Federal Court  Cour fédérale

Date: 20231214

Docket: IMM-2452-22
IMM_2453-22

Citation: 2023 FC 1681

Ottawa, Ontario, December 14, 2023

PRESENT: The Honourable Chief Justice Crampton

BETWEEN:

JASKIRAT SINGH SIDHU

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The circumstances leading to these proceedings are heartbreaking. I cannot recall any case more truly tragic for everyone involved.

[2] In April 2018, a bus carrying a hockey team from Humboldt, Saskatchewan, collided with a truck driven by the applicant, Mr. Sidhu. As a result of this horrible accident, 16 lives were lost and 13 additional people incurred life altering injuries. Beyond these catastrophic consequences, the families, friends and communities of all of the victims suffered terribly, and likely will continue to do so for many years to come.

[3] The applicant, Mr. Sidhu, and his spouse, Ms. Mann, have also experienced dramatic consequences. He was sentenced to eight years in prison. The dreams of a new life in Canada that he shared with Ms. Mann, following their recent marriage, have been shattered, and each of them has been severely traumatized.

[4] By all accounts, Mr. Sidhu has demonstrated an extraordinary degree of genuine, heart-wrenching remorse. He now faces removal to India, after he and Ms. Mann spent many years of hard work to establish themselves in Canada.

[5] The prospect of Mr. Sidhu's removal to India arises from two decisions (the **"Decisions"**) made pursuant to subsections 44(1) and 44(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [**IRPA**], respectively. In the first Decision, an officer (the **"Officer"**) of the Canada Border Services Agency exercised his discretion to prepare a report recommending that Mr. Sidhu be referred to an admissibility hearing in order to obtain a deportation order. In the second Decision, a Minister's delegate (the **"Delegate"**) found the Officer's Decision to be well founded and referred it to the Immigration Division of the Immigration and Refugee Board for a hearing. It is common ground between the parties that the Immigration Division will have no scope to consider any of the considerations that may weigh against the issuance of a deportation order, once it formally confirms that Mr. Sidhu is in fact "inadmissible" to Canada, on grounds of "serious criminality." This is why Mr. Sidhu seeks to have the Decisions set aside and remitted for reconsideration by different decision-makers.

[6] It bears underscoring that these proceedings are not appeals. They are applications for judicial review. As such, my sole focus will be upon whether to grant Mr. Sidhu's request to have the impugned Decisions set aside and remitted for reconsideration.

[7] In assessing those Decisions, the standard of review applicable to the procedural fairness issue raised by Mr. Sidhu is whether the *process* followed in reaching the Decisions was fair, having regard to all of the circumstances. The standard of review applicable to the other main issues raised by Mr. Sidhu is whether the Decisions were unreasonable. If I find that the Decisions were not unreasonable, they must stand, even if I may have made a different decision, based on the record that was before the Officer and the Delegate.

[8] Unfortunately, regardless of my determinations, the healing required to return to some form of a better life may become more difficult for some people who wish for a different outcome than the one I reach.

[9] For the reasons set forth below, I find that the processes followed by the Officer and the Delegate were fair, having regard to all of the circumstances. I also find that the Decisions were not unreasonable. In addition, I find that the Delegate did not fetter his discretion by only considering the seriousness of the offences for which Mr. Sidhu was convicted, as Mr. Sidhu has alleged.

II. Background

[10] Mr. Sidhu is a citizen of India. He arrived in Canada in early 2014, a few months after Ms. Mann landed here. They were married in February 2018 and became permanent residents of Canada the following month.

[11] In April 2018, during one of his first unsupervised trips as a truck driver, Mr. Sidhu failed to stop at a controlled intersection while driving a truck hauling two fully loaded trailers westbound on a highway near Nipawin, Saskatchewan. His vehicle was struck by a northbound bus carrying the Humboldt Broncos hockey team and others. Of the 29 people on the bus, 16 died and 13 suffered serious injuries.

[12] Mr. Sidhu was subsequently charged with 16 counts of dangerous operation of a motor vehicle causing death, and 13 counts of dangerous operation of a motor vehicle causing bodily injury. He pleaded guilty to those charges to spare the victims' families the ordeal of a trial. In March 2019, he was sentenced to 8 years imprisonment, which he immediately began to serve. The Delegate observed in his Decision that, as of that time, this was the longest prison sentence ever imposed in Canada for the offences in question.

[13] Mr. Sidhu has no other criminal history and has had no institutional offences during his incarceration. By all accounts, he has demonstrated an extraordinary level of remorse for the consequences of his actions.

III. Relevant Legislation

[14] The Officer recommended that Mr. Sidhu be referred to a hearing to determine his inadmissibility pursuant to paragraph 36(1)(a) of the IRPA. That provision states:

Serious criminality	**Grande criminalité**
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; […]

[15] The Officer's report was prepared pursuant to subsection 44(1) of the IRPA, which provides as follows:

Loss of Status and Removal	**Perte de statut et renvoi**
Report on Inadmissibility	**Constat de l'interdiction de territoire**
Preparation of report	**Rapport d'interdiction de territoire**
44 (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the	**44 (1)** S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un

relevant facts, which report shall be transmitted to the Minister.	rapport circonstancié, qu'il transmet au ministre.

[16] The Decision by the Delegate was made pursuant to subsection 44(2) of the IRPA. That provision states:

Referral or removal order	**Suivi**
44 (2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.	**44 (2)** S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi.

