Federal Court  Cour fédérale

Date: 20091005

Docket: IMM-1930-09

Citation: 2009 FC 987

Ottawa, Ontario, October 5, 2009

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

TIMOTHY ROSHAUN FOX

Respondent

AMENDED REASONS FOR JUDGMENT AND JUDGMENT

[1] The Minister of Citizenship and Immigration ("the Minister") seeks to set aside the March 26, 2009 decision of Immigration Division member Tessler ("the Tribunal") granting Timothy Roshaun Fox ("the respondent") a 13 month adjournment of his admissibility hearing concerning inadmissibility under section 36(1)*(a)* of the *Immigration and Refugee Protection Act* ("*IRPA*"). The Tribunal apparently granted the adjournment to avoid the application of section 128(5) of the *Corrections and Conditional Release Act* ("*CCRA*"), according to which the respondent would lose the benefit of the day parole he received and would be re-incarcerated if a removal order was made against him.

[2] For the reasons that follow, I am of the view that the Tribunal's decision is fundamentally flawed and should be set aside because it took into account irrelevant considerations in granting the adjournment. Therefore the Tribunal exceeded its jurisdiction, or, at the very least, exercised its jurisdiction unreasonably.

I. FACTS

[3] The respondent is an American citizen who became a permanent resident of Canada in 2002. He is married to a Canadian citizen, has a Canadian son and has lived in Vancouver since 2001. He served in the U.S. Navy for nine years and then held various jobs in the financial sector in Canada.

[4] On September 4, 2007, the respondent was convicted of importing 90 kilos of cocaine and was sentenced to 7 years and 10 months of imprisonment, after taking into account the 26 months of pre-sentence jail time served while awaiting trial. It was a non-violent first offence.

[5] On July 10, 2008, an Enforcement Officer with the Canada Border Services Agency ("the CBSA") prepared a report in accordance with section 44(1) of the *IRPA* that, in his opinion, the respondent is inadmissible pursuant to section 36(1)*(a)* of the *IRPA* and transmitted the report to a Minister's delegate.

[6] On October 17, 2008, the National Parole Board ("the NPB") directed that the respondent be released on day parole on December 23, 2008 pursuant to sections 125 to 126.1 of the *CCRA* (accelerated parole review for first time non-violent offender). The NPB found that there was no information indicating violent history or behaviour on the part of the respondent although a loaded handgun was seized on him at the time of his arrest. The weapon charges were stayed, and it was held that there were no reasonable grounds to believe that, if released, the respondent would commit a violent offence.

[7] On November 7, 2008, the Minister's delegate referred the matter to the Immigration Division for an admissibility hearing, pursuant to section 44(2) of the *IRPA*. The Minister did not provide reasons for his decision.

[8] On November 13, 2008, an Enforcement Officer with the CBSA attended at Matsqui Institution and issued an arrest warrant for the respondent and a Direction to the Warden, in accordance with sections 55(1) and 59 of the *IRPA*, instructing that the respondent be delivered to a CBSA officer at the end of his period of detention in order for the admissibility hearing to be held.

[9] In November 2008, the respondent applied to Legal Aid for the admissibility hearing, but the legal services society sent him two letters of refusal dated November 17 and December 5, 2008.

[10] On December 15, 2008, the admissibility hearing began but was postponed to February 3, 2009 in order to allow the respondent to obtain counsel.

[11] On December 23, 2008, the respondent was released from Matsqui Institution for day parole and was delivered to the custody of a CBSA officer. The same day, a 48-hour detention review was conducted before the Immigration Division. During the review, the respondent was represented by legal counsel. The next day, Immigration Division member King ordered the respondent be released from immigration detention to begin his day parole. The member found that the respondent was not a danger to the public and was not unlikely to appear for an admissibility hearing. In fact, it was held that his good behaviour in prison and his family situation, support, and goals would clearly dissuade him from committing new offences or from fleeing.

[12] The respondent continuously abided by his day parole conditions and spent most of his leisure time with his family. He used his recovered liberty to help his wife take care of his son, to accompany his son in sporting activities, to himself engage in physical activities, and to find a suitable church for his family.

