Date: 20070130

Docket: A-500-05

Citation: 2007 FCA 24

CORAM: **DESJARDINS J.A.**
DÉCARY J.A.
MALONE J.A.

BETWEEN:

SUKHVIR SINGH KHOSA

Appellant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard at Vancouver, British Columbia, on December 11, 2006.

Judgment delivered at Ottawa, Ontario, on January 30, 2007.

REASONS FOR JUDGMENT BY: DÉCARY J.A.

CONCURRED IN BY: MALONE J.A.
DISSENTING REASONS BY: DESJARDINS J.A.

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REASONS FOR JUDGMENT

DÉCARY J.A.

[1] I have read in draft the reasons for judgment of my colleague Madam Justice Desjardins. I am unable, with respect, to come to the same conclusions. To avoid repetition, I make mine, her recital of the facts in the early part of her reasons.

The Applicable Standard of Review

[2] I respectfully disagree with my colleague that the standard of review should be patent unreasonableness. An examination of recent Supreme Court of Canada rulings on humanitarian and

compassionate (H & C) decisions leads me to conclude that the standard should be reasonableness.

[3] In *Baker v. Canada*, [1999] 2. S.C.R. 817, the Supreme Court of Canada held that applications involving discretionary decisions made on humanitarian and compassionate grounds, for exemptions to the requirement that applications for immigration should be made abroad, are to be reviewed on the standard of reasonableness.

[4] While I appreciate that *Baker* dealt with a different provision of the *Immigration Act* as it then stood, (s. 114(2) of R.S.C., 1985, c.I-2), the Court was nevertheless addressing directly the issue of standard of review of H & C decisions. And even though the Court in *Baker* recognized that most of the *Pushpanathan* factors pointed to a greater degree of deference, it concluded that the appropriate standard of review was reasonableness. This was done, as I see it, on the basis that the decision related "…directly to the rights and interests of an individual in relation to the government, rather than balancing the interests of various constituencies or mediating between them" (at paragraph 60). Earlier, at paragraph 15, L'Heureux-Dubé J. had expressed the view that in practice an H & C decision determines whether a person who has been in Canada will be required to leave a place where he or she has become established. Such a decision, she goes on to say, is "… an important decision that affects in a fundamental manner the future of individuals' lives".

[5] In *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, the Supreme Court of Canada, at paragraph 32, stated that "… a piece of legislation or a statutory provision that essentially seeks to resolve disputes or determine rights between two parties will

demand less deference". *Dr. Q.* places importance on the "judicial paradigm involving a pure *lis inter partes* determined largely by the facts before the tribunal" that may exist when a tribunal exercises its powers. The paradigm exists in this case with the Board hearing testimony, weighing evidence, and applying legal tests to determine whether it will exercise its relief granting power under the Act.

[6] In *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, at paragraph 26, the Supreme Court found that in appeals under s. 70(1)*(b)* of the former *Immigration Act* which granted some persons the right to appeal removal orders made against them "on the ground that, having regard to all the circumstances of the case, the person should not be removed from Canada", the Board "is not involved in a managing or supervisory function, but in adjudicating the rights of individuals vis-à-vis the state", a factor which weighs in favour of a less deferential standard of review. Later in the reasons, at paragraph 90, the Court cites *Grewal v. Canada (Minister of Employment and Immigration)*, [1989] I.A.D.D. No. 22 (QL), where the Board held that such a discretionary decision involves "the exercising of a special or extraordinary power which must be applied objectively, dispassionately and in a *bona fide* manner after carefully considering relevant factors" (p. 2). The standard of patent unreasonableness which requires that "the result must almost border on the absurd" (*Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, [2004] 1 S.C.R. 609, at paragraph 18), is hardly reconcilable with the exercise of that special or extraordinary power.

[7] The situation, here, is different from that in *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3. The Minister's decision to issue " a danger to the security of Canada" opinion was at stake and it was found to be reviewable under the patent unreasonableness standard notwithstanding the fact that it relates to human rights and engages fundamental human interests (at paragraph 32). The special expertise of the Minister in matters of national security was a turning point in the Court's decision (see paragraph 31).

[8] Furthermore, in the case at bar, the central issue, as noted by the applications judge, is the application by the Board of the "possibility of rehabilitation" factor, the second of the seven factors listed by the Board in *Ribic v. Canada (Minister of Employment and Immigration)*, [1985] I.A.D.D. No. 4 and endorsed by the Supreme Court of Canada in *Chieu* at paragraphs 40, 41 and 90.

