Date: 20080415

Docket: IMM-3292-07

Citation: 2008 FC 482

Ottawa, Ontario, April 15, 2008

PRESENT: The Honourable Mr. Justice Blanchard

BETWEEN:

SURJIT SINGH DHADWAR

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

1. Introduction

[1] The Applicant, Surjit Singh Dhadwar, seeks judicial review of the July 19, 2007 decision by the Immigration Appeal Division of the Immigration and Refugee Board (the Board) dismissing his appeal of the June 27, 2007 removal order issued against him.

[2] The Applicant, the Appellant before the Board, seeks to have the decision by the Board set aside and the matter referred back for redetermination.

2. Facts

[3] The Applicant was born on January 10, 1973, in India and is a citizen of that country. He immigrated to Canada on July 19, 2000, under the family class, sponsored by his fiancé.

[4] The Applicant married his fiancé on August 5, 2000, and separated shortly thereafter. They were divorced in 2001. There are no children from the marriage.

[5] On June 22, 2003, the Applicant sexually assaulted a distant relative who was 18 years old and mentally disabled.

[6] The Applicant was charged with and pled guilty to sexual assault contrary to section 271 of the *Criminal Code* of Canada before the Provincial Court of British Columbia (the Provincial Court). For sentencing purposes, an agreed statement of facts was filed before the Court. On November 2, 2004, the Provincial Court sentenced the Applicant to a conditional sentence with terms followed by 18 months of probation.

[7] As a result of his June 27, 2007 conviction, the Applicant was found inadmissible for serious criminality under section 36(1)(*a*) of the *Immigration and the Refugee Protection Act*, S.C. 2001 c.27 (the Act) and was ordered removed from Canada.

[8] The Applicant appealed the removal order to the Board seeking special relief on humanitarian and compassionate grounds under section 67(1)(*c*) and subsection 68(1) of the Act.

On January 18, 2007, the Board heard the Applicant and subsequently dismissed his appeal on July 19, 2007.

[9] The present application for judicial review was filed on August 15, 2007.

3. Impugned Decision

[10] In dismissing the appeal, the Board noted that it found the Removal Order valid in law. The Appellant had not challenged its legal validity.

[11] The Board also noted that in determining whether to exercise its discretion to grant special relief, it was guided by the objectives set out in paragraph 3(1)(*h*) of the Act and the factors outlined in *Ribic v. Canada (Minister of Employment and Immigration)*, [1985] I.A.D.B. No. 4 (QL). I summarized below the Board's findings with respect to these factors:

(a) *Length of time in Canada and the degree of establishment; hardship in India and dislocation to the family in Canada*: The Board found that the Appellant has spent 27 years in India and 6 in Canada. Although he was briefly married upon his arrival, the Board notes that it bears the "hallmarks of a marriage of convenience." It further notes that the Appellant lives with a childhood friend, has an aunt in Canada and a few distant relatives. He has no property ownership in Canada and works at a window factory. The Board observes that prior to his arrival in Canada, the Appellant had a successful taxi business and with the sizeable savings he's made since 2000, it is reasonable to conclude that he would be able to have funds to finance a taxi business or find other employment in India. The Board attaches little weight to the English course the Appellant was taking due to his poor attendance record. Consequently, the Board concluded that the Appellant was not significantly established in Canada or that it would be a hardship for him to return to India to live with his immediate family.

(b) *Impact to the victim*: Relying on the victim's mother's testimony, the Board observed that she is very scared of men since the assault, is still on antidepressants

and experiences seizures. The mother also explained that their family does not go to family functions because they fear the Appellant might be there as a distant relative. The Board concluded "that the victim, who has the mental age of six or seven, has been, and continues to be, seriously impacted by the appellant's presence in Canada. Though she is no longer a child chronologically, in regards to her mental development, she is still a child in need of protection."

(c) *Seriousness of the offence*: The Board found that the offence committed was serious and aggravated by the fact that the victim had a mental disability and that there was some degree of knowledge and trust with respect to the Appellant since he was a distant relative, not a stranger. There was also a suggestion in the Police Report that the Appellant allegedly threatened the victim's family which prompted the police to arrest him quickly.

(d) *Credibility and Rehabilitation*: The Board noted that the Appellant's version of events "is marked with 'skilful exaggeration with partial suppression of the truth.'" The Board raised concerns that the reports prepared by Dr. Riar and Dr. Sandu were based on false or partial information relating to the sexual assault. It did not attach much weight to these since "the Appellant has not been truthful and has suppressed important facts to both psychiatrists." The Board was also concerned about the change in the Appellant's attitude and narration of events from the first pre-sentence report of August 2004 to the one in November 2004. Consequently, the Board concluded that the Appellant was not a credible person. Further, it doubted that any rehabilitation had taken place given that the exact nature of the crime was not discussed with his psychiatrists.