[13] On February 3, 2009, the respondent asked and obtained another postponement of the admissibility hearing to March 17, 2009 in order to obtain legal counsel.

[14] On March 17, 2009, the respondent appeared with his wife before Immigration Division member Tessler. Mrs. Fox, who is not a lawyer, acted as his assistant. Mrs. Fox asked for a further adjournment of the admissibility hearing until April 14, 2010 (the respondent's full parole eligibility date) to avoid having her husband re-incarcerated until this date. Mrs. Fox explained the hardship of

a removal order and of re-incarceration on the respondent and his family. Member Tessler listened to the submissions and then reminded Mrs. Fox that an admissibility hearing is distinct from a humanitarian and compassionate (H&C) procedure. Nevertheless, he greatly emphasized the humanitarian aspect of the file and decided to reserve his decision to March 26, 2009. Finally, on March 26, 2009, member Tessler, in an oral decision, granted the adjournment of the admissibility hearing until April 1, 2010.

[15] On March 26, 2009, the Tribunal granted the 13-month adjournment request, postponing the admissibility hearing to April 1, 2010.

II. THE IMPUGNED DECISION

[16] The impact of an inadmissibility hearing was very much on the Immigration Division member's mind. Indeed, he started off his discussion by pointing out that Mr. Fox would be immediately re-incarcerated if he was to be found inadmissible, even if he could not be removed from Canada until he could be released in April 2010. Here is what the Member stated by way of introduction to his discussion of Mr. Fox's request for an adjournment:

> All parties understand and acknowledge that if the admissibility hearing proceeds today and Mr. Fox is found inadmissible and ordered deported from Canada he would lose the privilege of accelerated day parole and be returned to prison where he would remain until his statutory release date on the 14th of April 2010 and this is by operation of subsection 128(5) of the *Corrections and Conditional Release Act.*
>
> All parties also understand and acknowledge that if the admissibility hearing proceeds today and Mr. Fox is found admissible – inadmissible the Minister would not be in the position to remove him

> from Canada until at least the 14th of April 2010 by operation of section 59(b) of the *Immigration and Refugee Protection Act*.
>
> Therefore, the solitary, practical effect of proceeding with the admissibility hearing at this time which is likely to result in a Deportation Order is that Mr. Fox will immediately be required to go back to prison where he will remain until April 2010.

[17] The Member then quoted relevant parts of the decision of this Court in *Capra* v. *Canada (Attorney General)*, 2008 FC 1212, which was brought to his attention by counsel for the applicant. In that decision, the Court confirmed the constitutionality of section 128 of the *CCRA*. Mr. Justice Russell came to that conclusion on the grounds that this section serves legitimate legislative intentions such as preventing foreign offenders on day parole from accessing Canadian society more easily than non-criminal foreign nationals under removal orders, as well as preventing offenders subject to removal from serving sentences that are significantly shorter than the sentences of Canadians because of more favourable systems abroad.

[18] The Tribunal, however, distinguished the *Capra* decision from the case at bar on three grounds: first, Mr. Capra was serving a sentence for additional convictions after a removal order had been made and an IAD appeal had been dismissed; second, the respondent here is still a permanent resident and is not yet subject to a removal order; and third, the respondent has already been at liberty for three months.

[19] The Tribunal also reviewed the legislation governing immigration procedures and stressed that the general emphasis in the *IRPA* is on balancing informality and efficiency with natural justice

and fairness. The Tribunal noted that subsection 162(2) of the *IRPA* provides that each division shall deal with all proceedings before it as informally and quickly as the circumstances and considerations of fairness and natural justice permit. Rule 43 of the *Immigration Division Rules* was also considered, which deals similarly with natural justice concerns such as the right to counsel, the degree of notice and the opportunity to prepare in the context of adjournment hearings; among the various factors to be taken into consideration, the Tribunal observed that subparagraph 43(2)*(i)* includes the more amorphous considerations of unreasonable delay and injustice, which reflects once more the *IRPA*'s emphasis on fairness.