[9] Rehabilitation is a criminal law concept with respect to which the Board cannot be said to have particular expertise. While the Board may come to a different conclusion from that reached by criminal courts on the basis of intervening events or new evidence such as the testimony of the offender before the Board, the Board should as a minimum pay deference to the findings of the criminal courts, i.e. it should explain why it is that rehabilitation has ceased to be a possibility.

[10] Deference to the criminal courts is rooted in the complexity of the task required in assessing the danger to the public that a particular offender represents. In the same way that provincial courts of appeal will show deference to the sentencing decisions made by trial judges, the IAD should be wary of questioning findings made by criminal courts on matters that fall squarely within their

realm of expertise. In this regard, comments made by the Ontario Court of Appeal in *R. v. Archer*, [2005] O.J. No. 4348 (QL) at paragraph 171 are apt:

> " …Deference is rooted in no small measure in the trial judge's primary role in the administration of criminal justice and in his or her close connection to the community where the offences occurred. As was said in R. v . M.(C.A.) (1996), 105 C.C.C. (3d) 327 (S.C.C.) at para. 91:
>
> > A sentencing judge also possesses the unique qualifications of experience and judgment from having served on the front lines of our criminal justice system. Perhaps most importantly, the sentencing judge will normally preside near or within the community which has suffered the consequences of the offender's crime. As such, the sentencing judge will have a strong sense of the particular blend of sentencing goals that will be "just and appropriate" for the protection of that community. The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at the same time taking into account the needs and current conditions of and in the community.
>
> [Emphasis added]

[11] In cases where, as suggested earlier in paragraph 9, a Board may question a finding of rehabilitation made by a provincial criminal court, the Board should, at a minimum, take into consideration the factors generally associated with the criminal law concept of rehabilitation. In the case at bar this would include the absence of a criminal record (other than the one at issue), the absence of previous convictions for dangerous driving, the response to community supervision and the recent history of the offender, including the upgrading of his education and his work record. On rehabilitation factors in criminal law, see *R. v. J.S.M.* [2006] B.C.R. No. 1947 (C.A.) *R. v. Laverty*, [1991] B.C.R. No. 3862 (C.A.); or more generally see Clayton C. Ruby, *Sentencing*, 6th ed. (Markham: LexisNexis Canada, 2004) at pages 214 (youth as a mitigating circumstance), 286 (conduct of the defence), 315 (absence of criminal record and first offenders), 336 (assessing the record), 651 (youth offences), 879-886 (criminal negligence causing death).

[12] I have therefore reached the view that the standard of review is reasonableness, essentially because the decision is not protected by a full privative clause, is not a polycentric one, relates to human interests and does not, in so far as the possibility of rehabilitation factor is concerned, engage the Board's expertise.

[13] In coming to this conclusion, I am comforted by the following statement by Major J., for the majority, in *Voice Construction Ltd.*, at paragraph 18:

> 18. *Dr. Q, supra,* confirmed that when determining the standard of review for the decision of an administrative tribunal, the intention of the legislature governs (subject to the constitutional role of the courts remaining paramount — i.e., upholding the rule of law). Where little or no deference is directed by the legislature, the tribunal's decision must be correct. Where considerable deference is directed, the test of patent unreasonableness applies. No single factor is determinative of that test. A decision of a specialized tribunal empowered by a policy-laden statute, where the nature of the question falls squarely within its relative expertise and where that decision is protected by a full privative clause, demonstrates circumstances calling for the patent unreasonableness standard. **By its nature, the application of patent unreasonableness will be rare**. A definition of patently unreasonable is difficult, but it may be said that the result must almost border on the absurd. **Between correctness and patent unreasonableness, where the legislature intends some deference to be given to the tribunal's decision, the appropriate standard will be reasonableness**. In every case, the ultimate determination of the applicable standard of review requires a weighing of all pertinent factors: see *Pushpanathan, supra,* at para. 27.
>
> [Emphasis added]

[14] Since the applications judge applied the wrong standard of review, it is my duty, on appeal, to review the Board's decision on the correct standard of review, that is, on the standard of reasonableness (see *Dr. Q.*, at paragraph 43).