[17] The objectives set forth in the IRPA with respect to immigration include the following:

Objectives — immigration	**Objet en matière d'immigration**
3 (1) The objectives of this Act with respect to immigration are	**3 (1)** En matière d'immigration, la présente loi a pour objet
[…]	[…]
(h) to protect public health and safety and to maintain the security of Canadian society;	**h)** de protéger la santé et la sécurité publiques et de garantir la sécurité de la société canadienne;
(i) to promote international justice and security by fostering respect	**i)** de promouvoir, à l'échelle internationale, la justice et la

for human rights and by denying access to Canadian territory to persons who are criminals or security risks;	sécurité par le respect des droits de la personne et l'interdiction de territoire aux personnes qui sont des criminels ou constituent un danger pour la sécurité;
[…]	[…]

IV. Issues

[18] Mr. Sidhu raises the following three issues with respect to the Officer's Decision:

i. Did the Officer make a procedurally unfair decision, by relying on extrinsic evidence?

ii. Was the Officer's decision unreasonable on the ground that it was made in a perverse and capricious manner and without regard to the evidence?

iii. Was the Officer's decision unreasonable on the ground that the Officer applied the wrong legal test?

[19] Insofar as the Decision of the Delegate is concerned, Mr. Sidhu raises the following four issues:

i. Did the Delegate make a procedurally unfair decision, by relying on extrinsic evidence?

ii. Did the Delegate fetter his discretion by refusing to consider (i) whether Mr. Sidhu posed a present or future risk to the public, or (ii) the potential hardship that would be faced by Mr. Sidhu in India?

iii. Was the Delegate's Decision unreasonable on the ground that it applied the wrong legal test?

iv. Was the Delegate's Decision unreasonable on the ground that it was made in a perverse and capricious manner and without regard to the evidence?

V. Standard of Review

[20] The procedural fairness issues raised by Mr. Sidhu are reviewable on a standard of correctness: *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, at para 43: *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196, at para 35 [***CARL***]. In this context, the Court's ultimate focus is upon "whether the procedure was fair having regard to all of the circumstances": *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69, at paras 35 and 54.

[21] It is unnecessary to determine the standard of review applicable to the fettering of discretion issues raised by Mr. Sidhu. This is because the result will be the same under either a correctness or a reasonableness standard, since a decision that is the product of fettered discretion is *per se* unreasonable: *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299, at para 24; *Danyi v Canada (Minister of Public Safety and Emergency Preparedness)*, 2017 FC 112, at para 19; *CARL*, at para 34 (application for leave dismissed).

[22] It is common ground between the parties that the standard of review applicable to the remaining issues raised by Mr. Sidhu is whether the Decisions were unreasonable. I agree:

Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65, at paras 16-17 [***Vavilov***].

[23] When reviewing a decision on a standard of reasonableness, the Court must approach the decision with "respectful attention" and consider the decision "as a whole": *Vavilov*, at paras 84–85. The Court's overall focus will be upon whether the decision is appropriately justified, transparent and intelligible. In other words, the Court will consider whether it is able to understand the basis upon which the decision was made and then to determine whether it "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law": *Vavilov*, at paras 86 and 97.

[24] A decision which is appropriately justified, transparent and intelligible is one that reflects "an internally coherent and rational chain of analysis" and "is justified in relation to the facts and the law that constrain the decision maker": *Vavilov*, at para 85. It should also reflect that the decision maker "meaningfully grapple[d] with key issues or central arguments raised by the parties": *Vavilov*, at para 128.

[25] It is not the role of the Court to make its own determinations of fact, to substitute its view of the evidence or the appropriate outcome, or to reweigh the evidence. The Court's function is solely to assess whether the administrative tribunal's determinations and reasoning are reasonable: *Vavilov*, at paras 125–126; *Pascal v Canada (Citizenship and Immigration)*, 2020 FC 751, at para 7.

VI. Assessment of the Officer's Decision

A. *Did the Officer make a procedurally unfair Decision, by relying on extrinsic evidence?*

[26] Mr. Sidhu maintains that the Officer proceeded in a procedurally unfair manner by relying on extrinsic evidence that was not disclosed to him, thereby depriving him of an opportunity to know the case he had to meet.

[27] The evidence in question consisted of letters from individuals in the community who opposed Mr. Sidhu's wish to remain in Canada.

[28] Under the heading "Potential for Rehabilitation", the Officer noted that Mr. Sidhu and his counsel had provided multiple letters of support from members of the community. He observed that the general theme of those letters was to support Mr. Sidhu's wish to stay in Canada. He then stated the following:

> However, the CBSA is also in possession of many more letters from concerned individuals expressing the opposite and are concerned with the example that not removing an individual who caused the level of devastation would set for our society. Of note, one particular letter urging for SIDHU's removal comes from Michael COOPER who is a federal Member of Parliament in the House of Commons.

[29] Mr. Sidhu notes that in his counsel's submissions to the CBSA, it was noted that their office had received hundreds of unsolicited letters and emails in support of Mr. Sidhu from people located across Canada. A sampling of those letters was provided to the CBSA. Given that the Certified Tribunal Record (**"CTR"**) contains only 39 letters, 20 of which support him,

Mr. Sidhu asserts that it is unknown why the Officer concluded that the CBSA had "many more letters" opposing his desire to remain in Canada. Mr. Sidhu adds that the Officer's above-quoted statement indicates that he had concluded that *public opinion* weighed in favour of deportation, and that this was a persuasive or determining factor in the Officer's conclusion to recommend that he be referred to an inadmissibility hearing.