[20] The Tribunal then went on to characterize the adjournment request as a balancing act between the public interest and the liberty interest of the respondent. It acknowledged that, in general, this balance weighs in favour of a prompt resolution, but was of the view that there was no pressing need to proceed in this case. There was no prejudice to the Minister as a removal cannot be enforced immediately, and the only effect of proceeding would be to send Mr. Fox back to prison. "Doing so", Tessler wrote, "seems only to serve administrative convenience as if process trumps people in every case".

[21] The Tribunal also rejected the argument presented by the Minister that an immediate decision would make it possible to offer a Pre Removal Risk Assessment to the respondent since the the risk to be returned to the United States is unlikely to be assessed as a bar to his removal. Furthermore, the Tribunal opined that there was a significant savings to the Canadian taxpayer in

keeping the respondent out of prison when he was determined by two different decision-makers not to be a danger to society or a flight risk.

[22] In light of the respondent's significant interest in staying at liberty and unified with his family, and of the absence of prejudice to the applicant in delaying the proceeding, the Tribunal therefore concluded that it was not unreasonable to delay the proceeding.

III. ISSUES

[23] In light of the oral and written submissions made by counsel on behalf of both parties, it appears that three questions have to be resolved to determine this application for judicial review:

a. The decision challenged being interlocutory in nature, are there special circumstances justifying a judicial review of that decision?

b. If the decision of the Tribunal is properly the subject of judicial review, what is the appropriate standard of review?

c. Did the decision of the Tribunal satisfy that standard of review?

IV. ANALYSIS

A. The relevant legislative framework

[24] This case involves section 50*(b)* of the *IRPA* and sections 128(3) to (7) of the *CCRA*, the legislative scheme relating to permanent residents and foreign nationals convicted of offences in Canada and sentenced to a term of imprisonment in Canada who become the subject of removal orders. For ease of reference, these sections are reproduced here:

Section 50 (b) of the *IRPA*:

50. A removal order is stayed	**50.** Il y a sursis de la mesure de renvoi dans les cas suivants :
[…]	[…]
(*b*) in the case of a foreign national sentenced to a term of imprisonment in Canada, until the sentence is completed;	*b*) tant que n'est pas purgée la peine d'emprisonnement infligée au Canada à l'étranger;

Sections 128 (3) to (7) of the *CCRA* :

128. (3) Despite subsection (1), for the purposes of paragraph 50(*b*) of the *Immigration and Refugee Protection Act* and section 40 of the *Extradition Act*, the sentence of an offender who has been released on parole, statutory release or an unescorted temporary absence is deemed to be completed unless the parole or statutory release has been suspended, terminated or revoked or the unescorted temporary absence is suspended or cancelled or the offender has returned to Canada before the expiration of the sentence according to law.	**128.** (3) Pour l'application de l'alinéa 50*b*) de la *Loi sur l'immigration et la protection des réfugiés* et de l'article 40 de la *Loi sur l'extradition*, la peine d'emprisonnement du délinquant qui bénéficie d'une libération conditionnelle d'office ou d'une permission de sortir sans escorte est, par dérogation au paragraphe (1), réputée être purgée sauf s'il y a eu révocation, suspension ou cessation de la libération ou de la permission de sortir sans escorte ou si le délinquant est revenu au Canada avant son expiration légale.
(4) Despite this Act or the *Prisons and Reformatories Act*, an offender against whom a removal order has been made	(4) Malgré la présente loi ou la *Loi sur les prisons et les maisons de correction*, l'admissibilité à la libération

under the *Immigration and Refugee Protection Act* is ineligible for day parole or an unescorted temporary absence until the offender is eligible for full parole.

conditionnelle totale de quiconque est visé par une mesure de renvoi au titre de la *Loi sur l'immigration et la protection des réfugiés* est préalable à l'admissibilité à la semi-liberté ou à l'absence temporaire sans escorte.

(5) If, before the full parole eligibility date, a removal order is made under the *Immigration and Refugee Protection Act* against an offender who has received day parole or an unescorted temporary absence, on the day that the removal order is made, the day parole or unescorted temporary absence becomes inoperative and the offender shall be reincarcerated.