Application of the Reasonableness Standard

[15] The Board examined the possibility of rehabilitation factor in express terms at paragraph 15 of its reasons and indirectly at paragraph 23. These paragraphs read:

> 15. In looking to the second of the Ribic factors, I have considered the appellant's expressions of remorse for his involvement in the offence, the possibility of the appellant's rehabilitation and the likelihood of re-offence. It is troublesome to the panel that the appellant continues to deny that his participation in a "street-race" led to the disastrous consequences. In my view, his continued denial at hearing of the extent of his culpability reflects a lack of insight into his conduct. At the same time, I am mindful of the appellant's show of relative remorse at this hearing for his excessive speed in a public roadway and note the trial judge's finding of this remorse as reflected in the court documents. This show of remorse is a positive factor going to the exercise of special relief. However, I do not see it as a compelling feature of the case in light of the limited nature of the appellant's admissions at this hearing. His continued denial that he was involved in a race with another vehicle and that it was this conduct, rather than speed coupled with a tire breakdown, that led to Ms. Thorpe's death, is not to his credit. While the appellant takes responsibility for his excessive speed, he does not acknowledge or take responsibility for his specific reckless conduct, involving, as it does, street-racing on a public roadway.
>
> 23. Counsel for the appellant made lengthy submissions contending that it is not the function of the Division to mete out further punishment to this appellant for his offence. Counsel is entirely correct that it would be inappropriate for the panel to take that role upon itself. The criminal justice system has spoken with respect to the appellant's guilt and handed down a sentence consistent with principles of sentencing in Canada. The role of the Division is distinct and separate from the criminal courts. This is an application for discretionary relief. Domestic immigration legislation provides that a removal order may be made as against permanent residents who are inadmissible on the grounds of serious criminality. When an appeal is taken from a removal order, the Division must look at all the circumstances in any given case, weigh the various factors both supportive and non-supportive of special relief and reach a determination. Counsel for the appellant urges the panel to conclude the appellant is not a danger to the Canadian public and, on that basis, find in the appellant's favour. While noting the trial judge's conclusions with respect to likelihood of re-offence and the absence of a prior criminal record, the fact is that, given the failure of the appellant to acknowledge his conduct and accept responsibility for his reckless behaviour, particularly street-racing with another vehicle on a public roadway, there is insufficient evidence upon which I can make a determination that the appellant does not represent a present risk to the public. Even were I to do so, in balancing all the relevant factors, I determine the scale

> does not tip in the appellant's favour and decline to exercise favourable discretion in all the circumstances of this case.

[16] It strikes me that the Board, in paragraph 15, sets out from the start what it proposes to do, that is consider “the appellant’s expressions of remorse for his involvement in the offence, the possibility of the appellant’s rehabilitation and the likelihood of re-offence”. However, it devotes the totality of its following analysis to the remorse issue, does not say a word about rehabilitation and re-offence and, in the following paragraph, “moves on to review other relevant circumstances in this case”. In other words the Board fails to do in full the exercise that it is mandated to do and which it itself stated it would be doing.

[17] It also strikes me that when the Board, in paragraph 23, comes back indirectly to the rehabilitation factor, it merely acknowledges the findings of the British Columbia courts in that regard, which are favourable to the appellant, and does not explain why it comes to the contrary conclusion that the rehabilitation factor militates against the appellant. The whole of the evidence with respect to the conduct of the appellant after his sentencing undisputedly strengthens the findings of the criminal courts. Yet, the Board ignores that evidence and those findings.

[18] It clearly appears from the transcripts of the hearing that the presiding member – who wrote the majority decision – and counsel for the Crown, had some kind of fixation with the fact that the offence was related to street-racing, to such a point that the hearing time and time again was transformed into a quasi-criminal trial, if not into a new criminal trial. The appellant was confronted by, and confused with, questions pertaining to legal definitions, such as that of criminal intent and

criminal negligence, with respect to which he did not have of course, nor could he have been expected to have, any knowledge. Questions were also put to him which were obvious attempts to revisit and correct findings made by the British Columbia courts. It was as if the Board, or at least its presiding member, disagreed with the criminal sentence imposed on the appellant and saw in the H & C decision an opportunity to redress the situation.

