Federal Court of Appeal | Cour d'appel fédérale

Date: 20161221

Docket: A-476-15

Citation: 2016 FCA 319

CORAM: **NADON J.A.**
RENNIE J.A.
DE MONTIGNY J.A.

BETWEEN:

ABHISHEK AJAY SHARMA

Appellant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

Heard at Winnipeg, Manitoba, on November 17, 2016.

Judgment delivered at Ottawa, Ontario, on December 21, 2016.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: NADON J.A.
RENNIE J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] The appellant brings this appeal on the basis of a certified question, to challenge the finding of Justice Barnes (the Judge) of the Federal Court, that he was not entitled to be provided with the inadmissibility report issued under subsection 44(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA or the Act) before his case was referred to the

Immigration Division (ID) of the Immigration and Refugee Board of Canada (the Board) under subsection 44(2) of the same Act. For the reasons that follow, I would dismiss this appeal.

I. Background

[2] The appellant, Abhishek Ajay Sharma, was born in India in 1979. He became a permanent resident of Canada in February 2007. As a result of a conviction for sexual assault committed in 2008, he was sentenced to a custodial term of two years less a day on June 11, 2013.

[3] The record shows that the sentencing judge took into account the immigration status of the appellant, and in particular, the limited appeal rights of permanent residents convicted of a serious criminality offence, in determining the appropriate sentence.

[4] On January 14, 2014, a Canada Border Services Agency (CBSA) Officer (the Officer) interviewed the appellant in prison and provided him with a letter informing him that he may be inadmissible to Canada on account of serious criminality under subsection 36(1) of IRPA. The letter advised the appellant of the criteria that would be considered in the decision-making process, and invited him to make written submissions as to why he should not be reported under subsection 44(1) of IRPA. The letter also indicated that the appellant would not have a right to appeal to the Immigration Appeal Division (IAD) if found inadmissible, as a result of amendments to IRPA adopted by Parliament on June 19, 2013 (*Faster Removal of Foreign Criminals Act*, S.C. 2013, c. 16 (FRFCA)). These amendments state that foreign nationals may not appeal from a decision of the ID of the Board, if they have been sentenced to a term of

imprisonment of more than six months (as opposed to a term of two years, which was previously the case). The appellant responded to this letter with handwritten submissions, along with a number of letters of support.

[5] After having reviewed the information submitted by the appellant, the Officer came to the conclusion that he was inadmissible to Canada for serious criminality. On March 4, 2014, she prepared a report under subsection 44(1) of IRPA stating her opinion and recommending that an admissibility hearing be held. On that same day, a Minister's delegate reviewed the report, concurred with the recommendation of the Officer, and referred the matter to the ID for an admissibility hearing pursuant to subsection 44(2) of IRPA.

[6] The ID concluded that the offence for which the appellant was convicted falls under the definition of serious criminality outlined in paragraph 36(1)(*a*) of IRPA. Given the mandatory language of paragraph 45(d) of the Act, the ID issued a deportation order on September 15, 2014. The appellant sought to appeal the removal order, but was unsuccessful as the IAD had no jurisdiction to hear or decide the matter by virtue of subsections 64(1) and (2) of IRPA.

[7] On October 14, 2014, the appellant applied for leave and judicial review of the subsection 44(1) inadmissibility report and of the subsection 44(2) referral decisions. The Judge dismissed both applications in a decision reported as 2015 FC 1315.

II. The impugned decision

[8] At the outset, the Judge declined to rule on the scope of discretion afforded to the Officer in considering personal or mitigating circumstances in the application of subsection 44(1), as there was evidence before him that the appellant did in fact benefit from an inquiry into his personal circumstances by the Officer.