(5) La libération conditionnelle du délinquant en semi-liberté ou en absence temporaire sans escorte devient ineffective s'il est visé, avant l'admissibilité à la libération conditionnelle totale, par une mesure de renvoi au titre de la *Loi sur l'immigration et la protection des réfugiés*; il doit alors être réincarcéré.

(6) An offender referred to in subsection (4) is eligible for day parole or an unescorted temporary absence if the removal order is stayed under paragraph 50(*a*), 66(*b*) or 114(1)(*b*) of the *Immigration and Refugee Protection Act*.

(6) Toutefois, le paragraphe (4) ne s'applique pas si l'intéressé est visé par un sursis au titre des alinéas 50*a*) ou 66*b*) ou du paragraphe 114(1) de la *Loi sur l'immigration et la protection des réfugiés*.

(7) Where the removal order of an offender referred to in subsection (5) is stayed under paragraph 50(*a*), 66(*b*) or 114(1)(*b*) of the *Immigration and Refugee Protection Act* on a day prior to the full parole eligibility of the offender, the unescorted temporary absence or day parole of that offender is resumed as of the day of the

(7) La semi-liberté ou la permission de sortir sans escorte redevient effective à la date du sursis de la mesure de renvoi visant le délinquant pris, avant son admissibilité à la libération conditionnelle totale, au titre des alinéas 50*a*) ou 66*b*) ou du paragraphe 114(1) de la *Loi sur l'immigration et la protection des réfugiés*.

stay.

[25] As already mentioned, these provisions were recently held to be constitutionally valid in *Capra, supra*. In that case, the Court explained that unlike the Canadian citizen who is subject to imprisonment and supervision in the community pursuant to the Warrant of Committal for Conviction until the Warrant Expiry Date, this scheme provides that a sentence of a non-Canadian subject to a removal order is deemed completed for the purposes of a removal from Canada when the offender is released from the penitentiary on day parole, full parole or statutory release.

[26] In order to ensure that the offender serves the denunciatory portion of the sentence incarcerated prior to removal, the offender subject to a removal order is not eligible for day parole until the offender's full parole eligibility date. If the offender is released on day parole prior to a removal order being issued, then when a removal order is issued, the offender is returned to incarceration and is not eligible to be released until the offender reaches the offender's full parole eligibility date.

[27] In that case, the Court found that it was perfectly legitimate for Parliament to postpone eligibility for day parole and unescorted release for foreign offenders to achieve specific policy objectives such as ensuring that such persons do not serve sentences shorter than the sentences served by Canadians for the same crime (which would occur if they were removed at an earlier time), and that the offender should not be placed in a better position than a non-offending foreigner subject to removal by giving the offender access to Canadian society and Canadian territory through

day parole and unescorted temporary absence. Subsection 128(4) of the *CCRA* was therefore determined compliant with sections 7, 9 and 15 of the *Canadian Charter of Rights and Freedoms.*

[28] It is true that in *Capra*, the focus was on s. 128(4) as opposed to s. 128(5) of the *CCRA*, as the deportation order had been made before the applicant had become eligible for an Unescorted Temporary Absence, and not after, as is the case here. But this distinction is not material to the constitutionality of the whole scheme put in place by Parliament, as s. 128(5) of the *CCRA* is really the corollary to s. 128(4) and is the expression of the same logic that underpins s. 128(4). In both cases, the variation in the way an offender subject to a removal order served the sentence of imprisonment imposed is triggered by the existence of the removal order, and the differential treatment embodied in sections 128(3) to (7) of the *CCRA* is a necessary consequence of a valid deportation order.