[30] I disagree. The above-quoted passage appeared in one of the sections of the Officer's Decision that preceded the final section (Section 9), entitled "Recommendation and Rationale". That final section began at the bottom of page 9 of the Officer's 14-page decision. The structure of the Decision reflects that the material summarized in the first eight sections was background information that provided the context for the Decision and rationale that were then provided in Section 9. In discussing Mr. Sidhu's prospects for rehabilitation in Section 9, the Officer made no mention of any letters from members of the community. Instead, he noted factors that were favourable to Mr. Sidhu. The only exception was the Officer's discussion of victim impact statements. The Officer noted that some family members have chosen to forgive Mr. Sidhu while others have not done so. The Officer added that the common theme in those statements was one of appreciation for Mr. Sidhu's guilty plea, which saved family members from the additional heartache that would have been associated with a long criminal trial.

[31] It is readily apparent from the Officer's discussion of Mr. Sidhu's prospects for rehabilitation in Section 9 of his Decision that this was considered to be a favourable factor for Mr. Sidhu, and that the Officer did not consider *public opinion* in reaching his Decision. In other words, it can reasonably be inferred from the absence of any discussion of public opinion in

Section 9 that the Officer exercised his discretion not to take that consideration into account in making his recommendation: *McAlpin v Canada (Minister of Public Safety and Emergency Preparedness)*, 2018 FC 422, at para 82 [***McAlpin***]. My finding in this regard is reinforced by two other aspects of the CTR. First, the Officer explicitly stated at the outset of Section 9 that he was basing his recommendations on the factors that he proceeded to address. Public or community opinion were not among those factors. Second, letters from the community were not mentioned in an e-mail from the Officer dated November 1, 2021, which listed the third party documents that were being considered by the Officer. That e-mail was sent in response to Mr. Sidhu's specific request for disclosure of any documents that the Officer intended to rely on in his deliberations.

[32] My interpretation of the structure of the Officer's Decision is also consistent with the internal guidance provided to officers in section 12.4.2 an enforcement manual entitled *ENF 5 Writing 44(1) Reports 9* [***ENF 5***], available at *https://www.canada.ca/content/dam/ircc/migration/ircc/english/resources/manuals/enf/enf05-eng.pdf*. Specifically, the second paragraph of that section provides as follows:

> Officers should keep in mind that where there is relevant information before them which cannot be disclosed to the person due to privacy or information sharing legislation, and where the officer cannot obtain authorization to disclose the document with appropriate redactions, the information should not be relied upon in the officer's reasons. There are exceptions where the duty of fairness can be met without having to furnish all the documents and reports the decision maker relied on, such as where a document is protected by privilege based on national security or on the solicitor-client relationship, however officers should be careful not to rely specifically on documents which cannot be disclosed. This position is consistent with Federal Court jurisprudence [for example, *Moghaddam v Canada (Citizenship and Immigration)*, 2018 FC 1063].

[33] In summary, for the reasons set forth above, I find that the Officer did not rely on extrinsic evidence, consisting of letters from members of the community opposing Mr. Sidhu's request to stay in Canada, in making his recommendation that Mr. Sidhu be referred to an admissibility hearing. It is readily apparent from the Officer's Decision that he did not consider public opinion in making that recommendation. Consequently, I reject Mr. Sidhu's submission that the Officer's Decision was procedurally unfair on the ground that the Officer considered such extrinsic evidence in the course of reaching his recommendation. Stated differently, the process followed by the Officer with respect to the letters from the public was not unfair, having regard to all of the circumstances.

[34] For the record, and more broadly speaking, the process leading up to the Officer's Decision was more than fair in the circumstances. Among other things, Mr. Sidhu was provided with a procedural fairness letter dated September 15, 2020, in which he was invited to make written submissions. After being granted multiple extensions of time to make those submissions, he made extensive representations, dated January 18, 2021, to which were attached over 400 pages of materials. He then made two further written submissions, dated April 29, 2021, and June 8, 2021, before being provided with a second procedural fairness letter (dated October 22, 2021), in which he was invited to make additional submissions. He then did so on January 17, 2022, when he also attached 144 pages of new materials. Moreover, between October 2021 and January 2022, he was granted three requests for an extension of time in which to provide his final submissions.

[35] I will pause to add in passing that Mr. Sidhu's submissions to the Officer reflect that he was well aware that some members of the community opposed his wish to stay in Canada. In other words, Mr. Sidhu was aware of the case he would have to meet in the event that public opinion wound up being a relevant factor in the Officer's determination. As it turned out, the Officer did not consider public opinion to be relevant.

B. *Was the Officer's Decision unreasonable on the ground that it was made in a perverse and capricious manner and without regard to the evidence?*

[36] Mr. Sidhu submits that the Officer's Decision was unreasonable because it focused entirely on one factor, namely, the seriousness of the offences for which he was convicted.

[37] I disagree. The Officer's Decision did not focus solely on the seriousness of the offences in question. That factor accounted for only one of the over four pages in the Recommendation and Rationale section of the Officer's Decision. In that section (Section 9), the Officer spent multiple paragraphs discussing each of the following factors: (i) seriousness of the offence, (ii) possibility of rehabilitation, (iii) length of time and establishment in Canada, (iv) family in Canada and the dislocation to the family if Mr. Sidhu were removed from Canada; (v) family and community support, and (vi) degree of hardship if removed from Canada. These were precisely the six factors Mr. Sidhu maintains the Officer was obliged to consider.

