Date: 20071115

Docket: IMM-1923-07

Citation: 2007 FC 1194

Ottawa, Ontario, November 15, 2007

Present: The Honourable Mr. Justice Shore

BETWEEN:

RACHID DERBAS

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] Beating one's wife is no different than beating a third party, despite the contention of the applicant. For the purpose of interpreting the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, once section 36 of this legislation is applied, the finding of serious criminality, in itself, bears its own consequences.

[2] Analyzing criminal inadmissibility, Mr. Justice Robert Décary noted in *Cha v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126, [2006] F.C.J. No. 491 (QL):

> [27] The section distinguishes between the criminality of permanent residents and that of foreign nationals. It distinguishes between offences committed in Canada and offences committed outside Canada. It distinguishes between offences that are qualified as "serious" (an offence punishable by a maximum term of imprisonment of at least 10 years or an offence for which a term of imprisonment of more than six months has been imposed) and offences which, for lack of a better word, I will describe as "simple" (an offence punishable by way of indictment or two offences not arising out of a single occurrence).
>
> [28] Parliament, therefore, wanted certain persons having committed certain offences in certain territories to be declared inadmissible, whatever the sentence imposed. **Subsections 36(1) and (2) of the Act have been carefully drafted. Nothing was left to chance nor to interpretation.**
>
> . . .
>
> [30] As I read subsection 36(3), Parliament has provided a complete, detailed and straightforward code which directs the manner in which immigration officers and Minister's delegates are to exercise their respective powers under section 44 of the Act. **Hybrid offences committed in Canada are to be treated as indictable offences regardless of the manner in which they were prosecuted (paragraph 36(3)(*a*)).** Convictions are not to be taken into consideration where pardon has been granted or where they have been reversed (paragraph 36(3)(*b*)). Rehabilitation may only be considered in defined circumstances (paragraph 36(3)(*c*)). The relative gravity of the offence and the age of the offender will only be a relevant factor where the *Contraventions Act*, S.C. 1992, c. 47 and the *Young Offenders Act*, R.S.C., 1985, c.Y-1 apply (paragraph 36(3)(*e*)).
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> [Emphasis added by the Court.]

NATURE OF JUDICIAL PROCEEDING

[3] This is an application for judicial review pursuant to subsection 72(1) of the IRPA, of a decision by an immigration officer of Citizenship and Immigration Canada (CIC) dated April 19, 2007, deciding that the application for permanent residence as a person in need of protection be dismissed pursuant to paragraph 36(1)(*a*) of the IRPA.

FACTS

[4] The applicant, Rachid Derbas, is a citizen of Syria.

[5] Mr. Derbas has been involved with the Kurdish party since secondary school.

[6] In July 1998, Mr. Derbas had been arrested and tortured by four Syrian secret service agents. He was allegedly released the following day after he undertook not to work for the Kurdish party any longer. However, in the beginning of 1999, Mr. Derbas says that he discretely resumed his activities with this party. In April 1999, after learning of the arrest of three of his party associates, he hid at his aunt's home in Al-Hasakah.

[7] On May 19, 1999, Mr. Derbas left Syria for Haraméya, in Turkey. On June 13, 1999, he left for Istanbul in order to head for Canada on June 15, 1999. When he arrived, he claimed refugee status, alleging that he feared persecution based on his Kurdish nationality.

[8] On March 13, 2001, the Refugee Protection Division of the Immigration and Refugee Board (Board) refused to grant refugee status. That same day, Mr. Derbas filed an application in the class of claimants not recognized as refugees in Canada through a procedure which became a pre-removal risk assessment (PRRA) pursuant to the new Act (IRPA). Simultaneously, on December 10, 2001, he filed an application for permanent residence in Canada based on humanitarian and compassionate considerations (HC) and the risks of return.

[9] On February 10, 2004, Mr. Derbas was convicted of three criminal offences that had been committed in Canada. Mr. Derbas pleaded guilty to one count of assault causing bodily harm on his ex-wife, an indictable offence under paragraph 267(*b*) of the *Criminal Code*, R.S.C. 1985, c. C-46

(Code), liable to imprisonment for a term not exceeding ten years. He was also found guilty of failing to comply with a condition, an offence under paragraph 145(5.1)(*b*) of the Code. Finally, Mr. Derbas was also found guilty of uttering threats, an offence described at section 264.1 of the Code. For all of these offences, Mr. Derbas was sentenced to 45 days of imprisonment and three years of probation (30 days for the offences described in paragraph 267(*b*) and 264.1 of the Code and 15 days for the offence under 145(5.1)(*b*) of the Code).