[19] Needless to say, it is not the role of the Board to second-guess decisions of the criminal courts. The words I used in a slightly different context in *Canada (Minister of Public Safety and Emergency Preparedness v. Cha* 2006 FCA 126 are quite applicable to this case:

> 40. "… It is simply not open to the Minister's delegate to indirectly or collaterally go beyond the actual conviction."

[20] In the end, this decision is an unreasonable one, a decision, to use the words of Iacobucci J. in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at paragraph 56,

> "… that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination."

[21] In the circumstances, I need not address the other issues raised by the appellant.

Disposition

[22] For these reasons I have formed the opinion that the decision of the Board should be set aside.

[23] I would allow the appeal, set aside the decision of the applications judge, allow the application for judicial review, set aside the decision of the Board and send the matter back to the Board for reconsideration by a differently constituted panel.

[24] With respect to the two questions certified,

> (i) Is the appropriate standard of review for a decision of the Immigration Appeal Division, denying special relief on humanitarian and compassionate considerations pursuant to paragraph 67(1) of the IRPA, one of patent unreasonableness?
>
> (ii) In the event that the answer to question number (i) is the affirmative, was it patently unreasonable for the Immigration Appeal Division to have denied special relief, where the person to be removed for serious criminality had not been incarcerated for the crimes in issue?

[25] I would answer the first one in the negative and state that the appropriate standard of review is that of reasonableness. Even though I do not need to answer the second question because of the way it is framed, I will say that whatever the standard applicable, the certification of questions of that nature should not be encouraged because at the end of the day they invite this Court to transform into legal principles what is nothing more than the consideration of a given factor in given circumstances.

"Robert Décary"
J.A.

"I agree.
B. Malone J.A."

DESJARDINS J.A. (Dissenting Reasons)

[26] This is an appeal of a decision rendered by Lutfy C.J. dismissing the application for judicial review of the appellant with regard to a decision of the Immigration Appeal Division of the Immigration Refugee Board (IAD). The IAD declined to exercise the discretionary jurisdiction provided by paragraph 67(1)(*c*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) to grant special relief on humanitarian and compassionate considerations from a removal order issued pursuant to paragraph 36(1)(*a*) of the Act, which reads:

Serious criminality **36.** (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	**Grande criminalité** **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;
[…]	[…]

[27] The power of the IAD to grant special relief pursuant to paragraph 67(1)(*c*) of the Act reads:

Appeal allowed **67**. (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,	**Fondement de l'appel** **67**. (1) Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :
[…]	[…]
(*c*) other than in the case of an appeal by the Minister, taking into	*c*) sauf dans le cas de l'appel du ministre, il y a — compte tenu de

account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case. [Emphasis added.]	l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales. [Je souligne.]

[28] The appellant, Mr. Khosa, a permanent resident of Canada, was born in India in 1982. He immigrated to Canada with his parents in 1996 at the age of fourteen. Both he and another accused, Bahadur Singh Bhalru, were convicted of criminal negligence causing death contrary to section 220(*b*) of the *Criminal Code*, R.S.C. 1985, c. C-46, as a result of their participation in an automobile race during the evening of November 13, 2000. The incident occurred along Marine Drive in Vancouver. It ended with the death of an innocent pedestrian who was struck by the appellant's vehicle. The appellant and Mr. Bhalru received a conditional sentence of two years less a day with various conditions attached. The appellant appealed his conviction and sentence. Both appeals were dismissed.

[29] Mr. Khosa was declared inadmissible for serious criminality pursuant to paragraph 36(1)(*a*) of the Act and was ordered to be removed from Canada by the Immigration Division (A.B. vol. 1, p. 000394). He appealed his removal order. He did not challenge the validity of his removal order but rather sought special relief on the basis of humanitarian and compassionate considerations. The majority of the IAD dismissed his appeal.

[30] The applications judge dismissed the application for judicial review and certified the following two questions:

(i) Is the appropriate standard of review for a decision of the Immigration Appeal Division, denying special relief on humanitarian and compassionate considerations pursuant to paragraph 67(1) of the IRPA, one of patent unreasonableness?

(ii) In the event that the answer to question number (i) is the affirmative, was it patently unreasonable for the Immigration Appeal Division to have denied special relief, where the person to be removed for serious criminality had not been incarcerated for the crimes in issue?