[38] Mr. Sidhu asserts that the Officer did not draw any conclusions regarding his high potential for rehabilitation, and that the Officer failed to mention the evidence he submitted in that regard. However, it is readily apparent from the Officer's Decision that this was recognized

and taken into account by the Officer. Among other things, the Officer noted that Mr. Sidhu has no previous criminal record and has a clean driving record. The Officer also stated that Mr. Sidhu has a strong and positive support network to help him in reintegrating into society when he is released from detention. The Officer added that Mr. Sidhu also has several friends who will support him upon his release. Beyond the foregoing, the Officer stated that Mr. Sidhu is clearly remorseful for the devastation that his actions have caused.

[39] Mr. Sidhu further states that the Officer's treatment of the seriousness of his offences was impoverished because the Officer did not consider some of his submissions in that regard.

[40] I disagree. The Officer's discussion of the seriousness of Mr. Sidhu's offences was more than sufficient. It consisted of a full single-spaced page, spanning five paragraphs. After summarizing some of the key findings of the sentencing judge, the Decision explicitly addressed Mr. Sidhu's principal points with respect to this factor, including that the collision did not involve speeding, intoxication, reckless driving or distraction on a cellular phone. The Decision also specifically addressed Mr. Sidhu's contention that although the consequences of his actions were high, the seriousness of the actual offence was low.

[41] In summary, for the reasons set forth above, I reject Mr. Sidhu's submission that the Officer's Decision was unreasonable on the grounds identified in the immediately preceding paragraphs of this section VI.B. The Officer's Decision was appropriately justified, transparent and intelligible. It also reflected an internally coherent and rational chain of analysis, and meaningfully engaged with the key issues raised by Mr. Sidhu.

C. *Was the Officer's Decision unreasonable on the ground that the Officer applied the wrong legal test?*

[42] Mr. Sidhu submits that the Officer's Decision was unreasonable on the ground that the Officer applied the wrong legal test. Specifically, he maintains that the Officer erroneously applied the test applicable to a consideration of a request under section 25 of the IRPA. In support of this submission, Mr. Sidhu asserts that the test applicable to a request under section 25 is whether humanitarian considerations, taken together, *outweigh* the inadmissibility of the applicant. He contrasts this test with his characterization of the test the Officer was obliged to apply pursuant to subsection 44(1), namely, to consider whether to recommend that he be referred to an admissibility hearing, *having regard to all of the circumstances of the case.*

[43] I disagree. The Officer was not obliged to have regard to all of the circumstances of the case. In any event, the Officer did consider the specific factors that Mr. Sidhu asserts ought to have been considered. In so doing, the Officer went well beyond the scope of his discretion, in a manner that favoured Mr. Sidhu.

[44] In support of his position, Mr. Sidhu relies on certain legislative history. In particular, he notes that under paragraph 70(1)(b) of the *Immigration Act*, RSC 1985, c I-2 [***Immigration Act***], the "predecessor" legislation of the current section 44, a permanent resident found inadmissible due to criminality had a right of appeal to the Immigration Appeal Division (the **"IAD"**) of the Immigration and Refugee Board. That provision provided an appeal, "on the ground that, having regard to all of the circumstances of the case, the [appellant] should not be removed from Canada." Mr. Sidhu observes that this test was interpreted to require consideration of the factors

set forth in *Ribic v Canada (Minister of Employment and Immigration)*, [1985] DSAI No. 4, IABD No. 4 (IAB), at pp. 4-5: *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, at paras 40 and 90. Those factors (the **"*Ribic* Factors"**) are as follows:

i. The seriousness of the offence(s) in question;

ii. The possibility of rehabilitation or, alternatively, the circumstances surrounding the failure to meet the conditions of admissibility to Canada;

iii. The length of time spent in Canada and the degree to which the appellant is established in this country;

iv. The family in Canada and the dislocation to the family that would likely be caused by removal from Canada;

v. The family and community support available for the appellant; and

vi. The degree of hardship that would be caused by the removal of the appellant to their country of nationality.

[45] Mr. Sidhu asserts that when Parliament was considering Bill C-11, *An Act respecting immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted or in danger*, 1st Sess, 37th Parl, 2001 (assented to November 1, 2001), which became the IRPA, important testimony was provided regarding subsections 44(1) and 44(2) of the IRPA. Specifically, he notes that Ms. Joan Atkinson, an Assistant Deputy Minister with Citizenship and Immigration Canada, testified regarding the extent of discretion that immigration officers and ministerial delegates would have under those provisions. In this regard, Ms. Atkinson stated that

those decision-makers would have “new discretion” to consider all of the circumstances of the case. In other words, the factors that had previously been considered by the IAD under section 70(1)(b) of the *Immigration Act* would continue to be taken into account under subsections 44(1) and 44(2) of the IRPA, albeit at an earlier stage of the process. Ms. Atkinson explained that this was considered necessary to achieve the appropriate balance between, on the one hand, protecting the safety and security of Canadians, and on the other hand, ensuring sensitivity to particular circumstances of individuals before making the decisions contemplated by subsections 44(1) and (2): House of Commons, Standing Committee on Citizenship and Immigration, *Evidence*, 37-1 (April 26, 2001) at 0930.

[46] Mr. Sidhu also relies on section 10.1 of ENF 5, which provides internal guidance to officers when preparing reports under subsection 44(1). Section 10.1 of ENF 5 states that “Officers must ensure that all relevant factors pertaining to the permanent resident have been addressed in their written recommendation to the [Minister’s Delegate]” and that these factors should include the personal circumstances of the individual in question.

[47] However, the legislative history and the internal guidance mentioned above and relied upon by Mr. Sidhu are not consistent with the settled jurisprudence regarding the very limited scope of the discretion contemplated by subsections 44(1) and 44(2) of the IRPA.