[10] On January 11, 2006, the PRRA application filed by Mr. Derbas was approved. The officer, Charles Lajoie, having reviewed his PRRA application, had determined that Mr. Derbas was a person at risk if he were to return to his native country, Syria, in accordance with the terms of paragraph 95(1)(*c*) of the IRPA.

[11] On March 14, 2006, Mr. Derbas applied for permanent residence as a person in need of protection. This application was dismissed on April 19, 2007, by the CIC immigration officer.

[12] Mr. Derbas considers that the decision of the immigration officer is based on erroneous findings of fact or law made in a perverse or capricious manner or without regard to the material before the officer which, accordingly, renders it inconsistent with the objective and spirit of the law.

[13] Further, he submits that the immigration officer erred in law in his decision by breaching section 7 of the *Canadian Charter of Rights and Freedoms*, Part I, Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11(the Charter), and the fundamental principles of justice.

[14] The respondent submits that the adjudicator's decision is founded in fact and in law and that Mr. Derbas has not shown that this Court's intervention is justified.

IMPUGNED DECISION

[15] The immigration officer determined that Mr. Derbas was inadmissible to Canada on grounds of serious criminality pursuant to paragraph 36(1)(*a*) of IRPA, based on the fact that Mr. Derbas had been found guilty of assault under paragraph 267(*b*) of the Code, an offence liable to imprisonment for a term not exceeding ten years.

ISSUES

[16] (1) Did the immigration officer err in refusing the applicant's permanent residence application on the pretext that he was inadmissible pursuant to paragraph 36(1)(*a*) of the IRPA?

(2) Did the immigration officer render a decision that violates or denies the right guaranteed under section 7 of the Charter?

ANALYSIS

Relevant legislative provision

[17] An application for permanent residence as a person in need of protection is governed by section 21 of the IRPA. This section provides:

Permanent resident	**Résident Permanent**
21. (1) A foreign national becomes a permanent resident if an officer is satisfied that the foreign national has applied for that status, has met the obligations set out in paragraph 20(1)(*a*) and subsection 20(2) and is not inadmissible.	**21.** (1) Devient résident permanent l'étranger dont l'agent constate qu'il a demandé ce statut, s'est déchargé des obligations prévues à l'alinéa 20(1)*a*) et au paragraphe 20(2) et n'est pas interdit de territoire.
Protected person	**Personne protégée**
(2) Except in the case of a person described in subsection 112(3) or a person who is a member of a prescribed class of persons, a person whose application for protection has been finally determined by the Board to be a Convention refugee or to be a person in need of protection, or a person whose application for protection has been allowed by the Minister, becomes, subject to any federal-provincial agreement referred to in subsection 9(1), a permanent resident if the officer is satisfied that they have made their application in accordance with the regulations and that they are not inadmissible on any ground referred to in section 34 or 35, subsection 36(1) or section 37 or 38.	(2) Sous réserve d'un accord fédéro-provincial visé au paragraphe 9(1), devient résident permanent la personne à laquelle la qualité de réfugié ou celle de personne à protéger a été reconnue en dernier ressort par la Commission ou celle dont la demande de protection a été acceptée par le ministre — sauf dans le cas d'une personne visée au paragraphe 112(3) ou qui fait partie d'une catégorie réglementaire — dont l'agent constate qu'elle a présenté sa demande en conformité avec les règlements et qu'elle n'est pas interdite de territoire pour l'un des motifs visés aux articles 34 ou 35, au paragraphe 36(1) ou aux articles 37 ou 38.