[29] This case also involves sections 162(2) and 173*(b)* of the *IRPA* and Rule 43 of the *Immigration Division Rules* (SOR/2002-229), relating to how an admissibility hearing before the Immigration Division shall proceed as well as to the factors to be taken into consideration when dealing with an application for an adjournment. These provisions read as follows:

Provisions of the *IRPA*:

162. (2) Each Division shall deal with all proceedings before it as informally and quickly as the circumstances and the considerations of fairness and natural justice	**162.** (2) Chacune des sections fonctionne, dans la mesure où les circonstances et les considérations d'équité et de justice naturelle le permettent, sans formalisme et

permit. avec célérité.

173. The Immigration Division, in any proceeding before it,	**173.** Dans toute affaire dont elle est saisie, la Section de l'immigration :
[…]	[…]
(*b*) must give notice of the proceeding to the Minister and to the person who is the subject of the proceeding and hear the matter without delay;	*b*) convoque la personne en cause et le ministre à une audience et la tient dans les meilleurs délais;

Rule 43 of the *Immigration Division Rules*:

43. (1) A party may make an application to the Division to change the date or time of a hearing.	**43.** (1) Toute partie peut demander à la Section de changer la date ou l'heure d'une audience.
(2) In deciding the application, the Division must consider any relevant factors, including	(2) Pour statuer sur la demande, la Section prend en considération tout élément pertinent. Elle examine notamment :
(*a*) in the case of a date and time that was fixed after the Division consulted or tried to consult the party, the existence of exceptional circumstances for allowing the application;	*a*) dans le cas où elle a fixé la date et l'heure de la procédure après avoir consulté ou tenté de consulter la partie, toute circonstance exceptionnelle qui justifie le changement;
(*b*) when the party made the application;	*b*) le moment auquel la demande a été faite;
(*c*) the time the party has had to prepare for the hearing;	*c*) le temps dont la partie a disposé pour se préparer;

(*d*) the efforts made by the party to be ready to start or continue the hearing;	*d*) les efforts qu'elle a faits pour être prête à commencer ou à poursuivre l'audience;
(*e*) the nature and complexity of the matter to be heard;	*e*) la nature et la complexité de l'affaire;
(*f*) whether the party has counsel;	*f*) si la partie est représentée;
(*g*) any previous delays and the reasons for them;	*g*) tout report antérieur et sa justification;
(*h*) whether the time and date fixed for the hearing was peremptory; and	*h*) si la date et l'heure qui avaient été fixées étaient péremptoires;
(*i*) whether allowing the application would unreasonably delay the proceedings or likely cause an injustice.	*i*) si le fait d'accueillir la demande ralentirait l'affaire de manière déraisonnable ou causerait vraisemblablement une injustice.

B. The interlocutory nature of the decision

[30] It is well established that an adjournment decision cannot be reviewed in the absence of special circumstances. The Federal Court of Appeal and this Court have frequently reiterated that scarce judicial resources should not be spent on applications to judicially review preliminary or interlocutory decisions, especially where an adequate remedy would be available later so as to cure any potential defect of the interlocutory decision. As the Court of Appeal stated in *Szczecka* v. *Canada (Minister of Employment and Immigration)* (1993), 116 D.L.R.(4th) 333, at para. 4:

> This is why unless there are special circumstances where there should not be any appeal or immediate

> judicial review of an interlocutory judgment. Similarly, there will not be any basis for judicial review, specially immediate review, when at the end of the proceedings some other appropriate remedy exists. These rules have been applied in several Court decisions specifically in order to avoid breaking up cases and the resulting delays and expenses, which interfere with the sound administration of justice and ultimately bring it into disrepute.
>
> See also: *Ali* v. *Canada (Minister of Citizenship and Immigration)*, 2004 FC 1174, at para. 34.

[31] The applicant referred the Court to a number of decisions where this Court and the Court of Appeal have accepted to rule on interlocutory adjournment decisions, therefore implicitly accepting that adjournment decisions do sometimes satisfy the "special circumstances" test: see *Hassanzadeh v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 902; *Canada (Attorney General) v. Subhaschandran*, 2005 FCA 27; *Canada (Minister of Employment and Immigration) v. Lundgren*, [1993] 1 F.C. 187; *Canada (Minister of Employment and Immigration)* v. *Han*, [1984] 1 F.C. 976. On the other hand, counsel for the applicant made no submission on this issue.