[48] In fairness to Mr. Sidhu, the most recent, jurisprudence on point was issued after the parties had perfected their respective records in this proceeding: *Obazughanmwen v Canada (Public Safety and Emergency Preparedness)*, 2023 FCA 151 [***Obazughanmwen***].

[49] *Obazughanmwen* concerned a permanent resident who was referred to the Immigration Division for inadmissibility pursuant to paragraphs 36(1)(a) (serious criminality) and 37(1)(a) (organized criminality) of the IRPA. The certified question was whether a ministerial delegate acting under subsection 44(2) has the discretion to consider complex issues such as humanitarian and compassionate (**"H&C"**) factors and the best interests of the child when deciding whether to refer a permanent resident to the Immigration Division for inadmissibility pursuant to section 37. That certified question was confined to inadmissibility under section 37 because the consequences of a declaration of inadmissibility are more serious where the basis for inadmissibility is section 37, as opposed to section 36. The applicant relied on those more serious consequences to assert that the Minister's delegate was obliged to consider H&C considerations in exercising their discretion under subsection 44(2). That submission was rejected by the Federal Court of Appeal (**"FCA"**), which drew largely upon the jurisprudence with respect to section 36 in reaching its conclusion.

[50] Among other things, the FCA concluded that the question regarding the scope of discretion contemplated by subsection 44(2) should not have been certified because it had already been answered on numerous occasions and therefore "put to rest": *Obazughanmwen*, at para 29.

[51] Regarding the relevant jurisprudence, the FCA observed that the overall consensus had coalesced around the principles that officers and ministerial delegates exercising their functions have "very limited discretion, and that there was no general obligation to consider H&C factors nor to explain why they were not considered sufficient to offset other factors supporting a

decision to refer a case for an admissibility hearing": *Obazughanmwen*, at para 29. The FCA added that this is especially so in cases of serious criminality and organized criminality: *Obazughanmwen*, at para 27; see also para 33.

[52] The FCA then endorsed the following rationale that it had provided in support of the foregoing position, in *Canada (Citizenship and Immigration) v Cha*, 2006 FCA 126 [***Cha***]:

> **[35]** I conclude that the wording of sections 36 and 44 of the Act and of the applicable sections of the Regulations does not allow immigration officers and Minister's delegates, in making findings of inadmissibility under subsections 44(1) and (2) of the Act in respect of persons convicted of serious or simple offences in Canada, any room to manoeuvre apart from that expressly carved out in the Act and the Regulations**. Immigration officers and Minister's delegates are simply on a fact-finding mission, no more, no less. Particular circumstances of the person, the offence, the conviction and the sentence are beyond their reach.** It is their respective responsibility, when they find a person to be inadmissible on grounds of serious or simple criminality, to prepare a report and to act on it. [Emphasis added.]
>
> […]
>
> **[37]** It cannot be, in my view, that Parliament would have in sections 36 and 44 of the Act spent so much effort defining objective circumstances in which persons who commit certain well defined offences in Canada are to be removed, to then grant the immigration officer or the Minister's delegate the option to keep these persons in Canada for reasons other than those contemplated by the Act and the Regulations. It is not the function of the immigration officer, when deciding whether or not to prepare a report on inadmissibility based on paragraph 36(2)(a) grounds, or the function of the Minister's delegate when he acts on a report, to deal with matters described in sections 25 (H&C considerations) and 112 (Pre-Removal Assessment Risk) of the Act (see *Correia* at paragraphs 20 and 21; Leong at paragraph 21; *Kim* at paragraph 65; *Lasin v. Canada (Minister of Citizenship and Immigration)*, [2005] FC 1356 at paragraph 18).
>
> *Obazughanmwen*, at para 31.

[53] The FCA added that, in *Sharma v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 319, at para 23, it was observed that the foregoing rationale applies with equal force to both foreign nationals and permanent residents: *Obazughanmwen*, at para 32.

[54] The FCA then proceeded to reiterate the bolded passage quoted at paragraph 52 above: *Obazughanmwen*, at para 39. It did so after noting (at paragraph 34) that in *Canada (Citizenship and Immigration) v Bermudez*, 2016 FCA 131, at para 38, it had observed that "non-citizens, whether they be foreign nationals or permanent residents, do not have the right to have H&C considerations imported and read into every provision of the IRPA, the application of which could jeopardize their status."

[55] Finally, the FCA repeated on several occasions that officers and ministerial delegates simply perform an administrative screening function: *Obazughanmwen*, at paras 27, 30, 37 and 38. It explained that this screening function is "only meant to look into readily and objectively ascertainable facts *concerning admissibility* and not to adjudicate controversial and complex issues of law and evidence" (emphasis added): *Obazughanmwen*, at para 37.

[56] In the course of reaching the foregoing conclusions, the FCA comprehensively reviewed the relevant jurisprudence and conducted a contextual analysis that included an assessment of the scheme and objectives of the IRPA: *Obazughanmwen*, at paras 32, 34, 36, 39 and 44-47. That analysis applied to both subsection 44(1) and subsection 44(2) of the IRPA: *Obazughanmwen*, at para 41.

[57] The FCA's analysis in *Obazughanmwen* is binding upon this Court, despite the 2001 testimony of Ms. Atkinson discussed at paragraph 45 above. In other words, notwithstanding Ms. Atkinson's testimony, the issue of the scope of discretion contemplated by subsections 44(1) and 44(2) "has been put to rest": *Obazughanmwen*, at paras 29 and 42. To the extent that the internal guidance provided to officers and discussed at paragraph 46 above is inconsistent with the FCA's analysis, it merits revision.