[9] Counsel for the appellant submitted to the Judge that the content of the duty of fairness required one of the decision-makers to provide him with the full inadmissibility report prior to referring the matter to the ID. The appellant argued for a heightened duty of fairness on the basis that (1) the sentencing judge had crafted his sentence in accordance with his immigration status; (2) the law changed within eight days of his sentence to remove a right of appeal to the IAD for custodial sentences of more than six months; (3) the best interests of his child were engaged; and (4) the CBSA could have issued the report prior to the legislative changes. In delaying the issuance of the report, the appellant suggests that the CBSA deprived him of an opportunity to avoid deportation.

[10] The Judge was not convinced that a breach of procedural fairness occurred, and was not persuaded that any of the above factors were relevant to the question of whether the appellant ought to have been given a copy of the inadmissibility report before the Minister’s delegate referred his case to the ID. After referring to several decisions, he came to the conclusion that the case law is well settled in that procedural fairness does not require an officer’s report to be put to the affected person prior to the subsection 44(2) referral. For the Judge, the right to challenge the

inadmissibility report would simply replicate what had already been provided to the appellant, that is, the circumstances triggering the inquiry into his admissibility, an opportunity to make written submissions, and a personal interview.

[11] As for the best interests of the child argument, the Judge noted that a lack of particulars in the Officer's report on this issue was a direct result of the lack of detail and attention paid to it by the appellant himself. The Judge also noted that the recourse to humanitarian and compassionate (H&C) relief remains available to the appellant, and that it is in this context where the best interests of his child will attract more meaningful attention from both the affected person and the responsible decision-maker.

[12] The Judge therefore dismissed the appellant's application. He nevertheless certified the following question (with hesitation, considering the "apparent uniformity of the decisions" on this point):

> Does the duty of fairness require that a report issued under [sub]section 44(1) of the IRPA be provided to the affected person before the case is referred to the Immigration Division under [sub]section 44(2)?

III. Issues

[13] This Court is not confined to the questions that have been certified by a judge of the Federal Court, nor does it have to answer the question(s) certified when it is of the view that it would be inappropriate or unnecessary for the disposition of the appeal to do so. This has been made clear in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 [*Baker*] and has been reiterated ever since by this Court (see, for instance,

Zaghbib v. Canada (Public Safety and Emergency Preparedness), 2016 FCA 182 at para. 49, [2016] F.C.J. No. 651; *O'Brien v. Canada (Citizenship and Immigration)*, 2016 FCA 159 at para. 8, [2016] F.C.J. No. 567).

[14] In the case at bar, the Judge only certified one question pertaining to the duty of fairness under section 44. Counsel for the appellant, nevertheless, has raised two other questions that were dealt with by the Judge but which he refused to certify: one relates to the scope of discretion to consider personal or mitigating factors under section 44, and the other pertains to the best interests of the appellant's child. Since the parties have joined issue on these questions, as well, I will address them in these reasons.

IV. Analysis

[15] On appeal from a decision on application for judicial review, the task of this Court is to determine whether the Judge identified the proper standard of review and applied it correctly (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45-47, [2013] 2 S.C.R. 559). In the case at bar, the Judge correctly identified the applicable standards of review, that is, correctness for the procedural fairness issue raised in the certified question, and reasonableness as to the decisions to write an inadmissibility report and to subsequently refer the report to the ID. The question for this Court is therefore to determine whether those standards were applied correctly.

[16] As for the decision of the Judge not to rule on the scope of the mandate adopted by the Officer, I agree with counsel for the respondent that it is of a discretionary nature. As such, it

attracts deference and must be reviewed on the standard of palpable and overriding error (see generally *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

A. *The duty of fairness*

[17] When a foreign national or permanent resident has been found guilty of an offence punishable by a maximum term of imprisonment of ten years or more, or of an offence for which a term of imprisonment of more than six months has been imposed, IRPA sets out a three step process to be followed, before that person can be found inadmissible for serious criminality pursuant to subsection 36(1). First, an immigration officer must exercise his discretion to prepare a report for the Minister:

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

[18] The Minister or the Minister's delegate may then refer the report to the ID for an admissibility hearing, if it is believed that the report is well-founded:

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	**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

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.	règlements, d'un étranger; il peut alors prendre une mesure de renvoi.