[32] In the case at bar, I am satisfied that the nature of the error is, in and of itself, sufficient to justify the review by this Court of the interlocutory decision. It is a well established principle that special circumstances are deemed automatically to exist when the alleged error is one of jurisdiction: *Pfeiffer v. Canada (Superintendent of Bankruptcy)*, [1996] 3 F.C. 584 (T.D.). For reasons that I will elaborate upon shortly, I have come to the conclusion that the tribunal acted beyond its jurisdiction or refused to exercise its jurisdiction in granting the 13-month adjournment sought by the respondent. Had the decision been made within the confines of the discretion

conferred to the tribunal by the legislation, the jurisdiction of this Court to review would have been more problematic. But this is not the case here.

[33] I also agree with the applicant that the Minister will have no adequate alternative remedy if the adjournment is allowed to stand. The respondent will have reached his full parole eligibility date by the resumption of the admissibility hearing, and the effects of this adjournment decision will have become moot. It is true that the adjournment of the hearing does not affect an eventual removal order, since such an order, even if issued, cannot be operative before the date on which the hearing should resume. But what the Minister is seeking is not so much the execution of the removal order as compliance with the law, which sets out that a foreign offender who is subject to a removal shall serve the denunciatory portion of his sentence before being eligible for day parole or unescorted temporary absence. In other words, the re-incarceration of the applicant is as much a potential consequence of the admissibility hearing as the removal order itself; from that angle, it can surely be said that the adjournment of the admissibility hearing to the date of the applicant's full parole eligibility leaves no adequate alternative remedy to the Minister, and cannot be remedied by the final decision once that hearing resumes.

[34] For the above reasons, I am therefore of the view that it is appropriate to entertain the Minister's application for judicial review in the special circumstances of this case.

C. The appropriate standard of review

[35] Had the Tribunal acted within its jurisdiction in granting the adjournment, there is no doubt that the applicable standard of review would have been reasonableness. In *Prassad* v. *Canada (Minister of Employment and Immigration)*, [1989] 1 S.C.R. 560, the Supreme Court made it clear that administrative tribunals must be able to control their own procedures; accordingly, adjournment of their proceedings was found to be very much in their discretion (subject, of course, to the rules of fairness).

[36] In the present case, however, the issue is not so much whether the Tribunal properly considered the factors found in s. 43(2) of the *Immigration Division Rules* in granting the adjournment, but whether the Tribunal had the jurisdiction or acted beyond its jurisdiction in granting the adjournment by taking into account irrelevant considerations. This is clearly a question of jurisdiction reviewable on the standard of correctness.

[37] Even if the issue could plausibly be cast as one going to the proper interpretation of paragraph 128(5) of the *CCRA*, it would still call for the application of the correctness standard. It is clearly not a question relating to the Tribunal's home statute and it falls outside its area of specialized expertise.

[38] As a result, this Court owes no deference to the Tribunal's decision, and must proceed according to its own analysis of the question that is debated between the parties. As the Supreme Court stated in *Dunsmuir v. New-Brunswick*, 2008 SCC 9, at para. 50:

> When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

Was the decision to adjourn for 13 months correct?

[39] Once a section 44 Report is referred to the Immigration Division for an admissibility hearing, pursuant to sections 162(2) and 173(3)*(b)* of the *IRPA*, the admissibility hearing must be heard as quickly as the circumstances and the considerations of procedural fairness and natural justice permit and without delay. The Tribunal's function at the admissibility hearing is exclusively to find facts. If the member finds the person described in section 36(1)*(a)* of the *IRPA*, then pursuant to section 45*(d)* of the *IRPA* and section 229(1)*(c)* of the *Immigration and Refugee Protection Regulations*, the Tribunal must issue a Deportation Order against the person.

[40] The Tribunal found as much in the case at bar and acknowledged that once the admissibility hearing commenced to determine if the respondent is inadmissible pursuant to paragraph 36(1)*(a)* of the *IRPA* for serious criminality, the matter would be straightforward as the documents before the Tribunal provided by the respondent established that he was serving a sentence of seven years and ten months for a conviction in Canada for importing cocaine.