ISSUES

[31] This appeal raises three issues, namely:

1) Whether the appropriate standard of review of a decision of the IAD, denying special relief on humanitarian and compassionate considerations pursuant to paragraph 67(1)(*c*) of the Act, is one of patent unreasonableness;

2) whether the standard of review was properly applied by the applications judge in reviewing the decision of the IAD;

3) in the event that the answer to question (1) is in the affirmative, whether it was patently unreasonable for the Immigration Appeal Division to have denied special relief where the person to be removed for serious criminality had not been incarcerated for the crimes in issue.

(1) THE STANDARD OF REVIEW OF A DECISION OF THE IAD

[32] In *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100, the Supreme Court of Canada appears to have deviated from its long standing practice of determining, through the pragmatic and functional analysis, the standard of review applicable to a decision of the IAD on a deportation order. The Supreme Court proceeded rather in accordance with paragraph 18.1(4)(*d*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. In *Sketchley v. Canada (Attorney*

General), 2005 FCA 404, this Court discussed the decision of the Supreme Court of Canada in *Mugesera* and concluded, at paragraph 67, that it is nevertheless wise to apply the pragmatic and functional analysis until the Supreme Court of Canada provides a clear direction not to do so.

[33] The overall aim of the pragmatic and functional analysis is to discern the legislative intent. Four contextual factors must be considered in order to determine the degree of deference owed to the decision being reviewed. These factors are: (1) the presence or absence of a privative clause or statutory right of appeal; (2) the expertise of the tribunal relative to that of the reviewing court on the issue in question; (3) the purpose of the legislation and the provision in particular, and (4) the nature of the question.

[34] I find, on the first factor, that the leave and the certification clauses (subsection 72(1) and paragraph 74(*d*) respectively of the Act), which lie somewhere between a privative clause and a statutory right of appeal but are neither, are not in themselves helpful in ascertaining the level of deference owed to the IAD decision.

[35] The second factor requires the consideration of three elements: (1) the expertise of the tribunal in question; (2) the Court's expertise relative to that of the tribunal; and (3) the nature of the specific issue before the administrative decision-maker in relation to this expertise: see *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at paragraph 33.

[36] In *Pushpanathan*, the Supreme Court of Canada stated, with respect to the Convention Refugee Determination Division's expertise, that "[t]he expertise of the Board is in accurately evaluating whether the criteria for refugee status have been met and, in particular, in assessing the nature of the risk of persecution faced by the applicant if returned to his or her country of origin" (at paragraph 47). It can be said, in the case at bar, that the expertise of the IAD lies in accurately evaluating whether the criteria for an exemption on compassionate and humanitarian considerations have been met. This is the type of determination that the IAD is regularly called upon to make. The inquiry is highly fact-based and contextual and "involves a considerable appreciation of the facts of that person's case, and is not one which involves the application or interpretation of definitive legal rules": see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraph 61. On this basis, I find that the IAD's expertise lies in matters of fact-finding.

[37] The Federal Court has greater expertise than the IAD on questions of law. It does not, however, have greater expertise than the IAD on questions of fact. The IAD is in a better position than the Court to appreciate and weigh the evidence and to make findings on credibility and trustworthiness. Here, the IAD was called upon to consider, in light of the circumstances of the case, the factors developed in *Ribic v. Canada (Minister of Employment and Immigration)*, [1985] I.A.D.D. No. 4 (QL), subsequently confirmed by the Supreme Court of Canada in *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, in order to determine whether it should exercise its discretion to grant an exemption on compassionate and humanitarian considerations having regard to the appellant's inadmissibility for serious criminality. These are

factors that the IAD itself has developed and has been applying for over fifteen years (*Chieu* at paragraph 41).

[38] The third factor, the purpose of the legislation, reflects the intent of Parliament to grant to the IAD a broad discretion to allow permanent residents facing removal orders to remain in Canada if it would be equitable to do so: *Chieu* at paragraph 66. The fact, however, that the matter to be decided is not polycentric, since it relates directly to the rights and interests of an individual in relation to the government rather than the balancing of interest of various constituencies, may diminish the expected deference.

[39] Finally, the question of whether an individual is entitled to an exemption on compassionate and humanitarian considerations is a question of mixed fact and law, which relates to the application of a legal test to the facts of the case. Questions of fact and questions of mixed fact and law are entitled to a high level of deference.