[18] Paragraph 36(1)(*a*) of the IRPA establishes the context in which a permanent resident application may be refused:

Serious criminality	**Grande criminalité**
36. (1) A permanent resident or a foreign national is inadmissible on	**36.** (1) Emportent interdiction de territoire pour grande criminalité les

grounds of serious criminality for	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;

[19] In this case, Mr. Derbas admits that he was found guilty in Canada of the criminal offence under section 267(*b*) of the Code which provides as follows:

Assault with a weapon or causing bodily harm	**Agression armée ou infliction de lésions corporelles**
267. Every one who, in committing an assault,	**267**. Est coupable soit d'un acte criminel et passible d'un emprisonnement maximal de dix ans, soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire et passible d'un emprisonnement maximal de dix-huit mois quiconque, en se livrant à des voies de fait, selon le cas:
…	[...]
(*b*) causes bodily harm to the complainant,	*b*) inflige des lésions corporelles au plaignant
is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months	

(1) Did the immigration officer err in refusing the applicant's permanent residence application on the pretext that he was inadmissible pursuant to paragraph 36(1)(*a*) of the IRPA?

Standard of review

[20] It has been consistently held in the case law that the appropriate standard for the judicial review of a decision varies according to the nature of the decision. For a question of law, the standard is that of correctness, for a question of fact, that of patent unreasonableness; and for a mixed question of fact and law, that of reasonableness. The Supreme Court of Canada confirmed this approach in *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100.

[21] This question raised is one of mixed fact and law, therefore the reasonableness standard will be applied.

The merits of the officer's decision

[22] Mr. Derbas was convicted of assault, an offence which is "an indictable offence and liable to imprisonment for a term not exceeding ten years or an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months" [Emphasis added by the Court.] (Code, paragraph 267(*b*)).

[23] The IRPA clearly establishes that a protected person can be given permanent residence status when his or her application complies with the Regulations and when that person is not inadmissible for one of the grounds contemplated in subsection 36(1) (IRPA, section 21).

[24] Mr. Derbas alleges that he pleaded guilty to the offence punishable on summary conviction under section 267 of the Code, an offence liable to imprisonment for a term not exceeding only eighteen months, and not an indictable offence, which in fact is not contemplated by paragraph 36(1)(*a*) of the IRPA (Applicant's memorandum, page 20, paragraph 2).

[25] When analyzing criminal inadmissibility, Décary J.A. notes in *Cha*, *supra*:

> [27] The section distinguishes between the criminality of permanent residents and that of foreign nationals. It distinguishes between offences committed in Canada and offences committed outside Canada. It distinguishes between offences that are qualified as "serious" (an offence punishable by a maximum term of imprisonment of at least 10 years or an offence for which a term of imprisonment of more than six months has been imposed) and offences which, for lack of a better word, I will describe as "simple" (an offence punishable by way of indictment or two offences not arising out of a single occurrence).
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> [28] Parliament, therefore, wanted certain persons having committed certain offences in certain territories to be declared inadmissible, whatever the sentence imposed. **Subsections 36(1) and (2) of the Act have been carefully drafted. Nothing was left to chance nor to interpretation.**
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> [30] As I read subsection 36(3), Parliament has provided a complete, detailed and straightforward code which directs the manner in which immigration officers and Minister's delegates are to exercise their respective powers under section 44 of the Act. **Hybrid offences committed in Canada are to be treated as indictable offences regardless of the manner in which they were prosecuted (paragraph 36(3)(*a*)).** Convictions are not to be taken into consideration where pardon has been granted or where they have been reversed (paragraph 36(3)(*b*)). Rehabilitation may only be considered in defined circumstances (paragraph 36(3)(*c*)). The relative gravity of the offence and the age of the offender will only be a relevant factor where the *Contraventions Act*, S.C. 1992, c. 47 and the *Young Offenders Act*, R.S.C., 1985, c.Y-1 apply (paragraph 36(3)(*e*)).
>
> [Emphasis added by the Court.]