[41] Yet the Tribunal made it very clear that its decision to grant the adjournment was essentially driven by its desire to allow the respondent to remain with his family and to benefit from his day parole until he became removable. This is made abundantly clear from the following two paragraphs of the decision:

> In the majority of immigration matters where the Minister is seeking a removal order I agree that a swift resolution of the matter is the reasonable course but here there is no pressing need to process. Where there is no prejudice to the Minister as a removal cannot be enforced at this time, when the only effect of proceeding will be to send Mr. Fox back to prison, there seems to be a certain unnecessary punitive quality to requiring that the matter proceed. Doing so seems only to serve administrative convenience as if process trumps people in every case.
>
> In this case the adjournment request becomes a matter of balancing the public interest with the liberty interest of the person. If the Minister is insisting that the objectives of the Act be served, I note that while at liberty Mr. Fox is able to remain united with his wife and son which not only serves the best interests of the child but maintains family unification.

[42] These are obviously valid humanitarian and compassionate considerations. But the Tribunal does not have any discretion to consider these factors at the admissibility hearing. It is rather at the stage of making an admissibility report under s. 44(1) or in the making of a referral to the Immigration Division under s. 44(2) of the *IRPA* that these considerations should be taken into account. This point was reiterated most recently by Mr. Justice Barnes in the following terms:

> The caselaw indicates that to the extent that any discretion exists to consider mitigating, aggravating or humanitarian factors in the process of determining the inadmissibility of a permanent resident, it does so

> at the point of the preparation of an admissibility report under ss. 44(1) or in the making of a referral to the Immigration Division under ss. 44(2) of the IRPA: see *Hernandez v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 429, 271 F.T.R. 257. (…) once the matter comes before the Immigration Division, the question for determination is only whether the person is inadmissible on the ground of serious criminality. The Immigration Division's admissibility hearing is not the place to embark upon a humanitarian review or to consider the fairness or proportionality of the consequences that flow from a resulting deportation order. Those are consequences that flow inevitably by operation of law and they impart no mitigatory discretion upon the Immigration Division.
>
> *Wajaras v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 200, at para. 11

[43] Now, the applicant is right to point out that s. 43(2)*(i)* of the *Immigration Division Rules* allows the Tribunal to consider whether allowing the application for an adjournment would "likely cause an injustice". The applicant states that on that basis, the Tribunal was justified to consider the exceptional circumstances that were brought to its attention, including the fact that the respondent was already at liberty, had been found not to be a danger to the public and not unlikely to appear for immigration proceedings, and that he was married to a Canadian citizen and had a nine-year-old child with attention deficit hyperactive disorder.

[44] This subsection, however, cannot be read in a vacuum and must be interpreted in context. All the subparagraphs of paragraph 43(2) of the *Immigration Division Rules*, as well as paragraph 162(2) of the *IRPA* relate to the procedural requirements to ensure that the hearing itself is

conducted fairly. The “injustice” to which subparagraph 43(2)*(i)* relates cannot extend to the effect of the consequences of the final substantive decision made at the conclusion of a hearing (i.e. the issuance of a removal order).

[45] Indeed, the facts of this case are not substantially different from the situation considered by the Court of Appeal in *Han, supra*. In that case, the respondent had been admitted to Canada as a permanent resident conditional upon his marrying within 90 days. The marriage did not take place, and a report that he had contravened the terms and conditions of his landing was made to the Minister. When the inquiry resumed after several adjournments on June 7, 1983, the respondent sought an adjournment so his application for citizenship could be processed; according to the *Immigration Act, 1976* then in force, he met the requirements of the *Citizenship Act* and was entitled as of right to a grant of citizenship, since he had remained a permanent resident notwithstanding his failure to fulfil the condition. At the time, section 35(1) of the *Immigration Regulations*, 1978 SOR/78-172 provided that the Adjudicator “…may adjourn the inquiry at any time for the purpose of ensuring a full and proper inquiry”. The adjournment was refused, but the Trial Judge quashed the refusal on the ground that the decision to grant or deny an adjournment was always a matter of discretion and that discretion is to be exercised fairly or in accordance with the principles of natural justice. He concluded that the refusal of the adjournment was unfair because it would quite likely result in the making of a deportation order which would prejudice the respondent's right to become a Canadian citizen.