[40] Considering that the second and the fourth factors (expertise and nature of the question, respectively) weigh in favour of a high level of deference and that the third factor (purpose of the legislation) gives a wide discretion to the IAD, I conclude that the appropriate standard is that of patent unreasonableness.

[41] The applications judge did not err in reaching that conclusion. The parties have not disputed it.

(2) WAS THE ABOVE STANDARD OF REVIEW PROPERLY APPLIED BY THE APPLICATIONS JUDGE IN REVIEWING THE DECISION OF THE IAD?

The decision of the IAD

[42] The majority of the IAD considered all of the testimonial and documentary evidence and applied each of the *Ribic* factors. It gave significant weight to the fact that the appellant, while having expressed remorse, continued to deny that he participated in a street race. The majority of the IAD was of the view that this attitude on the part of the appellant revealed that he lacked insight into his conduct. Although his show of remorse was a positive factor going to the exercise of special relief, the majority of the IAD determined that it was not a compelling feature in light of the limited nature of the appellant's admission at the hearing. The majority of the IAD concluded at paragraphs 23 and 24 of its reasons:

> [23]... Counsel for the appellant urges the panel to conclude the appellant is not a danger to the Canadian public and, on that basis, find in the appellant's favour. While noting the trial judge's conclusion with respect to likelihood of re-offence and the absence of a prior criminal record, the fact is that, given the failure of the appellant to acknowledge his conduct and accept responsibility for his reckless behaviour, particular street-racing with another vehicle on a public roadway, there is insufficient evidence upon which I can make a determination that the appellant does not represent a present risk to the public. Even were I to do so, in balancing all the relevant factors, I determine the scale does not tip in the appellant's favour and decline to exercise favourable discretion in all the circumstances of this case.
>
> [24]... I have considered the viability of a stay of execution of the removal order in the circumstances of this case. In looking to all relevant factors, including the appellant's circumstances and his family circumstances, however, I conclude special relief by way of a stay is not warranted in the facts of this case. The appellant's failure to acknowledge or take responsibility for his specific reckless conduct does not suggest that any purpose would be served by staying the present removal order.

[43] The dissent was prepared to grant a stay of the removal order for a period of three years.

The appellant's contentions

[44] The appellant says the majority opinion is patently unreasonable. The members of the majority disputed the findings of fact of the criminal courts without having the benefit of a thoughtful process. They gave excessive weight to some of what the British Columbia courts said and no weight to other parts of their reasons for judgment. In particular, the majority of the IAD placed great emphasis on the appellant's apparent denial that he was involved in a street race. They completely ignored the fact that Mr. Khosa had extreme remorse and also that he was, as described by the criminal courts, in a "spontaneous race" with clear limits, such as his always stopping at a red light. Also, says the appellant, the majority members showed total disregard for the appellant's testimony about the family farm in India and drew unreasonable conclusions from his testimony.

ANALYSIS

The remorse and the street racing

[45] The appellant testified before the IAD through the aid of an interpreter but did not testify before the criminal courts.

[46] On the issue of remorse, during his testimony before the IAD, the appellant apologized to the family members of the deceased pedestrian for what had happened. The trial judge in the criminal proceedings, madam Justice Loo, found that "by his actions immediately after learning of Ms. Thorpe's death and since the accident, that he [the appellant] has expressed remorse" (A.B. vol.1, p. 000386-000387) . This was noted by the B.C. Court of Appeal which also commented favourably on Mr. Khosa's prospect for rehabilitation.

[47] On the issue of racing, the appellant acknowledged before the IAD that he was “speeding” and that his “driving behaviour was exceptionally dangerous”. He did not admit however that he was racing (paragraphs 10 and 11 of the reasons for judgment of the applications judge). The B.C. Court of Appeal stated that “at trial, Loo J. found that Mr. Khosa and Mr. Bhalru engaged their Camaros in a street race along Marine Drive at speeds in excess of 100 kilometers per hour” (A.B. vol. 1, p. 000266, para. 6). The B.C. Court of Appeal also stated that “Loo J. characterized the contest between Mr. Khosa and Mr. Bhalru as a ‘spontaneous street race’” and that “she distinguished this from the more deliberate and organized industrial races in which ‘committed street racers’ might participate” (A.B. vol.1, p. 000266, para. 10).

