from the IAD's reasons was any reference to the evidence before it that: in March of 2003, Mr. Philip was convicted of two offences under the *Highway Traffic Act*, R.S.O. 1990, c. H.8, and one offence under the *Compulsory*

Automobile Insurance Act, R.S.O. 1990, c. C.25; in November of 2003, Mr. Philip was convicted of an offence under the *Highway Traffic Act*; and in May of 2004, Mr. Philip was convicted of a further offence under the *Highway Traffic Act*. On the basis of these convictions and its failure to appreciate the circumstances surrounding Mr. Philip's conviction under *Christopher's Law (Sex Offender Registry)*, the IAD's finding that Mr. Philip was unlikely to re-offend was made without regard to the evidence before it and was patently unreasonable.

[7] One further concern exists in respect of the IAD's decision. The legislation applicable to its decision is section 192 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, and sections 70, 73 and 74 of the *Immigration Act*. These provisions are set out in the schedule to these reasons.

[8] In the exercise of its discretion, the IAD was required to consider all the circumstances of the person facing removal. The phrase "all of the circumstances" has been held to include the factors identified by the IAD in the leading case of *Ribic v. Canada (Minister of Employment and Immigration)*, [1985] I.A.B.D. No. 4. See: *Burgess v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1302 at paragraph 16, and *Ivanov v. Canada (Minister of Citizenship and Immigration)*, cited above, at paragraph 12.

[9] The factors identified as relevant in *Ribic* are:

1. The seriousness of the offense that led to the deportation order.
2. The possibility of rehabilitation.

3. The length of time spent in Canada and the degree to which the appellant is established here.
4. The appellant's family in Canada and the dislocation to the family that deportation of the appellant would cause.
5. The support available to the appellant, not only within the family but also within the community.
6. The degree of hardship that would be caused to the appellant by his return to his country of nationality.

[10] In its reasons, the IAD failed to expressly advert to the *Ribic* factors. Further, the IAD failed to consider:

1. The seriousness of the offences that led to the deportation order;
2. The evidence of the offences committed since the 2001, which touch upon the possibility of rehabilitation; and
3. The absence of any exceptional reasons for allowing the appeal flowing from things such as Mr. Philip's establishment in Canada, the circumstances of his family in Canada, and the degree of hardship to be caused to Mr. Philip by his return to his country of nationality (Dominica).

[11] From its failure to specifically mention the *Ribic* factors or to consider the above matters, I conclude that the IAD erred in law by failing to consider the relevant factors when exercising its discretion.

[12] The consequence of these errors is that the application for judicial review is allowed, and the matter is remitted for redetermination before a differently constituted panel of the IAD. The parties posed no question for certification, and I am satisfied that no question arises on this record.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is allowed and the decision of the IAD dated February 14, 2006 is hereby set aside.
2. The matter is remitted for redetermination by a differently constituted panel of the IAD.

3. The Registry is directed to redact from page 23 of the applicant's record and pages 112, 120, and 169 of the certified tribunal record the name of the minor who was the victim of the offences of sexual assault, sexual touching, and invitation to sexual touching.

"Eleanor R. Dawson"

Judge

SCHEDULE

Section 192 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 reads as follows:

192. If a notice of appeal has been filed with the Immigration Appeal Division immediately before the coming into force of this section, the appeal shall be continued under the former Act by the Immigration Appeal Division of the Board.

192. S'il y a eu dépôt d'une demande d'appel à la Section d'appel de l'immigration, à l'entrée en vigueur du présent article, l'appel est continué sous le régime de l'ancienne loi, par la Section d'appel de l'immigration de la Commission.

Sections 70, 73 and 74 of the *Immigration Act*, R.S.C. 1985, c. I-2 (repealed by S.C. 2001, c. 27)

read as follows:

70. (1) Subject to subsections (4) and (5), where a removal order or conditional removal order is made against a permanent resident or against a person lawfully in possession of a valid returning resident permit issued to that person pursuant to the regulations, that person may appeal to the Appeal Division on either or both of the following grounds, namely,
 (a) on any ground of appeal that involves a question of law or fact, or mixed law and fact; and
 (b) on the ground that, having regard to all the circumstances of the case, the person should not be removed from Canada.