[26] In a matter where the interpretation of section 36 of the IRPA was at issue and in which there was also an allegation like the one alleged by Mr. Derbas in this case, Madam Justice Danièle Tremblay-Lamer, stated the following in *Canada* (*Minister of Citizenship and Immigration) v.*

Kelley, 2007 FC 82, [2007] F.C.J. No. 271 (QL), regarding the interpretation of subsection 36(3) of the IRPA:

> [15] The respondent was convicted under section 264 of the *Criminal Code*, and therefore was liable to imprisonment for a term not exceeding ten years.
>
> [16] The applicant submits that as he could potentially be sentenced "up to and including ten years of imprisonment", the respondent meets the requirements of subsection 36(1) of the Act.
>
> [17] The respondent submits that having been convicted of a summary offence he was only liable to a maximum term of imprisonment of six months rather than ten years, and therefore the IAD was correct in holding as it did.
>
> [18] I disagree with the respondent. Subsection 36(3) of the Act is clear that offences that may be prosecuted either summarily or by indictment are deemed to be indictable offences, even where prosecuted summarily.
>
> [19] Thus, I find that the IAD committed a reviewable error by incorrectly finding that the "maximum term of imprisonment is less than 10 years" in relation to subsection 264(3) of the *Criminal Code*. Clearly, this offence qualifies as "serious criminality" by virtue of subsection 36(1) as it was punishable for a term "not exceeding ten years", which necessarily includes the possibility of a ten-year sentence.
>
> [20] In misinterpreting subsection 264(3) of the *Criminal Code*, along with subsections 36(1) and 36(3) of the Act, the IAD erred in its application of subsection 68(4) and section 197 of the Act. In the circumstances of this matter, the correct interpretation was that the respondent's stay of execution of the removal order was cancelled by operation of law and the appeal was terminated
>
> [Emphasis in the original.]

[27] The criminal offence provided under paragraph 267(*b*) of the Code is nevertheless liable to imprisonment for a term not exceeding ten years. Accordingly, this observation alone is sufficient to engage subsection 21(2) of the IRPA and to support a finding that the permanent residence application filed by Mr. Derbas as a person in need of protection cannot be granted.

[28] As Madam Justice Judith Snider points out in *Hernandez v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 429, [2005] F.C.J. No. 533 (QL), at paragraph 6: "serious criminality [is defined] as being an offence which is either "punishable by a maximum term of imprisonment of at least 10 years" or "for which a term of imprisonment of more than six months has been imposed"."

Accordingly, she determines that Mr. Derbas falls within the ambit of paragraph 36(1)(*a*) of the IRPA.

[29] In this case, Mr. Derbas is also under the purview of paragraph 36(1)(*a*) in that he is inadmissible for serious criminality and therefore inadmissible to Canada.

CONCLUSION

[30] In this case, the immigration officer simply applied the IRPA provisions to the case before us. In light of the above, the officer did not at all err in his decision so as to justify the intervention of this Court.

(2) Did the immigration officer render a decision that violates or denies the right guaranteed under section 7 of the Charter?

[31] Mr. Derbas alleges in his arguments that the officer breached the provisions of the Charter and that his deportation to Syria would breach section 7 of the Charter. He adds that these sections should be interpreted in light of international human rights standards.

[32] The respondent submits that these arguments are premature and inappropriate and that the decision now being impugned is the one by an officer pursuant to subsection 21(2) of the IRPA, refusing the application for permanent residence filed by Mr. Derbas.

[33] To date, it has not been established that the Minister has decided to enforce a removal order against Mr. Derbas. It is therefore premature at this stage for him to raise his argument against a removal order.

[34] The Court must point out, as the respondent indicates, that the PRRA application filed by Mr. Derbas was approved on January 11, 2006, the applicant is therefore a protected person within the meaning of the IRPA. Mr. Derbas is therefore subject to the principle of non-refoulement, recognized at subsection 115(1) of the IRPA (Tribunal record, results of pre-removal risk assessment application, page 16).

[35] According to subsection 115(1), the protected person cannot be removed to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment (IRPA, subsection 115(1)).

[36] The IRPA nevertheless provides an exception to this principle of non-refoulement, for persons regarding whom the Minister has issued an opinion that the person should not be present in Canada based on either a danger to the public, a danger to Canada's security, or the nature and seriousness of his or her past actions in Canada. There is nothing in this matter that shows that such an opinion has been or will be issued against Mr. Derbas.

[37] For all of these reasons, Mr. Derbas has not shown that this Court's intervention is justified.

JUDGMENT

THE COURT ORDERS that

1. The application for judicial review be dismissed;

2. No serious question of general importance be certified.

"Michel M.J. Shore"
Judge

Certified true translation

Kelley A. Harvey, BCL, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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