[48] The IAD referred to the two elements of remorse and street racing in its analysis of the *Ribic* test. The majority wrote, at paragraph 15:

> [15] In looking to the second of the Ribic factors, I have considered the appellant's expressions of remorse for his involvement in the offence, the possibility of the appellant's rehabilitation and the likelihood of re-offence. It is troublesome to the panel that the appellant continues to deny that his participation in a "street-race" led to the disastrous consequences. In my view, his continued denial at hearing of the extent of his culpability reflects a lack of insight into his conduct. At the same time, I am mindful of the appellant's show of relative remorse at this hearing for his excessive speed in a public roadway and note the trial judge's finding of this remorse as reflected in the court documents. This show of remorse is a positive factor going to the exercise of special relief. However, I do not see it as a compelling feature of the case in light of the limited nature of the appellant's admissions at this hearing. His continued denial that he was involved in a race with another vehicle and that it was this conduct, rather than speed coupled with a tire breakdown, that led to Ms. Thorpe's death, is not to his credit. While the appellant takes responsibility for his excessive speed, he does not acknowledge or take responsibility for his specific reckless conduct, involving, as it does, street-racing on a public roadway.

[49] The majority of the IAD gave significant weight to the street racing. It characterized the appellant's remorse as a "relative remorse" whereas the dissenting member assigned less weight to his denial and focused on the fact that the race was spontaneous, unplanned and of short-duration.

[50] The applications judge carefully reviewed the statements of the appellant before the IAD and the findings of the British Columbia criminal courts on the issue of remorse and street racing. He explained, at paragraph 36, that the majority of the IAD "chose to place greater weight on his denial that he participated in a 'race' than others might have". The applications judge explained that, unlike the criminal courts, the IAD had the opportunity to assess Mr. Khosa's testimony. He concluded that the IAD's assessment was not patently unreasonable (paragraphs 36, 37 and 39 of the applications judge's reasons for judgment). What he said is the following:

> [36] After careful consideration of the record, I am satisfied that the majority members took into consideration the relevant evidence, including the findings of the criminal courts on the issues of "the race" and remorse. In assessing Mr. Khosa's expression of remorse, they chose to place greater weight on his denial that he participated in a "race" than others might have. The IAD conclusion on the issue of remorse appears to differ from that of the criminal courts. The IAD, however, unlike the criminal courts, had the opportunity to assess Mr. Khosa's testimony.
>
> [37] The three-person panel of the IAD, in this case all triers of fact, heard the same testimony and reviewed the same record. Their assessments differ, particularly on the issue of remorse. In the end, on all of the Ribic factors, this Court is being asked to weigh anew the evidence before the IAD. This is not the proper role for a court of judicial review.
>
> […]
>
> [39] In summary, I have not been able to conclude that the majority opinion is patently unreasonable or, in the words of paragraph 18.1(4)(d) of the Federal Courts Act, one which was based on an erroneous finding of fact "made in a perverse or capricious manner or without regard for the material". Put simply, even if one were more attracted to the minority opinion, the record in this case is such that it would be legally wrong for the Court to set aside the majority decision.

[51] The applications judge made no reviewable error. The IAD, under paragraph 67(1)(*c*) of the Act, is mandated to consider "all the circumstances of the case". The IAD, in the case at bar, did consider the decisions of the criminal courts. But it had to make its own determination in light of the statute to be applied. It conducted its own inquiry in order to determine whether special relief should be granted. In doing so, it was called upon to have regard to the objectives of the Act, as set out in subsection 3(1), including the objectives "to protect the health and safety of Canadians and to maintain the security of Canadian society" (reasons and decision of the IAD, A.B. vol. 1, p.000032). It had the opportunity to observe the appellant during his testimony. This assessment of the IAD is distinct from the one made by the criminal courts.

[52] The majority was obviously preoccupied with what they perceived as the lack of responsibility shown by Mr. Khosa in denying what was a key finding in the criminal courts, namely racing. They felt that in doing so, he did not appreciate the full consequences of his conduct. The other rehabilitation factors, namely "the likelihood of re-offence and the absence of a prior criminal record" (paragraph 23 of the reasons of the IAD) were outweighed by what they characterized as his "relative remorse" (paragraph 15 of the reasons of the IAD).

[53] This finding of the majority is well within the domain of the IAD.