[19] Pursuant to paragraph 45(*d*), the ID appears to have no other option than to make a removal order against the foreign national or the permanent resident if he or she is inadmissible according to the Act:

Decision	**Décision**
45 The Immigration Division, at the conclusion of an admissibility hearing, shall make one of the following decisions:	**45** Après avoir procédé à une enquête, la Section de l'immigration rend telle des décisions suivantes :
…	[…]
(d) make the applicable removal order against a foreign national who has not been authorized to enter Canada, if it is not satisfied that the foreign national is not inadmissible, or against a foreign national who has been authorized to enter Canada or a permanent resident, if it is satisfied that the foreign national or the permanent resident is inadmissible.	**d)** prendre la mesure de renvoi applicable contre l'étranger non autorisé à entrer au Canada et dont il n'est pas prouvé qu'il n'est pas interdit de territoire, ou contre l'étranger autorisé à y entrer ou le résident permanent sur preuve qu'il est interdit de territoire.

[20] As previously mentioned, there is no right of appeal to the IAD where a permanent resident or foreign national is found to be inadmissible on the ground of serious criminality. Prior to 2013, a permanent resident or a foreign national could appeal from an inadmissibility finding if his or her crime had been punished by a term of imprisonment of less than two years. That option has now been removed.

[21] It is trite that the scope of the duty of fairness in any given circumstances is variable and contextual. In accordance with the principle laid out in *Baker*, the type of participatory rights that the duty of fairness requires will generally depend on the following five non-exhaustive factors: (1) the nature of the decision; (2) the statutory scheme; (3) the importance of the decision to the affected individual; (4) the legitimate expectations of the person challenging the decision; and (5) the administrative decision-maker's choice of procedure.

[22] Applying these principles, it is clear that an officer's decision under subsection 44(1) and the Minister's decision under subsection 44(2) bear none of the hallmarks of a judicial or quasi-judicial decision. It is true that officers and the Minister or his delegate appear to have some flexibility when deciding whether or not to write an inadmissibility report or to refer it to the ID. As this Court found in *Cha v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126 at para. 35, 267 D.L.R. (4th) 324 [*Cha*], however, there are limits to the discretion afforded to officers and Minister's delegates despite the use of the word "may" in the wording of subsections 44(1) and (2). In that case, the Court determined that the particular circumstances of the foreign national, along with the nature of the offence, conviction and sentence, were beyond the scope of the discretionary powers exercised pursuant to subsections 44(1) and (2).

[23] The extent of the discretion will therefore be dependent on a number of factors, including the alleged grounds of inadmissibility and whether the person concerned is a permanent resident or a foreign national. Indeed, this Court cautioned in *Cha* that it was only dealing with foreign nationals, and that different considerations may apply to permanent residents. It is possible, for example, that the scope of discretion will be somewhat broader for permanent residents than for

foreign nationals because of their closer ties to Canada. I shall revert to that question when addressing the second issue raised in this appeal. At the end of the day, however, the officers and the Minister or his delegate must always be mindful of Parliament's intention to make security a top priority (see paragraphs 3(1)(*h*) and (*i*) of IRPA). The following rationale offered by this Court in *Cha* in support of a limited discretion would appear to apply with equal force to both foreign nationals and permanent residents:

> [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 …

[24] That being said, I am prepared to accept that the decisions to make a report and to subsequently refer it to the ID are not without significance. Considering that, once referred, the options of the ID appear to be very limited since it "shall make" a removal order if satisfied that the foreign national or the permanent resident is inadmissible, it would appear that the only discretion (albeit very limited) to prevent a foreign national or permanent resident from being removed rests with the immigration officer and the Minister or his delegate. As a result, I am prepared to accept that this factor favours a heightened level of procedural fairness.