(2) Subject to subsections (3) to (5), an appeal lies to the Appeal Division from a removal order or conditional removal order made against a person who
 (a) has been determined under this Act or the regulations to be a Convention refugee but is not a permanent resident; or
 (b) seeks landing or entry and, at the time that a report with respect to the person was made by an immigration officer pursuant to paragraph 20(1)(a), was in possession of a valid immigrant visa, in the case of a person seeking landing, or a valid visitor's visa, in the case of a person seeking entry.

(3) An appeal to the Appeal

70. (1) Sous réserve des paragraphes (4) et (5), les résidents permanents et les titulaires de permis de retour en cours de validité et conformes aux règlements peuvent faire appel devant la section d'appel d'une mesure de renvoi ou de renvoi conditionnel en invoquant les moyens suivants :
 a) question de droit, de fait ou mixte;
 b) le fait que, eu égard aux circonstances particulières de l'espèce, ils ne devraient pas être renvoyés du Canada.

(2) Sous réserve des paragraphes (3) à (5), peuvent faire appel devant la section d'appel d'une mesure de renvoi ou de renvoi conditionnel :
 a) les non-résidents permanents qui se sont vu reconnaître le statut de réfugié au sens de la Convention aux termes de la présente loi ou de ses règlements;
 b) les personnes qui, ayant demandé l'admission, étaient titulaires d'un visa de visiteur ou d'immigrant, selon le cas, en cours de validité lorsqu'elles ont fait l'objet du rapport visé à l'alinéa 20(1)a).

(3) Les moyens que peuvent

Division under subsection (2) may be based on either or both of the following grounds:

(a) on any ground of appeal that involves a question of law or fact, or mixed law and fact; and
(b) on the ground that, having regard to the existence of compassionate or humanitarian considerations, the person should not be removed from Canada.

(3.1) No appeal may be made to the Appeal Division by a person with respect to whom a certificate has been filed under subsection 40.1(1) where it has been determined, pursuant to paragraph 40.1(4)(d), that the certificate is reasonable.

(4) A person described in subsection (1) or paragraph (2)(a) against whom a deportation order or conditional deportation order is made may appeal to the Appeal Division on any ground of appeal that involves a question of law or fact, or mixed law and fact, where the person is
(a) a person, other than a person described in subsection (5), with respect to whom a certificate referred to in subsection 40(1) has been issued; or
(b) a person, other than a person described in subsection (3.1), who has been determined by an adjudicator to be a member of an inadmissible class described in paragraph 19(1)(e), (f), (g), (j) or (l).

(5) No appeal may be made to the Appeal Division by a person described in subsection (1) or

invoquer les appelants visés au paragraphe (2) sont les suivants :

a) question de droit, de fait ou mixte;
b) le fait que, pour des raisons d'ordre humanitaire, ils ne devraient pas être renvoyés du Canada.

(3.1) Ne peut faire appel devant la section d'appel la personne à l'égard de laquelle il a été décidé, en application de l'alinéa 40.1(4)d), que l'attestation visée au paragraphe 40.1(1) est raisonnable.

(4) Les moyens d'appel sont limités aux questions de droit, de fait ou mixtes dans le cas d'appels relatifs à une mesure d'expulsion ou d'expulsion conditionnelle interjetés par les personnes, visées au paragraphe (1) ou aux alinéas (2)a) ou b), qui, selon le cas :
a) ont fait l'objet de l'attestation prévue au paragraphe 40(1), sauf si elles sont visées au paragraphe (5);
b) appartiennent, selon la décision d'un arbitre, à l'une des catégories non admissibles visées aux alinéas 19(1)e), f), g), j) ou l), sauf si elles sont visées au paragraphe (3.1).