[58] In light of the decision in *Obazughanmwen*, it is appropriate to update the general principles that were summarized in *McAlpin*, and subsequently followed in several decisions of this Court: see e.g., *Thavakularatnam v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 1245, at paras 74-78; *Slemko v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 718, at paras 22 and 43; *McLeish v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 705, at paras 74-77, 80 and 86; *Surgeon v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1314, at para 9; *Singh v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1170, at paras 23-28.

[59] Whereas *McAlpin* recognized some prior uncertainty as to whether officers and ministerial delegates could consider H&C factors in exercising their discretion under subsections 44(1) and (2) (*McAlpin*, at para 70(2)), that uncertainty has now been eliminated.

[60] Consequently, it is appropriate to restate the general principles applicable to the scope of the discretion contemplated by subsections 44(1) and (2) of the IRPA as follows:

1. The scope of discretion held by immigration officers under subsection 44(1) and by ministerial delegates under subsection 44(2) of the IRPA is very limited, especially in cases of serious criminality and organized criminality: *Obazughanmwen*, at paras 27 and 29.

2. In this context, immigration officers and ministerial delegates are simply on a fact-finding mission, no more, no less. Particular circumstances of the person, the offence, the conviction and the sentence are beyond the reach of those decision-makers: *Obazughanmwen*, at paras 31 and 39 (quoting *Cha*, at para 35). Such excluded personal circumstances include H&C considerations: *Obazughanmwen*, at paras 31 (quoting *Cha*, at paragraph 37) and 44-45; see also *Lin v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 862 at para 20 [***Lin***], aff'd 2021 FCA 81.

3. For greater certainty, the exercise contemplated by subsections 44(1) and (2) is an administrative screening function that is only meant to look into readily and objectively ascertainable *facts concerning admissibility*: *Obazughanmwen*, at para 37; see also paras 27 and 30.

4. These principles apply equally to foreign nationals and permanent residents: *Obazughanmwen*, at para 32; see also *Lin*, at paras 17-18. They also apply with equal force to sections 36 and 37 of the IRPA: *Obazughanmwen*, at para 41.

[61] It follows from the foregoing that the Officer did not err by applying the wrong legal test, as asserted by Mr. Sidhu. The Officer was not required to consider "all of the circumstances of the case," including the *Ribic* Factors. The Officer's role was confined to considering readily and objectively ascertainable facts concerning Mr. Sidhu's admissibility. Consequently, it was not unreasonable for the officer to have failed to give greater consideration to the *Ribic* Factors that Mr. Sidhu considers to have weighed in his favour.

[62] In any event, the Officer did in fact consider the *Ribic* Factors. In so doing, he exceeded his statutory mandate. In this context, it can hardly be maintained that he ought to have given even greater consideration to considerations that were beyond his remit in the first place.

D. *Summary*

[63] For the reasons set forth in part VI.A. above, the Officer did not proceed in a procedurally unfair manner, as alleged by Mr. Sidhu.

[64] For the reasons provided in parts VI.B. and VI.C. above, the Officer's Decision was not unreasonable. That decision fell well "within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law": *Vavilov*, at para 86.

VII. Assessment of the Decision of the Minister's Delegate

A. *Did the Delegate make a procedurally unfair Decision, by relying on extrinsic evidence?*

[65] Mr. Sidhu submits that because the Delegate based his Decision on an underlying report (prepared by the Officer) that was procedurally unfair, the Delegate's Decision "similarly lacks procedural fairness." Given my finding, discussed paragraphs 26-35 above, that the Officer's Decision was not procedurally unfair, I reject Mr. Sidhu's similar submissions regarding the Delegate's Decision.

B. *Did the Delegate fetter his discretion by refusing to consider (i) whether Mr. Sidhu posed a present or future risk to the public, or (ii) the potential hardship that Mr. Sidhu would face in India?*

[66] Mr. Sidhu asserts that the Delegate arbitrarily limited the scope of his discretion by refusing to consider objective psychological evidence that he is at low risk to reoffend. Mr. Sidhu insists that the Delegate "fixat[ed] solely on the consequences of the accident" and failed to consider the future security or protection of the public.

[67] I disagree. The Delegate explicitly stated that Mr. Sidhu's "possibility of rehabilitation is high and is a positive factor." He then proceeded to acknowledge Mr. Sidhu's "extraordinary level of remorse since the criminal offense occurred." He also recognized the fact that Mr. Sidhu's early guilty plea was "overwhelmingly appreciated by the victims and their families in many victim impact statements."

[68] Mr. Sidhu also maintains that the Delegate fettered his discretion by refusing to consider the hardship he would face upon his return to India, including evidence of his post-traumatic stress disorder (**"PTSD"**) and his Major Depressive Disorder (**"MDD"**).

[69] I disagree. On the first page of his Decision, the Delegate explicitly stated that he had "fully considered the [H&C] factors that are present," and that he was "fully cognizant of the adverse impact that this decision could potentially have on" Mr. Sidhu.

[70] Later in the Decision, the Delegate observed that "any hardship [Mr. Sidhu] would experience if removed from Canada is minimized by the amount of immediate family members residing in India." While the word "minimized" was a poor choice of language, bordering on callous, the fact remains that the Delegate did not fetter his discretion by refusing to consider the hardship that Mr. Sidhu would face upon his return to India. In the course of considering that issue, the Delegate explained that Mr. Sidhu "has a very good and strong family [in India] that will be there for him," and that the likelihood of employment opportunities in India is strong. The Delegate then explicitly addressed Mr. Sidhu's PTSD and his MDD, together with his submission that he would suffer hardship due to "a lack of psychiatrists [in India] to treat him." The Delegate gave "some weight" to that submission.