(e) *Support available to the Appellant with the family and within the community*: Although the Appellant submitted 11 letters of support, the Board found that none of them "set out explicitly what they understand the appellant was convicted of and many of the letters do not indicate any knowledge whatsoever of issues that the appellant had been or is currently facing. None indicate any hardship if the appellant was deported." The Board concluded that the Provincial Court Judge considered the appellant to be of some risk and threat to some individuals and a segment of our society.

[12] In summary, the Board was of the opinion that the Appellant had not provided sufficient evidence to warrant special relief. It reasoned that the Appellant had committed a serious offence with aggravating features and found that his presence in Canada is a risk to the health and safety of Canadians. The Board also found that the Appellant had not yet engaged in true rehabilitation since he was not truthful with his psychiatrist. The Board indicated that the Appellant had failed

to show significant establishment in Canada and found that the victim, with a developmental age of six to seven years, continued to be impacted by his presence in Canada.

[13] The board concluded that the Departure Order made against the appellant is valid in law and that there are not sufficient humanitarian and compassionate considerations to warrant special relief in light of all the circumstances of the case.

4. Issue

[14] The only issue before this is Court is whether the Board properly exercised its discretion by not granting a stay?

5. The Law

[15] Subsections 36(1), 67(1) and 68(1) of the Act provide:

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;
(*b*) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act	*b*) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une

of Parliament punishable by a maximum term of imprisonment of at least 10 years; or

(*c*) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;

c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.

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

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

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.

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.

[16] The parties agree that in granting special relief under paragraph 67(1)(c) of the Act, the Board must consider the evidence before it in light of the various factors outlined in *Ribic*, supra and confirmed in *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84; 2002 SCC 3 at paragraph 40. These factors are:

> (a) the seriousness of the offence or offences leading to the deportation and the possibility of rehabilitation;
>
> (b) the circumstances surrounding the failure to meet the conditions of admission which led to the deportation order;
>
> (c) the length of time spent in Canada and the degree to which the applicant is established;
>
> (d) the existence of family in Canada and the dislocation to that family that deportation of the applicant would cause;
>
> (e) the support available for the applicant not only within the family but also within the community; and
>
> (f) the degree of hardship that would be caused to the applicant by his return to his country of nationality (this factor is sometimes referred to as "foreign hardship").

[17] The weight to be accorded to any of the above factors will vary according to the particular circumstances of each case: *Thanabalasingham v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 599 at paragraph 32. In such appeals before the Board, the onus is on the individual facing removal to establish why he or she should be allowed to remain in Canada. If the onus is not met, the default position is removal (*Chieu*, above, at paragraph 57).

6. Standard of Review

[18] In her December 14, 2007 decision, in *The Minister of Public Safety and Emergency Preparedness v. Lennox Philip* 2007 FC 908, Mme Justice Dawson dealt with the standard of review applicable to decisions of the Immigration Appeal Division. At paragraph 4 of her reasons she wrote:

> [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.

[19] The Supreme Court of Canada in *David Dunsmuir v. Her Majesty the Queen in Right of the Province of New Brunswick*, 2008 SCC 9, recently decided that there are now only two standards of review; reasonableness and correctness. In its reasons the Supreme Court defined the concepts of these two standards and provided guidance in determining the appropriate standard of review to be applied in individual cases. At paragraphs 55 and 56 of the Court's reasons for decision, Justices Bastarache and Lebel for the majority wrote:

> [55] A consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied:

> - A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.
> - A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).
> - The nature of the question of law. A question of law that is of "central importance to the legal system ... and outside the ... specialized area of expertise" of the administrative decision maker will always attract a correctness standard (*Toronto (City) v. C.U.P.E.*, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.
>
> [56] If these factors, considered together, point to a standard of reasonableness, the decision maker's decision must be approached with deference in the sense of respect discussed earlier in these reasons. There is nothing unprincipled in the fact that some questions of law will be decided on the basis of reasonableness. It simply means giving the adjudicator's decision appropriate deference in deciding whether a decision should be upheld, bearing in mind the factors indicated.