[25] As for the nature of the statutory scheme and the importance of the decision, *Baker* teaches us that greater procedural protections will generally be required in cases where "no appeal procedure is provided within the statute, or when the decision is determinative of the issue

and further requests cannot be submitted" (at para. 24). It is noteworthy that preparing a report under subsection 44(1) and referring it to the ID pursuant to subsection 44(2) does not necessarily entail removal. For instance, one may apply to the Minister for an exemption on humanitarian and compassionate grounds (IRPA, s. 25) upon the issuance of a deportation order, an opportunity which the appellant availed himself of. A pre-removal risk assessment (IRPA, s. 112) is another option available in such circumstances. Both of these processes allow for the provision of additional submissions that will be taken into account by the particular decision-maker. The subsection 44(1) report, the subsection 44(2) referral, and the ID's removal order are thus not necessarily determinative of whether the appellant will be removed from Canada, given the possibility of seeking relief via other provisions of the Act. While these decisions are important in the sense that they trigger the process that may ultimately strip the appellant of his permanent residency, they are of no immediate and practical consequence for the appellant.

[26] If a legitimate expectation is said to exist, it will generally attract heightened procedural fairness requirements. The doctrine of legitimate expectation requires particular attention to the promises or regular practices of administrative decision-makers, in recognition of the fact that it is generally unfair to act in contravention of representations as to procedure, or to backtrack on substantive promises (*Baker*, para. 26). In that respect, the appellant points to Immigration Manual ENF 5 (Writing 44(1) Reports) (the Manual) to show that he had a legitimate expectation in having the Officer's inadmissibility report disclosed to him prior to the Minister's delegate's review. Section 11.3 of that Manual states as follows:

> Wherever possible, an officer who writes a report must also provide a copy of that report to the person concerned. The officer must make all reasonable efforts to locate this person, and all steps and actions taken to do so should be clearly indicated on the person's file.

> (…)
>
> It is accepted in the context of natural justice that persons who are reported under A44(1) should fully understand both the case against them, and the nature and purpose of the report.

[27] Unfortunately the Manual is of no assistance to the appellant. Not only is that kind of governmental guideline not binding on courts (see, for ex., *Cha* at para. 15), but there is no evidence that the appellant relied on this Manual or that he was promised an earlier disclosure of the inadmissibility report. Moreover, the procedure outlined in the Manual does not support the appellant's position. First, it does not specify when the report should be disclosed. Further, the purpose of the disclosure is to ensure that the persons reported understand the case they have to meet before the ID, and not to make further submissions before the Minister or his delegate. This understanding of the Manual is borne out by Immigration Manual ENF 6 (Review of Reports under A44(1)) (Manual ENF 6), according to which "…participatory rights will be given only once to the person concerned at the 44(1) stage" (see section 5.1 at p. 16).

[28] Finally, IRPA itself does not set out any particular procedure to be followed in making a report and referring it to the ID. Parliament has left the procedure to be followed to the decision-maker. In the Manual, however, Citizenship and Immigration Canada has elected to give the affected person an opportunity to provide written or oral submissions along with letters of support. The Manual also requires that permanent residents be informed of the criteria against which their case is being assessed, and of the possible outcome if the case is referred to the ID, including the possibility of no appeal rights to the IAD. As stated in *Baker*, a certain level of deference must be showed to the procedural choices of the decision-maker (para. 27).

[29] Balancing all of these factors, I am of the view that the duty of fairness is clearly not at the high end of the spectrum in the context of decisions made pursuant to subsections 44(1) and (2). Even assuming that a permanent resident is entitled to a somewhat higher degree of participatory rights than a foreign national as a result of a greater establishment in Canada leading to more serious consequences in the event of removal, I am satisfied that the process followed in this case satisfies the requirements of procedural fairness. Prior to the decision to make a report, the appellant was interviewed, given a letter setting out the nature of the decision to be made, and advised that he would have no right to appeal the removal order if one was issued by the ID. He was also invited to make written submissions and to provide letters of support, and he availed himself of these options. The submissions and supporting documents he presented were considered by the Officer. Bearing in mind that the decisions to write a report and to refer it to the ID do not involve a final determination of the appellant's rights to stay in Canada, as was the case in *Baker*, I have no doubt that the appellant was afforded the kind of participatory rights that decisions of this nature warrant.