[71] Mr. Sidhu takes issue with the fact that the Delegate proceeded to state that (i) there was no evidence to suggest that his PTSD and MDD were permanent, and (ii) given the "impermanence and dynamic nature" of his mental health, it would be more appropriate for it to be assessed during the removal stage, by way of a request for a temporary deferral of removal.

Mr. Sidhu asserts that, he cannot count on his PTSD and MDD being properly considered at the deferral stage, because the jurisprudence limits the types of considerations that may be considered at that stage to short-term, temporary factors.

[72] In my view, the manner in which the Delegate handled this issue did not amount to a fettering of his discretion. In brief, he considered the issue, gave it positive weight, and then made observations that were in the nature of *obiter dicta*, and that were in any event unnecessary and beyond the scope of his discretion. I note that the Delegate later returned to the issue of Mr. Sidhu's hardship of removal and gave it an overall "neutral" weighting, presumably having regard to the positive considerations of his strong family in India and the strong likelihood of employment opportunities, mentioned above.

[73] Mr. Sidhu also takes issue with the fact that the Delegate stated that he would have access to a pre-removal risk assessment, should a deportation order be issued. Mr. Sidhu asserts that such an assessment would not include his mental deterioration and risk of suicide.

[74] Once again, this observation was in the nature of *obiter dictum*, and in any event unnecessary and beyond the scope of the Delegate's discretion. I will therefore refrain from commenting upon it. The fact remains that the Delegate did not fetter his discretion by refusing to consider the potential hardship that Mr. Sidhu would face upon his return to India, including as a result of his access to support for his PTSD and MDD.

[75] I will note in passing that Mr. Sidhu will still have the ability to make a request to apply for permanent residence from within Canada on H&C grounds, pursuant to section 25 of the IRPA.

C. *Was the Delegate's Decision unreasonable on the ground that he applied the wrong legal test?*

[76] Mr. Sidhu's submissions with respect to this issue closely track the similar allegations he made in relation to the Officer's Decision. That is to say, Mr. Sidhu maintains that the Delegate failed to have regard to "all of the circumstances of the case," in considering whether to recommend that he be referred to an admissibility hearing. Mr. Sidhu states that the Delegate instead engaged in an impermissible (and inadequate) balancing of H&C factors against the seriousness of his offences, and their horrific consequences.

[77] For the same reasons provided in Part VI.C. above, I find that the Delegate did not err in the manner asserted by Mr. Sidhu.

[78] In brief, the Delegate was not required to consider "all of the circumstances of the case," including the *Ribic* Factors. The Delegate's role was confined to considering readily and objectively ascertainable facts concerning Mr. Sidhu's admissibility. Consequently, it was not unreasonable for the Delegate to have failed to give greater consideration to the specific *Ribic* Factors that Mr. Sidhu considers to have weighed in his favour.

[79] In any event, as with the Officer, the Delegate did in fact consider the *Ribic* Factors, albeit to a much lesser extent than was done by the Officer. He was under no obligation to do more: see paragraphs 42-62 above.

D. *Was the Delegate's Decision unreasonable on the ground that it was made in a perverse and capricious manner and without regard to the evidence?*

[80] Mr. Sidhu recycles his above-mentioned submissions regarding the Delegate's treatment of his PTSD and MDD by stating that the manner in which those considerations were considered was unreasonable. In this regard, Mr. Sidhu asserts that in characterizing his PTSD and MDD as being impermanent and dynamic, the Delegate disregarded the record. This included the Officer's finding that he would likely suffer lifelong mental health effects associated with knowing the impact that his actions had caused on the victims and their loved ones. Mr. Sidhu adds that there was no evidentiary or logical basis for the Delegate's conclusions that his PTSD and MDD were "impermanent" or "dynamic."

[81] For the reasons set forth at paragraphs 49-61 above, it was beyond the scope of the Delegate's discretion to consider the effect that Mr. Sidhu's removal from Canada would have on his PTSD and his MDD. This is a complete response to Mr. Sidhu's submissions on this issue.

[82] In any event, even under the weight of jurisprudence that existed prior to the FCA's decision in *Obazughanmwen*, the Delegate was not required to consider H&C factors. However, having decided to do so, he was required to (i) list the most important H&C factors identified by

Mr. Sidhu, and (ii) provide a very brief explanation of why they were rejected: *McAlpin*, at paras 70(4) and (5). See also the other jurisprudence cited at paragraph 58 above.

[83] In my view, the Delegate's Decision satisfied those requirements of the pre-*Obazughanmwen* jurisprudence. In brief, the Decision briefly addressed Mr. Sidhu's PTSD and MDD, and gave these conditions "some weight." In contesting that determination, Mr. Sidhu is essentially asking the Court to reweigh the evidence on the record.

[84] For greater certainty, based on the evidentiary record, it was not unreasonable for the Delegate to characterize Mr. Sidhu's PTSD and MDD as being "impermanent" or "dynamic." This is because one of the psychologists who examined him noted that his treatment had assisted him to experience "significant relief" from his symptoms: CTR, at 1391. The other psychologist who examined him stated that "treatment provided by a mental health professional able to address the trauma that he experienced would be very likely to advance him to the point of being successfully rehabilitated and fully functioning": CTR, at 1467. This evidence from Mr. Sidhu's psychologists provided a reasonable basis for the Delegate's characterization of his PTSD and his MDD as being "impermanent" and "dynamic."