[20] Here the impugned decision is not protected by a full privative clause, does not engage the Board's special expertise, at least in so far as rehabilitation is concerned, and the nature of the question is essentially discretionary. I have no difficulty finding, on the application of the above-cited factors, that the applicable standard of review to the question before me in this application is reasonableness. This is the same standard applied by the Federal Court of Appeal in *Khosa,* above, at paragraph 12, to a decision of the Immigration Appeal Division involving consideration of he *Ribic* factors. That decision is now before the Supreme Court.

[21] The Supreme Court provides further guidance in articulating the approach to be followed in applying the "new" reasonableness standard at paragraph 47 of its reasons:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

7. Analysis

[22] Here, as noted by the Board the Applicant did not challenge the legal validity of the removal order but rather, brought his appeal solely on the ground there were sufficient humanitarian and compassionate considerations in the circumstances to warrant special relief and stay the removal order. It is well established that in the absence of a special privilege existing, an individual subject to a lawful removal order has no right whatever to remain in Canada. In this appeal, the Applicant is therefore attempting to obtain a discretionary privilege. He is not in a position to assert a right.

[23] The Applicant contends that the Court's intervention is warranted because the Board committed the following errors in making its decision, namely:

(a) erred in law by making patently unreasonable findings of fact regarding the factors outlined in *Ribic* related to the seriousness of the offence and in failing to explain why it differed from the findings of fact made by the criminal court;

(b) erred in law by failing to take into account some of the factors associated with rehabilitation namely the absence of a criminal record, the absence of previous convictions for sexual assault, the response of the Applicant to community supervision and the recent history of the Applicant including the upgrading of his education and good work record in the exercise of its discretion;

(c) erred in law in reaching inappropriate inferences from the evidence that impacted on its conclusion regarding the Applicant's lack of credibility and the credibility of medical evidence submitted in support of the Applicant's case;

(d) erred in law by relying on irrelevant considerations namely, the victim impact evidence of the complainant's family in the exercise of its discretion under paragraph 67(1)(*c*) of the Act.

[24] In making its findings regarding to the seriousness of the offence the Board accepted the Crown's submissions which essentially relied on the version of events found in the police report. The report indicated that the Applicant had pushed the victim to the floor, kept her down, put her knee on his shoulder despite her starting to cry and saying no. In the report, it was further alleged that the Applicant had touched the victim's neck and face with his penis, that he pulled down her pajamas and her panties, that he put his fingers inside her vagina, touched her vagina with his penis and achieved penetration. The Board further relied on the police report as a reliable source of information to find that the Applicant had threatened the victim's family.

[25] The evidence before the sentencing judge painted a different picture of the events surrounding the assault. The judge had before him a pre-sentence report and an agreed statement of facts. The agreed facts before the sentencing judge did not reflect the version of events suggested by the Respondent before the Board. The Provincial Court found that the Applicant was a distant relative and knew the victim but found that he was not in a position of trust in

relation to the victim. The Court was also aware that the victim had a mental age of a five to seven year old. With respect to the actual assault, the Court found that the Applicant had initiated contact with the victim, found that there was no penetration but the contact was rough enough to cause redness and tenderness in the victim's vaginal and anal areas. The agreed statement of facts indicated that the majority of the sexual contact took place while the Applicant and the victim were both standing and that, at one point, the Applicant had the victim lift her leg. The Court found that there is no suggestion of any inappropriate similar conduct by the Applicant towards the victim or anyone else either before or since the offence.

[26] It is open to the Board to rely on evidence it finds to be relevant, credible and trustworthy and to determine its weight. It is also open to the Board to reject the Applicant's version of events and accept the facts as indicated in the police report. However, in so doing, it is important not to mischaracterize the nature of the police report. As my colleague, Mr. Justice Mosley indicated in *Rajagopal v. Canada (Minister of Public Safety and Emergency Preparedness)* [2007] FC 523, at paragraph 43, a police report contains allegations as recorded by the police officer upon investigation of the complaint, not the findings of fact reached by the court that convicted the Applicant and imposed sentence.

[27] In the instant case, the Board accepted as fact many of the allegations contained in the police report. In particular, the allegation that the victim's family was threatened by the Applicant, through a third party, with physical harm or the filing of false charges against the victim's father should he talk to the police. The sentencing judge, who did not have the benefit of the police report, made no such finding. The Applicant denied making such a threat in his

testimony before the Board. The Applicant's denial is also reported in the police report. There is no further mention of the allegation in the record. There is no indication that the allegation was further investigated by the police, no charges were laid, nor is there any direct evidence regarding the threat by the victim's father or the family friend through whom the threat was allegedly communicated. Apart from the police report, there is no other evidence adduced before the Board to establish that the threat was actually made. We are left with the allegation contained in the police report. The evidence before the Board did establish that the victim's family wanted the Applicant deported. Through the police report, the Board was also aware that it is the victim's father who informed the police of the alleged threat.