(5) Ne peuvent faire appel devant la section d'appel les personnes, visées au paragraphe

paragraph (2)(a) or (b) against whom a deportation order or conditional deportation order is made where the Minister is of the opinion that the person constitutes a danger to the public in Canada and the person has been determined by an adjudicator to be

(a) a member of an inadmissible class described in paragraph 19(1)(c), (c.1), (c.2) or (d);
 (b) a person described in paragraph 27(1)(a.1); or
 (c) a person described in paragraph 27(1)(d) who has been convicted of an offence under any Act of Parliament for which a term of imprisonment of ten years or more may be imposed.

(6) Where the Appeal Division directs that the execution of a deportation order or conditional deportation order be stayed, the direction is of no effect and, notwithstanding subsection 74(2), the Appeal Division may not review the case, where the Minister is of the opinion that the person has breached the terms and conditions set by the Appeal Division and that the person constitutes a danger to the public in Canada and the person has been determined by an adjudicator to be

(a) a member of an inadmissible class described in paragraph 19(1)(c), (c.1), (c.2) or (d);
 (b) a person described in paragraph 27(1)(a.1); or
 (c) a person described in paragraph 27(1)(d) who has been convicted of an offence under any Act of Parliament for which a term of imprisonment

(1) ou aux alinéas (2)a) ou b), qui, selon la décision d'un arbitre :

a) appartiennent à l'une des catégories non admissibles visées aux alinéas 19(1)c), c.1), c.2) ou d) et, selon le ministre, constituent un danger pour le public au Canada;
 b) relèvent du cas visé à l'alinéa 27(1)a.1) et, selon le ministre, constituent un danger pour le public au Canada;
 c) relèvent, pour toute infraction punissable aux termes d'une loi fédérale d'un emprisonnement maximal égal ou supérieur à dix ans, du cas visé à l'alinéa 27(1)d) et, selon le ministre, constituent un danger pour le public au Canada.

(6) Malgré le paragraphe 74(2), la section d'appel ne peut réexaminer le cas —

l'ordonnance de sursis visant la mesure de renvoi ou de renvoi conditionnel cessant alors d'avoir effet — si, selon le ministre, la personne n'a pas respecté les conditions du sursis et constitue un danger pour le public au Canada et que, selon la décision d'un arbitre, elle :

a) appartient à l'une des catégories non admissibles visées aux alinéas 19(1)c), c.1), c.2) ou d);
 b) relève du cas visé à l'alinéa 27(1)a.1);
 c) relève, pour toute infraction punissable aux termes d'une loi fédérale d'un emprisonnement maximal égal ou supérieur à dix ans, du cas visé à l'alinéa 27(1)d).

of ten years or more may be imposed.

[...]

73. (1) The Appeal Division may dispose of an appeal made pursuant to section 70

(a) by allowing it;

(b) by dismissing it;

(c) in the case of an appeal made pursuant to paragraph 70(1)(b) or 70(3)(b) respecting a removal order, by directing that execution of the order be stayed;

or

(d) in the case of an appeal made pursuant to paragraph 70(1)(b) or 70(3)(b) respecting a conditional removal order, by directing that execution of the order on its becoming effective be stayed.

(2) The Appeal Division may dispose of an appeal made pursuant to section 71

(a) by allowing it and making the removal order or conditional removal order that the adjudicator who was presiding at the inquiry should have made;

or

(b) by dismissing it.

(3) Where the Appeal Division disposes of an appeal made pursuant to section 71 by allowing it and making a removal order or conditional removal order against the person concerned, that person shall, where the person would have had an appeal pursuant to this Act if the order had been made by an adjudicator after an

[...]

73. (1) Ayant à statuer sur un appel interjeté dans le cadre de l'article 70, la section d'appel peut :

a) soit y faire droit;

b) soit le rejeter;

c) soit, s'il s'agit d'un appel fondé sur les alinéas 70(1)b) ou 70(3)b) et relatif à une mesure de renvoi, ordonner de surseoir à l'exécution de celle-ci;

d) soit, s'il s'agit d'un appel fondé sur les alinéas 70(1)b) ou 70(3)b) et relatif à une mesure de renvoi conditionnel, ordonner de surseoir à l'exécution de celle-ci au moment où elle deviendra exécutoire.