[30] I agree with the Judge, in particular, that there is no duty to provide the subsection 44(1) inadmissibility report to the person concerned prior to the subsection 44(2) referral decision. To be meaningful, such a duty would have to entail a right of response by the appellant, whereby he could only replicate the submissions already made to the immigration officer. It is to apprise the person concerned of the case to be met before the ID and to allow for an application for judicial review that the report is shared, not to have a second kick at the can before the Minister on the basis of the same information already considered and assessed by the Officer.

[31] The jurisprudence of the Federal Court on this point appears to have unanimously rejected the appellant's thesis (see, for example, *Hernandez v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 429 at paras. 70-72, 45 Imm. L.R. (3d) 249 [*Hernandez*, 2005]; *Lee v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 158 at paras. 31-33, [2006] F.C.J. No. 260; *Spencer v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 990 at paras. 18-20, 298 F.T.R. 267 [*Spencer*]; *Hernandez v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 725 at paras. 24-26, 325 F.T.R. 108; *Chand v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 548 at para. 26, 170 A.C.W.S. (3d) 144; *Tran v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 1078 at paras. 20-27, 181 A.C.W.S. (3d) 981; *Qureshi v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 238 at paras. 15-16).

[32] The only cases that counsel for the appellant could muster in support of his theory (*Bhagwandass v. Canada (Minister of Citizenship and Immigration)*, 2001 FCA 49, 199 D.L.R. (4th) 519; *Haghighi v. Canada (Minister of Citizenship and Immigration)*, [2000] 4 F.C.R. 407) are taken from other types of administrative processes, namely in the public danger opinion process and in the disposition of a humanitarian application.

[33] The case review of recommendations prior to the public danger opinion or the internal risk opinion triggered by a humanitarian application are of a different nature and cannot be analogized to the report and the referral envisaged by subsections 44(1) and (2). I agree with the respondent that the inadmissibility report and the case highlights are more in the nature of *pro forma* documents, whose essential purpose is to list relevant information from the file (revolving

around the criminal conviction and related objective facts) and to provide a brief rationale for the Officer's actions and recommendation. They are clearly distinguishable from case review recommendations in the context of public danger opinion and internal risk opinions, which are more akin to advocacy tools.

[34] All of the relevant cases from the Federal Court stress that a relatively low degree of participatory rights is warranted in the context of subsections 44(1) and (2), and that procedural fairness does not require the officer's report to be put to the person concerned for a further opportunity to respond prior to the section 44(2) referral to the ID. To the extent that the person is informed of the facts that have triggered the process is given the opportunity to present evidence and to make submissions, is interviewed after having been told of the purpose of that interview and of the possible consequences, is offered the possibility to seek assistance from counsel, and is given a copy of the report before the admissibility hearing, the duty of fairness will have been met. As emphasized by Justice L'Heureux-Dubé in *Baker* (at para. 22):

> [U]nderlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

[35] Counsel for the appellant, nevertheless, submits that even if there is no general duty on the respondent to disclose a report prior to its referral to the ID by the Minister or his delegate, there are factors in this case which militate in favour of such a duty. These factors are: (1) the best interests of a child are engaged; (2) the appellant was intentionally given a reduced sentence by a Queen's Bench judge so that he could appeal to the IAD; (3) the appellant at the time of

sentencing had appeal rights from a removal order to the IAD; and (4) the appellant lost his appeal rights to the IAD because of timing of both the written report and the referral to an admissibility hearing.

[36] In my view, none of these factors are germane to the level of participatory rights owed to the appellant and certainly do not serve to heighten the duty of procedural fairness owed in the circumstances.