The family farm

[54] The appellant's second contention relates to the aggressive questioning conducted by the presiding member of the IAD about the grandfather's family farm in India and the alleged

misconstruction of the evidence by the majority members. The appellant claims that the presiding member failed to retain the fact that following the death of the grandfather, a few days after the appellant's involvement in the car accident, the appellant's father planned to sell the family farm in India and return to Canada.

[55] At paragraph 4 of its reasons for judgment, the majority summarized the appellant's testimony that the grandfather had passed away some two months prior to the hearing and that his father was planning to sell the family farm in India and return permanently to Canada with the funds to establish a local business. The majority of the IAD also referred to the fact that Mr. Khosa had a sister residing in India with her husband and children and that they planned to immigrate to Canada in the future. At paragraph 18, the majority referred to this earlier evidence "that, given the recent death of the appellant's grandfather, the appellant's father now wishes to sell the family property and move permanently to Canada". The majority again referred to the sister living in India and to the fact that she and her husband planned to immigrate to Canada in the near future. The members of the majority then concluded that "[p]resently, it is clear there is immediate and extended family in India along with family property, including a family home". [My emphasis.]

[56] The duty of the IAD is to assess all the circumstances of the case "at the time that the appeal is disposed of" (paragraph 67(1)(*a*) of the Act). The IAD mentioned the family's future plans but appeared to also give weight to the situation as it was at the time of the hearing. The weight the majority view gave to one part of the appellant's testimony by comparison to the other, namely future plans with all their contingencies, is not for this Court to reassess. It is now settled

law that the Court must not second guess the decisions of the IAD with respect to the weight assigned to the various factors it has to consider.

[57] The appellant's second contention was not addressed by the applications judge who made a determination only on what he characterized as the "principal submission" made by Mr. Khosa, namely the race and the remorse issue (paragraph 33 of the applications judge's reasons for judgment).

CONCLUSION

[58] In a recent decision, *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*, 2006 FCA 31 at paragraph 14 (leave to the Supreme Court of Canada dismissed), this Court stated, with respect to its role on appeal of a decision of the Federal Court on a judicial review application:

> However, in more recent cases, the Supreme Court has adopted the view that the appellate court steps into the shoes of the subordinate court in reviewing a tribunal's decision. […] The appellate court determines the correct standard of review and then decides whether the standard of review was applied correctly. […] In practical terms, this means that the appellate court itself reviews the tribunal decision on the correct standard of review.
>
> [My emphasis.]

The applications judge applied the correct standard of review. He made no reviewable error in concluding that the IAD's decision was not patently unreasonable. The intervention of this Court is not warranted.

(3) IN THE EVENT THAT THE ANSWER TO QUESTION (1) IS IN THE AFFIRMATIVE, WAS IT PATENTLY UNREASONABLE FOR THE IMMIGRATION APPEAL DIVISION TO HAVE DENIED SPECIAL RELIEF WHERE THE PERSON TO BE REMOVED FOR SERIOUS CRIMINALITY HAD NOT BEEN INCARCERATED FOR THE CRIMES IN ISSUE?

[59] In concluding, the applications judge noted that while the appellant had not been incarcerated, the removal order was nevertheless maintained.

[60] The fact that the person to be removed on account of serious criminality has not been incarcerated for the crimes in issue is not determinative. A conditional sentence constitutes imprisonment. The sentence is served in the community rather than in prison: *R. v. Proulx*, [2000] 1 S.C.R. 61 at paragraphs 20-21; *R. v. Wu*, [2003] 3 S.C.R. 530 at paragraph 3.

CONCLUSION

[61] I would therefore dismiss this appeal and would answer the two certified questions as follows:

(i) Is the appropriate standard of review for a decision of the Immigration Appeal Division, denying special relief on humanitarian and compassionate considerations pursuant to paragraph 67(1) of the IRPA, one of patent unreasonableness? **Yes.**

(ii) In the event that the answer to question number (i) is the affirmative, was it patently unreasonable for the Immigration Appeal Division to have denied special relief, where the person to be removed for serious criminality had not been incarcerated for the crimes in issue? **No**

"Alice Desjardins"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-500-05
STYLE OF CAUSE:	Sukhvir Singh Khosa v. MCI
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	December 11, 2006
REASONS FOR JUDGMENT BY:	Décary J.A.
CONCURRED IN BY:	Malone, J.A.
DISSENTING REASONS BY:	Desjardins J.A.
DATED:	January 30, 2007

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