[46] The Court of Appeal reversed that decision on the ground that the Trial Judge had misinterpreted section 35(1) of the *Immigration Regulations*. All three judges, in separate reasons, came to the conclusion that the Adjudicator did not have the jurisdiction to grant the adjournment for the purpose of allowing his citizenship application to be processed, and that the Trial Judge had erred in assuming that he had that jurisdiction. They also agreed that the decision to grant or deny an adjournment is not always a matter of unconstrained discretion. The Court found that the purpose for which the adjournment was sought in that case had nothing to do with a better conduct of the inquiry, but to ensure that the inquiry could never be held. This was clearly not within the jurisdiction of the Adjudicator. As for the notion of fairness on which the reasoning of the Trial Judge hinged, the Court had this to say:

> It does not appear to me that the legal notion of fairness on which the reasoning hinges is taken in its proper sense. This notion of fairness as developed and applied by supervisory bodies in reviewing purely administrative decisions pertains to procedural requirements, as does the broader notion of natural justice in which it is embedded; it refers to the manner in which the tribunal has reached its conclusion, not to the substance of the conclusion itself. The tribunal has, of course, a strict duty to act in good faith, within the purview of the law from which it draws its authority and for relevant motives, its discretion, as it is usually said, must be exercised "judicially", but the suitability and the fairness of the decision are matters left to its sole appreciation. It is apparent from the reasons of the learned Trial Judge that the "taint of unfairness" he was seeing was directed to the decision itself because of its possible prejudicial effects to the respondent; it had nothing to do with the manner in which the decision had been reached. (*Han*, *supra*, at p. 987)

[47] The same reasoning must govern the case at bar. As previously stated, the question for determination at the admissibility hearing is whether the respondent is inadmissible for serious criminality. The consequences that flow from a finding of inadmissibility are not relevant to such a determination. They have been set out by Parliament which has seen fit to postpone eligibility for day parole and unescorted release for foreign offenders until they have purged the denunciatory portion of their sentence. One may disagree with that policy, but it is not for the Tribunal (nor, indeed, for this Court) to do away with the will of Parliament by circumventing it with an adjournment order which, for all intent and purposes, would render s. 128(5) nugatory and of no effect. In doing so, I am therefore of the view that the Tribunal acted without jurisdiction or beyond its jurisdiction.

[48] In his written submissions, the respondent also hinted at a possible abuse of power to the extent that the applicant was improperly insisting to see the respondent re-incarcerated even though he was not a danger to the public or a flight risk. His counsel did not press the issue at the hearing, and properly so. This question has already been addressed by the Court in *Wajaras*, *supra*, and found to be of no merit. It is certainly not contrary to the interests of justice that the Minister insists, even repeatedly, that an Act of Parliament be complied with.

[49] For all of the above reasons, this application for judicial review will therefore be granted. At the hearing, counsel for the respondent asked for permission to propose a certified question after having had the opportunity to be appraised of my reasons. I granted him that permission, and I will therefore allow him seven days from the release of these reasons to draft any question which he

believes should be certified. In the event that he elects to do so, the applicant will be given a further seven days to reply.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is granted. There shall be a separate order as to whether one or more questions will be certified.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1930-09
STYLE OF CAUSE:	The Minister of Citizenship and Immigration and Timothy Roshaun Fox
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	September 23, 2009
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APPEARANCES:

Ms. Helen Park	FOR THE APPLICANT
Mr. Craig Costantino	FOR THE RESPONDENT

SOLICITORS OF RECORD:

MR. JOHN H. SIMS, Q.C. Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE APPLICANT
ELGIN, CANNON & ASSOCIATES Barristers & Solicitors Vancouver, British Columbia	FOR THE RESPONDENT