[85] I observe in passing that the second psychologist's prediction that Mr. Sidhu's removal from Canada would lead to a foreseeable deterioration in his mental health was based on his speculation that Mr. Sidhu's access to good treatment would be more difficult in India. In turn, that speculation was based on the fact that India has far fewer psychiatrists per 100,000

population than Canada: CTR, at 947-948. No consideration was given to Mr. Sidhu's family connections and economic means in India.

[86] Mr. Sidhu further asserts that the Delegate unreasonably mischaracterized the evidence regarding the impact of his removal on his spouse, Ms. Mann. In this regard, Mr. Sidhu maintains that the Delegate's finding that his removal would only result in "minimal dislocation of family or hardship" was unreasonable, because the Delegate focused solely upon Ms. Mann's willingness to return to India, should he be deported. This was despite Ms. Mann's evidence that all of her dreams for her future in Canada, and everything she had worked hard for, would be destroyed, leaving her and Mr. Sidhu shattered and facing the prospect of deteriorating mental health in India.

[87] The Delegate's treatment of Ms. Mann's evidence bordered on being disingenuous and cavalier. He would have been better advised to say nothing at all, particularly given the very limited scope of his discretion. That discretion did not extend to considering the effects of Mr. Sidhu's Deportation Order on Ms. Mann, who is a third party.

[88] In any event, the Delegate's limited reference to Ms. Mann's evidence was not unreasonable. It was made in the context of explaining his determination that Mr. Sidhu would experience "minimal" dislocation of family or hardship if he were to be removed from Canada. As discussed at paragraph 70 above, that determination was also based on his findings that Mr. Sidhu has a very good and strong family in India who would "be there for him," and that he has a strong likelihood of employment in India. In this context, while the word "minimal" was a

poor choice of language, it did not render unreasonable the Delegate's determination with respect to the issues of family dislocation and hardship. That determination was appropriately justified, transparent and intelligible. It also fell "within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law": *Vavilov*, at para 86.

[89] Finally, Mr. Sidhu maintains that the Delegate's Decision was unreasonable because it is logically inconsistent with his finding that the "possibility of [Mr. Sidhu's] rehabilitation is high and is a positive factor." Mr. Sidhu adds that there was no evidence to suggest that he posed any future risk to public safety. He further asserts that public safety contemplates a forward-looking assessment of whether an applicant is likely to reoffend. In support of this position, he states that ENF 5, discussed at paragraphs 32 and 46 above, as well as the *Ribic* Factors, focus on a forward-looking assessment.

[90] As previously discussed, Mr. Sidhu's positions regarding ENF 5 and the *Ribic* Factors are inconsistent with the jurisprudence, particularly *Obazughanmwen.* More generally, his position that forward-looking considerations trump the seriousness of the offence(s) in question is inconsistent with the scheme of the IRPA, particularly the objective set forth in paragraph 3(1)(i), as well as the substantive provisions in sections 34-37, 40 and 41, which contain numerous provisions that render individuals inadmissible to Canada based upon their past actions.

[91] Accordingly, it was not unreasonable for the Delegate to give greater weight to the seriousness of the offences for which Mr. Sidhu was convicted than he gave to Mr. Sidhu's

prospects for rehabilitation. In other words, despite the fact that the Delegate gave positive weight to Mr. Sidhu's prospects for rehabilitation, it was reasonably open to the Delegate to give even greater weight to the seriousness of the offences, and to the consequences that those offences had on the victims.

[92] It was also not unreasonable for the Delegate to weigh the seriousness of those offences, and their consequences, more heavily than the combined weight he gave to the various other considerations that he assessed. Once again, his decision to do so was appropriately justified, transparent and intelligible. It also fell "within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law": *Vavilov*, at para 86.

VIII. Conclusion

[93] The facts underlying Mr. Sidhu's applications to this Court were devastating for everyone involved. Many lives were lost, others were torn apart, and many hopes and dreams were shattered.

[94] Unfortunately, nothing this Court decides can change much of those truly tragic consequences.

[95] For the reasons set forth in part VI.A., above, I find that the Officer did not proceed in a procedurally unfair manner, as alleged by Mr. Sidhu.

[96] For the reasons provided in parts VI.B. and VI.C., above, I further find that the Officer's Decision was not unreasonable.

[97] Accordingly, Mr. Sidhu's request that the Officer's decision be set aside is dismissed.

[98] For the reasons set forth in part VII.A. – D. above, I reject Mr. Sidhu's various submissions with respect to the Delegate's decision. Consequently, his request that the Delegate's decision be set aside will also be dismissed.

[99] Should Mr. Sidhu wish to remain in Canada, he will still have the ability to make a request to apply for permanent residence from within Canada on H&C grounds, pursuant to section 25 of the IRPA.

[100] At the end of the hearing of these applications, the parties stated that the issues raised did not give rise to a serious question of general importance. I agree. Consequently, no such question will be certified for appeal pursuant to paragraph 74(d) of the IRPA.

JUDGMENT IN IMM-2452-22 and IMM-2453-22

THIS COURT'S JUDGMENT is that:

1. Mr. Sidhu's applications to set aside the Decisions of the Officer and the Delegate are dismissed.

2. There is no question for certification pursuant to paragraph 74(d) of the IRPA.

"Paul S. Crampton"
Chief Justice

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Michael A.E. Greene	FOR THE APPLICANT
Brendan Friesen	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Sherritt Greene Barrister and Solicitor Calgary, Alberta	FOR THE APPLICANT
Department of Justice Canada Winnipeg, Manitoba	FOR THE RESPONDENT