(2) Ayant à statuer sur un appel interjeté dans le cadre de l'article 71, la section d'appel peut :

a) soit y faire droit en prenant la mesure de renvoi ou de renvoi conditionnel que l'arbitre chargé de l'enquête aurait dû prendre;

b) soit le rejeter.

(3) Dans les cas où la section d'appel fait droit à l'appel visé à l'article 71 en prenant une mesure de renvoi ou de renvoi conditionnel qui, si elle avait été prise par un arbitre, aurait été susceptible d'appel, la personne visée est réputée avoir interjeté un appel fondé sur les alinéas 70(1)b) ou 70(3)b),

inquiry, be deemed to have made an appeal to the Appeal Division pursuant to paragraph 70(1)(b) or 70(3)(b), as the case may be.

74. (1) Where the Appeal Division allows an appeal made pursuant to section 70, it shall quash the removal order or conditional removal order that was made against the appellant and may

- (a) make any other removal order or conditional removal order that should have been made; or
- (b) in the case of an appellant other than a permanent resident, direct that the appellant be examined as a person seeking admission at a port of entry.

(2) Where the Appeal Division disposes of an appeal by directing that execution of a removal order or conditional removal order be stayed, the person concerned shall be allowed to come into or remain in Canada under such terms and conditions as the Appeal Division may determine and the Appeal Division shall review the case from time to time as it considers necessary or advisable.

(3) Where the Appeal Division has disposed of an appeal by directing that execution of a removal order or conditional removal order be stayed, the Appeal Division may, at any time,

- (a) amend any terms and conditions imposed under

selon le cas.

74. (1) Si elle fait droit à un appel interjeté dans le cadre de l'article 70, la section d'appel annule la mesure de renvoi ou de renvoi conditionnel et peut :

- a) soit lui substituer celle qui aurait dû être prise;
- b) soit ordonner, sauf s'il s'agit d'un résident permanent, que l'appellant fasse l'objet d'un interrogatoire comme s'il demandait l'admission à un point d'entrée.

(2) En cas de sursis d'exécution de la mesure de renvoi ou de renvoi conditionnel, l'appellant est autorisé à entrer ou à demeurer au Canada aux éventuelles conditions fixées par la section d'appel. Celle-ci réexamine le cas en tant que de besoin.

(3) Dans le cas visé au paragraphe (2), la section d'appel peut, à tout moment :

- a) modifier les conditions imposées ou en imposer de nouvelles;
- b) annuler son ordre de surseoir à l'exécution de la mesure, et

subsection (2) or impose new terms and conditions; or
(b) cancel its direction staying the execution of the order and
(i) dismiss the appeal and direct that the order be executed as soon as reasonably practicable, or
(ii) allow the appeal and take any other action that it might have taken pursuant to subsection (1).

parallèlement :
(i) soit rejeter l'appel et ordonner l'exécution dès que les circonstances le permettent,
(ii) soit procéder conformément au paragraphe (1).

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-1139-06

STYLE OF CAUSE: THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS, Applicant

and

LENNOX PHILIP, Respondent

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: SEPTEMBER 6, 2007

**REASONS FOR JUDGMENT
AND JUDGMENT:** DAWSON, J.

DATED: SEPTEMBER 14, 2007

APPEARANCES:

LENNOX PHILIP
(self-represented)

FOR THE RESPONDENT

LISA HUTT
MARIA BURGOS

FOR THE APPLICANT

SOLICITORS OF RECORD:

LENNOX PHILIP
(self-represented)

FOR THE RESPONDENT

JOHN H. SIMS, Q.C.
DEPUTY ATTORNEY GENERAL OF CANADA

FOR THE APPLICANT