[37] Even assuming that the best interests of the appellant's child ought to be considered when deciding to make a report and then to refer it for an admissibility hearing, I fail to see how this could have an impact on the narrow issue at stake in this proceeding, that is, whether he was entitled to receive the Officer's report (including the highlights report) prior to the decision of the Minister to refer the matter to the ID. The only factor in the *Baker* analysis that could be impacted by the presence of a child is the importance of the decision to be made on the appellant. Yet, as previously noted, the decisions to make a report and to refer it to the ID are administrative in nature, and do not translate to any change in status for the appellant. Only the ID can make a removal order in this case, and the appellant has a number of other recourses available to him before actually being removed from the country (applications for judicial review of the report, of the referral and of the ID decisions, a pre-removal risk assessment, and an H&C application). Even if I were to find that the best interests of the appellant's child could remotely be affected by the decisions made pursuant to subsections 44(1) and (2), which would somewhat increase the importance of those decisions, I am not convinced that they would tip the balance in the overall analysis required by *Baker* to mandate additional procedural requirements (i.e., the

opportunity to respond prior to the subsection 44(2) referral) in a process that is already eminently fair and transparent.

[38] The three other factors raised by the appellant are closely linked and will be addressed together. The first thing that ought to be said is that Parliament's decision to lower the threshold for serious criminality under section 64 and to limit the right of appeal is not sufficient, in and of itself, to raise the bar of the procedural fairness requirements to be followed in those procedures. Prior to the legislative change, the duty of fairness for those without appeal rights (i.e., those sentenced to a term of imprisonment of more than two years) did not include the right to obtain the Officer's report and to make representations at the referral stage. The fact that Parliament has decided to draw the cut-off line at six months instead of two years is of no import in determining the participatory rights of the persons concerned. Indeed, Parliament turned its mind to the temporal application of its amendment and softened its impact by determining that persons whose referral to the ID was signed by the Minister or his delegate before June 19, 2013, regardless of the date the referral was sent to the ID, would not be caught by the new six month limit and would be eligible to an appeal if their term of imprisonment was less than two years (see FRFCA, s. 33). It is not for courts to vary the clear intention of Parliament and to remedy the alleged unfairness of its choice by stretching the requirements of procedural fairness beyond its accepted meaning and content.

[39] The fact that the sentencing judge purposely sentenced the appellant to two years less a day to allow him to appeal a potential removal order can be of no consequence in delineating the confines of the procedural fairness requirements in the present instance. First of all, the

conviction and sentencing of the appellant in a criminal court is an entirely separate process from the immigration procedure. The choices made by the criminal court judge within the exercise of her discretion cannot have any repercussions on the duties owed by the respondent to the appellant pursuant to a statute enacted for entirely different purposes. Moreover, it is clear that the sentencing judge would not have been able to design a sentence allowing for an appeal to the IAD, had the amendment to subsection 64(2) of IRPA been adopted at the time she ordered the sentence. Her review of the jurisprudence led her to the conclusion that the appropriate range of sentence for sexual assault was two to three years of imprisonment. Accordingly, reducing the lower threshold of this range by one day to avoid the impact of a stiffer sentence on the appellant's immigration status did not make the sentence disproportionate to the gravity of the offence and the degree of responsibility of the offender. The same could not be said, however, of a reduction from two years to six months. As the Supreme Court stated in *R v. Pham*, 2013 SCC 15, [2013] 1 S.C.R. 739:

> [13] Therefore, collateral consequences related to immigration may be relevant in tailoring the sentence, but their significance depends on and has to be determined in accordance with the facts of the particular case.
>
> [14] The general rule continues to be that a sentence must be fit having regard to the particular crime and the particular offender. In other words, a sentencing judge may exercise his or her discretion to take collateral immigration consequences into account, provided that the sentence that is ultimately imposed is proportionate to the gravity of the offence and the degree of responsibility of the offender.
>
> [15] The flexibility of our sentencing process should not be misused by imposing inappropriate and artificial sentences in order to avoid collateral consequences which may flow from a statutory scheme or from other legislation, thus circumventing Parliament's will.
>
> [16] These consequences must not be allowed to dominate the exercise or skew the process either in favour of or against deportation. Moreover, it must not lead to a separate sentencing scheme with a *de facto* if not a *de jure* special range of sentencing options where deportation is a risk.

[40] Finally, the appellant submits that he would have had a right to appeal had it not been for the delay in completing the report and the referral. Without imputing any wrongdoing or bad faith on the respondent, the appellant contends that the mere fact that the respondent could have reported and referred the appellant to the ID before June 19, 2013 means that the timing of these decisions determined whether the appellant could appeal.

[41] Once again, this is not a relevant factor in determining the scope of procedural fairness owed in this instance. I agree with the Judge that the CBSA was most probably not aware of the appellant's sentencing in the eight days prior to the legislative change taking place, and it cannot seriously be argued that not reporting and referring the appellant to an admissibility hearing within five business days constitutes the kind of inordinate delay that would heighten the scope of procedural fairness owed in this case. There is absolutely no evidence (nor was the argument made) that the respondent intentionally sat on the case with a view to deprive the appellant of a right to appeal. Even if it were the case, granting more participatory rights to the appellant and allowing him to make further representations before the report is referred would clearly not be the appropriate measure to be taken; procedural rights are meant to ensure fairness and transparency, not to sanction misbehaviour from government officials. And I would venture to add, once more, that it is not for the judiciary to thwart Parliament's intention and to extend the breadth of transitional provisions. Parliament could have chosen, for transitional purposes, the sentencing date as the cut-off date instead of the date on which the referral decision is signed by the Minister or his delegate. It has not seen fit to do so, and courts should not interfere with this policy choice.

[42] For all of the foregoing reasons, I am therefore of the view that the Judge correctly concluded that the process followed was procedurally fair, that the appellant was provided with all the participatory rights that his situation entails, and that the respondent was not required to disclose the inadmissibility report prior to the referral decision.

B. *The scope of discretion under section 44*

[43] Relying on the use of the word "may" in subsection 44(1) (as opposed to "shall" in the previous version of IRPA) and on legislative history, counsel for the appellant made a powerful argument (as he did before the Judge) that officers have broad discretion to consider personal or mitigating circumstances in deciding to make an inadmissibility report and are not bound to make such a report as soon as the objective facts set out in paragraph 36(1) (i.e., the conviction for an offence punishable by a maximum term of imprisonment of at least ten years or for which a term of imprisonment of more than six months has been imposed) are ascertained. According to counsel, the *quid pro quo* when the government adopted IRPA and limited the right of appeal of permanent residents was to confer on officers the discretion to consider H&C grounds that were formerly assessed by the Board.

[44] The scope of the discretion that can be exercised pursuant to section 44 has divided the Federal Court, and the Judge below found as much. One line of cases, exemplified by such decisions as *Correia v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 782, 253 F.T.R. 153; *Leong v. Canada (Solicitor General)*, 2004 FC 1126, 256 F.T.R. 298; and *Richter v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 806, 73 Imm. L.R. (3d) 131, aff'd by 2009 FCA 73, [2009] F.C.J. No. 309, adopted a narrow interpretation of section 44 and

determined that officers have no discretion to consider factors beyond an individual's alleged inadmissibility. Conversely, another series of decisions adopted a broader approach and held that officers have a wide enough discretion to consider the personal circumstances of an individual, in addition to the facts underlying the alleged inadmissibility (see, for example, *Hernandez*, 2005; *Spencer*; and *Faci v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 693, [2011] F.C.J. No. 893).

[45] The Judge was clearly sympathetic to this latter approach, and I note that the respondent also acknowledged a limited discretion to consider personal or mitigating factors. Indeed, the Manual suggests the following factors that should be considered before deciding to write a report: (1) whether a decision on rehabilitation is imminent in minor criminality cases; (2) prior convictions and involvement in criminal or organized criminal activities (3) maximum sentence that could have been imposed; (4) the sentence imposed; (5) the circumstances of the particular incident under consideration; and (6) whether the conviction involved violence or drugs.

[46] Similarly, Manual ENF 6 lists the following factors that may be considered when deciding whether to refer a report to the ID: (1) age at time of landing; (2) length of residence, location of family support and responsibilities; (3) conditions in home country; (4) degree of establishment; (5) prior convictions and involvement in criminal or organized crime activities; (6) history of non-compliance and current attitude; (7) seriousness of the offence; and (8) sentence imposed and maximum sentence that could have been imposed. These policy manuals, while not binding, certainly suggest that officers making a report and the Minister or his delegate

in deciding to refer the report to the ID are not constrained by the mere verification of a conviction and/or term of imprisonment.

[47] The Judge did not commit an overriding and palpable error, however, in deciding not to rule definitively on this issue in light of the fact that the decision-makers in this case did in fact consider personal or mitigating factors. The record shows that the appellant was invited to make submissions in writing on a variety of considerations, including his age at the time he became a permanent resident, the length of time he has been in Canada, the location of his family support and his related responsibilities, his degree of establishment in Canada (work, language, community involvement), and any other relevant factors. The appellant availed himself of that opportunity, submitting letters of support and his own handwritten submissions. The appellant was also interviewed by the Officer. In her report, the Officer stated that "all information on file and provided by Mr. SHARMA" was taken into consideration (Appeal Book at p. 41).

[48] In those circumstances, I agree with the Judge that the appellant has no basis to complain about the scope of the mandate adopted by the Officer since he received the most favourable approach. The appellant's submissions in this respect are therefore academic, and a determination of the precise extent of an officer's discretion would have no bearing on the outcome of this case. Therefore, it is preferable to leave this issue for another day, and in particular whether a person concerned is entitled to a full scale H&C analysis at the stage of the inadmissibility report.

C. *The best interests of the child*

[49] The appellant submits that the Officer was not alive, attentive or sensitive to the interests of his son, and relies for that assertion on the highlights report where the only mention of his child is to the effect that "[h]e [the appellant] is recently divorced and his ex-wife lives with his son in Calgary" (Appeal Book at p. 39). According to the appellant, these reasons do not reflect the best interests of his child and must therefore be taken to illustrate how little consideration was given to that primary consideration.

[50] The problem with this submission is that the appellant did not provide much evidence to the Officer with respect to the best interests of his son. In his handwritten nine page letter to the Officer, the appellant barely devoted but a mere few lines to his son and his representations consisted mainly of the fact that he loved his son and that he intended to move to Calgary to improve his access to him. Apart from this letter, the only other references to his son are found in letters from an aunt and a cousin, who asserted that the appellant loves his son and cannot live without him. Tellingly, the appellant failed to make any submissions as to how his eventual deportation would impact his son. The least that can be said is that the Officer had very little to work with.

[51] In those circumstances, I agree with the Judge that the appellant has no one but himself to blame if the Officer did not have more to say about his son. Even assuming that the best interests of a child is a proper factor to be taken into consideration when deciding whether or not to make a report, the Officer was left to speculate as to the potential impact of the appellant's removal on his son. The decision of the Judge on that score was therefore entirely reasonable.

V. Conclusion

[52] For all of the above reasons, I would dismiss the appeal. The parties have not sought costs and therefore none will be awarded. I would answer the certified question as follows:

> Question: Does the duty of fairness require that a report issued under [sub]section 44(1) of the IRPA be provided to the affected person before the case is referred to the Immigration Division under [sub]section 44(2)?
>
> Answer: The duty of fairness does not require the transmission of an inadmissibility report to the affected person before a decision is made by the Minister or his delegate to refer that report to the Immigration Division pursuant to subsection 44(2), provided that such a report is communicated to the affected person before the hearing of the Immigration Division.

"Yves de Montigny"

J.A.

"I agree
M. Nadon J.A."

"I agree
Donald J. Rennie J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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