[28] Based on the information before it the Board make the following factual determination:

> "I find the Police Report a reliable source of information that there was a threat to the family of the victim and that they would have been at risk of harm if the police had not acted quickly."

[29] As stated above, the police report does not record findings of fact, but rather allegations of fact following an investigation. In my view, it was not open to the Board to accept as fact the allegations contained in the police report without pointing to evidence or testimony to support an argument that on a balance of probabilities the police report characterizes the underlying facts in an accurate manner. Further, the Board failed to explain why it preferred the allegations of fact found in the police report over the Applicant's evidence, or the findings of the sentencing judge in respect of the circumstances surrounding the offence. I am left to conclude that the Board's

finding was made without regard to the evidence and is consequently perverse and unreasonable. In so doing the Board committed a reviewable error.

[30] In my opinion the error is determinative of the within application because to the significance of the impugned finding in the context of the Applicant's appeal. In its reasons, the Board accepted that the factual circumstances, as related in the police report, elevated the seriousness of the threat "significantly". I agree. The circumstances of the alleged threat, if accepted, indicate that the Applicant was prepared to undermine the very justice system he relies on to obtain the discretionary relief he seeks in this application. Such a finding must be properly founded in the evidence and was not. The significance of this finding on the Board's assessment of the seriousness of the offence is such, that it may well have had a bearing on the outcome of the appeal. It follows that this application for judicial review will be allowed.

[31] While my above finding is determinative it is unnecessary to consider the other issues raised in this application. I will nevertheless make the following observations regarding the Applicant's rehabilitation.

[32] The Board's findings relating to the Applicant's rehabilitation are found at paragraph 44 of its reasons. That paragraph reads as follows:

> 44. As the appellant has not been truthful and has suppressed important facts to both psychiatrists (…) I am unable to find that the appellant is a credible person and <u>I am not convinced of any rehabilitation given that the nature of the crime has not been discussed with his psychiatrist. I accordingly give little weight of remorse other than remorse because the offence had led to his deportation</u>. [Emphasis added.]

[33] While the Board's findings relating to the Applicant's credibility and the impact of these findings on the Applicant's rehabilitation may have been open to the Board on the evidence, it was also necessary for the Board to take into account the factors generally associated with the criminal law concept of rehabilitation. Mr. Justice Décary writing for the Federal Court of Appeal in *Khosa*, above stated the following at paragraph 11 of his reasons:

> 11. In cases where...a Board may question a finding of rehabilitation made by a provincial criminal court, the Board should, at a minimum, take into consideration the factors generally associated with the criminal law concept of rehabilitation. In the case at bar this would include the absence of a criminal record (other than the one at issue), the absence of previous convictions for dangerous driving, the response to community supervision and the recent history of the offender, including the upgrading of his education and his work record. …

[34] Notwithstanding the significant evidence adduced in respect to the Applicant's rehabilitation in the instant case, the Board failed to address any of the following factors in its reasons, namely, the Applicant's apology, his guilty plea, the Provincial Court's finding of remorse, the counseling sessions he attended, the absence of a criminal record or the successful completion of his conditional sentence order. In the circumstances, these important factors pertaining to the Applicant's rehabilitation that should have been expressly dealt with, were essentially ignored by the Board in its reasons.

[35] For the above reasons, the application will be allowed and the matter sent back for reconsideration before a differently constituted panel of the Board to be dealt with in accordance with the above reasons.

[36] The parties have had the opportunity to raise a serious question of general importance as contemplated by paragraph 74(*d*) of the Act and have not done so. I am satisfied that no serious question of general importance arises on this record. I do not propose to certify a question.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is allowed.

2. The matter is to be sent back for reconsideration before a differently constituted panel of the Board to be dealt with in accordance with the above reasons;

3. No question of general importance is certified.

"Edmond P. Blanchard"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3292-07
STYLE OF CAUSE:	SURJIT SINGH DHADWAR v. THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	February 26 2008
REASONS FOR JUDGMENT AND JUDGMENT:	Blanchard J.
DATED:	April 15, 2008

APPEARANCES:

Mr. Andrew Z. Wlodyka Vancouver, B.C. 604-875-9338	FOR THE APPLICANT
Mr. Keith Reimer Vancouver B.C. 604-666-6542	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lowe & Company 900-777 West Broadway Vancouver B.C. V5Z 4J7	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT