Date: 20031229

Docket: IMM-358-03

Citation: 2003 FC 1524

Ottawa, Ontario, this 29th day of December, 2003

Present: **THE HONOURABLE JUSTICE JAMES RUSSELL**

BETWEEN:

STEVEN ANTHONY ROMANS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

[1] This is an application for judicial review of the decision of James Waters, Member of the Appeal Division of the Immigration and Refugee Board ("Appeal Division"), dated January 3, 2003 and communicated to the Applicant on or about January 7, 2003 ("Decision") wherein the Appeal Division dismissed the Applicant's re-opened appeal against a deportation order dated June 7th, 1999 ("Deportation Order") and declined to grant a stay of the Deportation Order. The Applicant seeks an order quashing the Decision and an order remitting the matter back for redetermination by a differently constituted panel.

BACKGROUND

[2] The Applicant is a permanent resident of Canada. He came to Canada from Jamaica as a young child in 1967 when he was approximately 18 months of age. He was admitted as a permanent resident and has retained that status ever since. In his teenage years, he began to display symptoms of schizophrenia. He got into trouble with the police. He was eventually arrested and convicted of thirty-six criminal offences. Three of these offences were sexual assault convictions, while others included trafficking in small amounts of crack. There were also assault and assault causing bodily harm convictions. On March 12, 1999, a report was issued under section 27 of the former *Immigration Act* before an Adjudicator of the Immigration and Refugee Board. The result of the section 27 inquiry was the issuance of the Deportation Order on June 7, 1999.

[3] The Applicant appealed to the Appeal Division. The Appeal Division dismissed the appeal. At the time of the appeal, the Applicant was deemed incompetent to represent himself and a designated representative was appointed. At the initial hearing, the Applicant's mother and the designated representative, a social worker, testified. At the time the appeal was dismissed, the Appeal Division was precluded from considering country conditions in Jamaica as a result of the decision of the Federal Court of Appeal in *Chieu v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1776.

[4] The Appeal Division concluded that the evidence was such that there was a high likelihood that the Applicant would re-offend and that he posed a danger to the public. The Appeal Division

also concluded that it would make no significant difference to the Applicant if he was deported because he was unlikely to notice much change in his circumstances.

[5] A judicial review of the Appeal Division's decision was dismissed by Dawson J. in *Romans v. Canada (M.C.I.)*, [2001] F.C.J. 740 ("*Romans I*"). In her reasons, Dawson J. concluded that, although section 7 of the Charter was engaged in the process, there had been no breach of fundamental justice and she felt she was bound by the decision of the Supreme Court of Canada in *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] S.C.J. No. 27 where the Supreme Court held that Parliament has the right to enact legislation prescribing the conditions under which non-citizens will be permitted to enter and remain in Canada. Dawson J. concluded that the Supreme Court of Canada decision in *Chiarelli*, *supra*, was not "predicted upon the age or capacity of Mr. Chiarelli" (para. 28).

[6] Dawson J. certified the following question:

> In light of the decision of the Supreme Court of Canada in *United states of America v. Burns*, [2001] S.C.J. No. 8, 2001 SCC 7 and in light of the evolved nature of Charter interpretation, is it a violation of fundamental justice to deport a permanent resident pursuant to paragraph 27(1)(*d*) of the Act in circumstances where the permanent resident has resided in Canada since very early childhood so as to have no establishment outside of Canada, and where the permanent resident suffers from a serious mental illness to an extent which makes him unable to function in society?
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> (*Romans v. Canada (Minister of Citizenship and Immigration)* 2001 F.C.T. 466)

[7] The Federal Court of Appeal answered the certified question in the negative and rejected the Applicant's appeal:

> 2. The fact that the appellant has resided in Canada since early childhood, has no establishment outside of Canada and suffers from chronic paranoid schizophrenia does not give him an absolute right to remain in Canada, that right being recognized by section 6(1) of the Charter to Canadian citizens only.
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> ...
>
> 4. We are satisfied that, in doing so, the Appeal Division did a balancing of competing interests as mandated, albeit in different circumstances, by the Supreme Court of Canada in *United States v. Burns*, [2001] 1 S.C.R. 283 and could, on the evidence before it, reach the conclusion that the deportation of the appellant, in the circumstances of this case, was in accordance with the principles of fundamental justice. Madam Justice Dawson declined to intervene ([2001] F.C.J. No. 740, 2001 FCT 466), and rightly so.

[8] The application for leave to appeal the Federal Court of Appeal decision in *Romans I* to the Supreme Court of Canada was dismissed.

[9] The Applicant then applied to re-open before the Appeal Division. The application contained an affidavit from the Applicant's stalwart and faithful mother. She indicated that she had been in contact with psychiatrists and had discovered that, as a result of new medication, there was a good possibility that her son could be treated. She also indicated that she was advised that, if treated properly, the Applicant had an excellent chance of responding positively and that it was desirable to transfer her son from the West Detention Centre, where he had been in detention, to Penetang. The Applicant submitted extensive documentary evidence, and relied on the personal knowledge of his mother to indicate that, in Jamaica, persons who are detained in that country undergo humiliation, are often subjected to physical and sexual assaults, and that his life would be in danger.

DECISION UNDER REVIEW

[10] At the Appeal Division hearing that is the subject of this judicial review, the Applicant's mother was appointed designated representative and she testified that the family came to Canada in 1965 and, at that time, the Applicant was 18 months of age. She also testified that she and her husband became citizens about five years later and that, out of ignorance on her part, she did not apply for citizenship for the Applicant. She said that until his late teens, the Applicant was very obedient but then began to show signs that he was mentally ill. He was in his early 20s when he was diagnosed with chronic paranoid schizophrenia. She testified that there had been no systematic attempts to help her son. She also said that the Applicant has no family in Jamaica, and that he would not be able to receive adequate treatment if he was sent there.

[11] Dr. Sameh Hassan was accepted as an expert witness to provide a psychiatric assessment of the Applicant. He testified that there was still a healthy part of the Applicant and that he could be rehabilitated. He also testified that there was a good opportunity to help the Applicant to become semi-independent. Dr. Hassan also indicated that, with proper treatment, the Applicant could be in a half-way house in a year and could live in society with low risk. Dr. Hassan pointed out that he had seen cases where patients with long-term residential treatment have been rehabilitated.

[12] Counsel for the Applicant argued at the re-opened hearing that, when the Appeal Division exercised its discretion, it had to do so in accordance with the *Charter*, and that, pursuant to the jurisprudence of this Court, including the judicial review of *Romans 1* before Dawson J., the

Applicant's rights under section 7 of the *Charter* were engaged. Counsel argued that the case was now distinguishable from *Romans 1* in that there was new evidence as to country conditions in Jamaica which had not been before the previous tribunal because the jurisprudence at that time had precluded consideration of country conditions. Counsel also noted at the re-opened hearing that the Appeal Division had new evidence of expert psychiatric testimony that indicated that the Applicant had a good chance for recovery with proper treatment. Counsel argued that, when exercising its discretion pursuant to the decision of the Supreme Court of Canada in *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, the Appeal Division had to have regard for principles fundamental justice. Counsel took the position that the only possible way the Appeal Division could exercise its discretion in this case, given the evidence on country conditions, was to allow the appeal. Counsel argued, in the alternative, that the Appeal Division should issue a stay of the Deportation Order on the condition that the Applicant be held in detention until such a time as he was found by a psychiatrist to be able to live on his own.

[13] The Minister argued for dismissal, based on his view that the Applicant still posed a danger to the public. The hearing was then adjourned on the understanding that, if the appeal was dismissed on equitable grounds, the Appeal Division would reconvene to receive evidence and consider the *Charter* issues that had been raised in a Notice of Constitutional Question put forward by the Applicant. However, after the Appeal Division dismissed the appeal in equity, it requested submissions on jurisdiction to consider the *Charter* on a re-opened appeal. After receiving submissions, it ruled that it only had jurisdiction to re-open an appeal from a removal order on discretionary grounds and dismissed the appeal.

[14] The Applicant filed extensive documentary evidence on country conditions in Jamaica, including evidence of police brutality towards mentally ill detainees. The Appeal Division concluded that the conditions for mentally ill persons in prisons, hospitals and on the streets of Jamaica were worse than those that existed in Canada.

[15] The Appeal Division noted that the Applicant had been ordered deported on June 7, 1999. His first appeal had been dismissed and the judicial review of that appeal had been dismissed. He had been granted an opportunity to reopen, but the Appeal Division made the following points:

> Many of the findings of the original Appeal Division were not challenged at the new hearing by either party. Appellant's counsel did not challenge the prior finding that offences for which the appellant had been convicted were serious. Minister's counsel did not seek to upset the prior finding that "the appellant, to the extent that he is established anywhere in the world, is established in Canada," nor did he contest the prior Appeal Division's conclusion there would be great emotional hardship to the appellant's family, and particularly to his mother, if he were deported. Given the appellant's mental condition and inability to give testimony, the issue of remorse was not canvassed extensively at either hearing.
>
> The fresh evidence put forward at the hearing was in relation to the possibility of the appellant's rehabilitation and the potential foreign hardship he may experience in Jamaica, which was established as his likely country of removal.

[16] With respect to the possibility of rehabilitation, the Appeal Division referred to the previous decision in *Romans 1* where the possibility of the Applicant re-offending was found to be high. The Appeal Division went on to note that the Applicant remained in detention and that Dr. Hassan had interviewed him and reviewed the records. It further noted that Dr. Hassan testified that the Applicant was suffering from chronic paranoid schizophrenia, substance abuse and was potentially a danger to himself and the public if he was not in detention. The Appeal Division further noted Dr.

Hassan's evidence that schizophrenia impairs judgement and blurs emotional cognitive functions and that the Applicant's schizophrenia was further complicated by his addiction to crack cocaine. The Appeal Division acknowledged Dr. Hassan's evidence that there were new medications available that had not yet been administered to the Applicant, but concluded that there were significant difficulties in the way of its ensuring the safety of the public if it were to stay the Deportation Order:

> The evidence indicates that the appellant has been admitted and discharged from the Scarborough Grace Hospital, the Queen Street Mental Health Centre and the Wellesley Central Hospital. The appellant's stays at each of these hospitals was short term despite the severity of his medical condition. The history of past hospitalizations indicate *(sic)* that the appellant was able to leave the hospital and return to the streets within a short period of time. There was insufficient credible or trustworthy evidence presented to find that the appellant's past motivation to be out on the streets rather than in a hospital, has changed. After careful consideration, I have determined that I am not able to draft conditions that would ensure the safety of the public if I stayed the deportation order. The proposed treatment plan does not specifically address the issue of the appellant's drug addiction. The plan with respect to obtaining treatment for his schizophrenia is laden with uncertainty and possible loopholes that could compromise public safety.

[17] The Appeal Division then went on to deal with foreign hardship, summarizing the Applicant's evidence on country conditions in Jamaica and acknowledging that he has no contacts there. The Appeal Division went on to indicate that the only hospital in Jamaica that accommodates the mentally ill is Bellevue, and there were limited opportunities for rehabilitation there because it is usually filled to capacity and drugs for treatment are not available. The Appeal Division made the following significant comment:

> The IAD concluded , based on the evidence at the original hearing, that the effect of appellant's illness had turned him into a street person in Canada. "If deported, he is unlikely to notice much change in his circumstances."

> ...
>
> ... Having regard to all the evidence, I am persuaded that psychiatric care is available in Jamaica. I am also persuaded that the quality of that care is less than that available in Canada.

[18] The Appeal Division then came to the following conclusion:

> ... Having regard to all of the evidence presented, I am persuaded, on a balance of probabilities, that conditions for the mentally ill in prisons, hospitals and on the streets of Jamaica are worse than those existing in Canada. I am not persuaded, on a balance of probabilities, that the conditions on the streets of Jamaica are such that hardship faced by the appellant would be significantly worse than that he faced in Canada.

[19] As a result, the appeal was dismissed. The Appeal Division then went on to make the following statement concerning its jurisdiction to entertain Charter arguments:

> The discretionary jurisdiction of the IAD is of a continuing nature in removal cases under the Immigration Act. The IAD has jurisdiction to reopen an appeal from a removal order on discretionary grounds only. Counsel for the appellant filed a notice of constitutional question prior to the hearing challenging the validity of sections 36(1)(a), 44(1) and 48(1) of the current *Immigration and Refugee Protection Act*. This appeal is governed by the *Immigration Act*. Nevertheless, on a reopening, the appellant cannot attack the constitutional validity of the removal order. The appeal is dismissed.

ISSUES

[20] The Applicant raises the following issues:

Did the Appeal Division err in law in concluding that it could not consider the *Charter* on a reopened appeal?

Did the Appeal Division err in law in failing to consider whether or not it ought to have exercised its discretion in accordance with the dictates of the *Charter* as required by the Supreme Court of Canada in *Suresh*, *supra*?

Is section 7 of the *Charter* engaged in the appeal process in this case?

If section 7 of the Charter is engaged, is the Deportation Order in this case in accordance with the principles of fundamental justice?

Did the Appeal Division err in law in concluding that it did not have jurisdiction to order the Applicant detained until such time as he obtained the necessary treatment?

Did the Appeal Division err in law in the manner in which it exercised its jurisdiction in this case?

STANDARD OF REVIEW

[21] Snider J. discussed the applicable standard of review for Appeal Division Decision in *Beaumont v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 1718 (F.C.T.D.) by reference to *Romans 1*:

> 20. The applicable standard of review is discussed in the case of *Romans v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 740 (F.C.T.D). whereby the Court affirmed that the standard of review with respect to the findings of the IAD. The Court stated:
>
> > Analysis of this issue begins with consideration of the applicable standard of review. The Appeal Division has been given a broad discretion to allow a person to remain in Canada. Thus, for a decision of the Appeal Division on this issue to be reviewable it must be shown that the Appeal Division either refused to exercise its discretion or exercised its discretion other than in accord with established legal principles. If exercised bona fide, and not arbitrarily or illegally, and without regard to irrelevant considerations, the Court is not entitled to interfere with the Appeal Division's decision. It is not enough that the Court might have exercised the discretion differently.

PERTINENT LEGISLATION

[22] Section 7 of the *Canadian Charter of Rights and Freedoms* (the *Charter*) provides that:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

[23] The relevant provisions of the *Immigration Act*, RSC 1985, c. I-2 are as follows:

27. (1) An immigration officer or a peace officer shall forward a written report to the Deputy Minister setting out the details of any information in the possession of the immigration officer or peace officer indicating that a permanent resident is a person who	27. (1) L'agent d'immigration ou l'agent de la paix doit faire part au sous-ministre, dans un rapport écrit et circonstancié, de renseignements concernant un résident permanent et indiquant que celui-ci, selon le cas:
...	
d) has been convicted of an offence under any Act of Parliament, other	...

than an offence designated as a contravention under the contraventions Act, for which a term of imprisonment of more than six months has been, or five years or more ay be, imposed;

74. (1) Where the Appeal Division allows an appeal made pursuant to section 70, it shall quash the removal order or conditional removal order that was made against the appellant and may

(a) make any other removal order or conditional removal order that should have been made; or

(b) in the case of an appellant other than a permanent resident, direct that the appellant be examined as a person seeking admission at a port of entry.

74. (2) Where the Appeal Division disposes of an appeal by directing that execution of a removal order or conditional removal order be stayed, the person concerned shall be allowed to come into or remain in Canada under such terms and conditions as the Appeal Division may determine and the Appeal Division shall review the case from time to time as it considers necessary or advisable.

...

103(3) Where the Minister has issued a certificate under subsection (2), the Minister may amend the certificate to which the detention relates to include any matter referred to in subparagraph (2)(a)(i) or (ii), following which the person shall be brought before an adjudicator forthwith and at least once during every seven day period thereafter, at which times the adjudicator shall review the reasons for the person's continued detention.

...

103(6) Every review under subsection (2) or (3) of the detention of a person suspected of being a member of an

d) a été déclaré coupable d'une infraction prévue par une loi fédérale, autre qu'une infraction qualifiée de contravention en vertu de la Loi sur les contraventions:

(i) soit pour laquelle une peine d'emprisonnement de plus de six mois a été imposée,

(ii) soit qui peut être punissable d'un emprisonnement maximal égal ou supérieur à cinq ans;

74. (1) Si elle fait droit à un appel interjeté dans le cadre de l'article 70, la section d'appel annule la mesure de renvoi ou de renvoi conditionnel et peut:

a) soit lui substituer celle qui aurait dû être prise;

b) soit ordonner, sauf s'il s'agit d'un résident permanent, que interrogatoire comme s'il demandait l'admission à un point.

74. (2) En cas de sursis d'exécution de la mesure de renvoi ou de renvoi conditionnel, l'appelant est autorisé à entrer ou à demeurer au Canada aux éventuelles conditions fixées par la section d'appel. Celle-ci réexamine le cas en tant que de besoin.

...

103(3) Le ministre peut modifier l'attestation en y incluant toute question visée aux sous-alinéas (2)a)(i) ou (ii). Le cas échéant, l'intéressé est amené sans délai devant un arbitre et, par la suite, comparaît devant lui au moins une fois tous les sept jours pour examen des motifs qui pourraient justifier une prolongation de sa garde.

...

103(6) L'examen prévu aux paragraphes (2) ou (3) se fait à huis clos si l'intéressé est soupçonné d'appartenir à l'une

inadmissible class described in paragraph 19(1)(e), (f), (g), (j), (k) or (l) shall be conducted in camera.	des catégories non admissibles visées aux alinéas 19(1)e), f), g), j), k) ou l).

ANALYSIS

Did the Appeal Division err in law in concluding that it could not consider the *Charter* on a reopened appeal?

[24] The Applicant argues that the Appeal Division in this case concluded it could not consider the *Charter* because its power to reopen derived solely from its ongoing equitable jurisdiction, so that it could not consider legal issues in a re-opened appeal. The Applicant submits that it is abundantly clear that every tribunal must apply the law in accordance with the *Charter*. The constitutionality of the Deportation Order was not raised at the first appeal. It was raised, however, on application for judicial review of that appeal in *Romans 1* and, based on the record, this Court concluded that section 7 of the *Charter* was engaged, but there had been no breach of fundamental justice.

[25] The Applicant submits that there is no doubt that the Appeal Division has jurisdiction to consider and apply the *Charter* (*Armadale Communications v. Canada (Minister of Employment and Immigration)*, [1991] 3 F.C. 242) and that, as the *Charter* is the Supreme Law of Canada, all other legislation must give way to it. In *Suresh*, *supra*, the Supreme Court noted as follows:

> 77. The Minister is obliged to exercise the discretion conferred upon her by the *Immigration Act* in accordance with the Constitution. This requires the Minister to balance the relevant factors in the case before her.
>
> ...

> In Canada, the balance struck by the Minister must conform to the principles of fundamental justice under s. 7 of the Charter. It follows that insofar as the *Immigration Act* leaves open the possibility of deportation to torture, the Minister should generally decline to deport refugees where on the evidence there is a substantial risk of torture.

[26] The Applicant argues that, given these *dicta*, the Appeal Division was clearly wrong in concluding that it did not have the jurisdiction to consider *Charter* arguments. While it might well be the case that the Appeal Division could not consider other legal issues that were previously decided in the first appeal, that reasoning cannot apply to *Charter* issues. The Appeal Division clearly erred in declining *Charter* jurisdiction and in denying the Applicant the opportunity to present evidence on *Charter* issues.

[27] In reply, the Respondent submits that the Decision was made in a manner consistent with the *Charter*. The Federal Court of Appeal in *Romans v. M.C.I.*, 2001 F.C.A. at paras. 1 and 2 decided that it did not have to determine whether section 7 of the *Charter* was engaged. The same position was taken by the Supreme Court of Canada in *Chiarelli v. Canada (M.E.I.)*, [1992] 1 S.C.R. 711.

[28] In *Chiarelli, supra*, the Supreme Court of Canada determined that it was not necessary, in the context of deciding whether the deportation of criminals complied with the *Charter*, to answer the threshold question as to whether the right of life, liberty and security of the person is engaged by deportation. Rather, it found it sufficient to determine that there was no breach of the principles of fundamental justice.

[29] In *Chiarelli, supra*, the Court noted that Parliament has the right to enact legislation prescribing the conditions under which non-citizens will be permitted to enter and remain in Canada. Where a permanent resident has violated an essential condition under which he or she was permitted to remain in Canada, there can be no breach of fundamental justice in giving practical effect to the termination of the permanent resident's right to remain in Canada. In the case of a permanent resident, this Court has held that deportation is the only way in which to accomplish this.

[30] The Respondent says that *Chiarelli, supra,* is on all fours with the case at bar. The Supreme Court's decision was not predicated upon the age or capacity of Chiarelli. Rather, the Supreme Court held that "it is not necessary, in order to comply with fundamental justice, to look beyond the criminal convictions to other aggravating or mitigating circumstances."

[31] The Applicant's contention that he has an absolute right to remain in Canada irrespective of his violent conduct and several criminal convictions is also inconsistent with s. 6 of the *Charter* and s. 4(2) of the *Immigration Act*. Only Canadians have an absolute right to remain in Canada.

[32] Applying *Chiarelli, Canepa,* and *Williams*, the Federal Court of Appeal has held that the certification of a person as a "danger to the public" (which takes away an applicant's right to an appeal before the Appeal Division) does not violate s. 12 of the *Charger,* even if the person is suffering from mental illness.

Da Costa v. M.C.I., [1998] 2 F.C. 182 (C.A.)

Canepa v. Canada (Minister of Employment and Immigration) (1992), 93 D.L.R. 589 (F.C.A.)

[33] The Respondent notes that the Applicant conceded at the first hearing that the Deportation Order was valid in law. The initial board found the Deportation Order valid at law. At the second hearing, the Respondent notes that the Applicant tried to argue that the Appeal Division, on a re-opened hearing, has the jurisdiction to revisit the legal (i.e. constitutional) validity of the Deportation Order. The Respondent provided submissions to the effect that the Appeal Division, on a re-opened hearing, does not have the jurisdiction to consider the constitutional validity of the Deportation Order because the Appeal Division does not have the authority to sit in review of another board on questions of law. Judicial review in this Court is the proper forum for such arguments.

[34] The Respondent notes that this Court considered a challenge to the first Appeal Division decision on judicial review in *Romans 1* and submits that this Court noted that the validity of the Deportation Order was not challenged before the Appeal Division and the judicial review was, therefore, restricted to examining the Appeal Division's treatment of whether, in light of all the circumstances, the Applicant should not be removed from Canada (*Romans v. Canada (Minister of Citizenship and Immigration)* (2001), F.C.T. 466 at para. 7).

[35] The Respondent provided precedents from previous Appeal Division decisions that held that, on a re-opening, the Appeal Division's jurisdiction is limited to equitable considerations properly

before the Appeal Division. The Appeal Division, in its reasons, relied on these precedents to find that it was not open to the Applicant to argue the legality of the Deportation Order:

> 21. In addition to the scope of the Appeal Division's power to reopen, as articulated in Grillas, the Appeal Division, like other administrative tribunals, is bound by the principles set out in another decision of the Supreme Court of Canada, *Chandler v. Alberta Association of Architects* [See Note 19 below]. In *Chandler* the Supreme Court set out four circumstances in which an administrative tribunal would have authority to reopen its own decision. One of those circumstances is where a tribunal makes an error which has the effect of rendering its decision a nullity. In my view, an error of jurisdiction falls within that category of circumstances. For example, if the Appeal Division wrongly concludes that an appellant is not a permanent resident, when the appellant is in fact a permanent resident, and on that basis declines to hear the appellant's appeal, the decision of the Appeal Division is a nullity. That may give rise to a duty to reopen the appeal. This may be the one instance in which the Appeal Division is bound to revisit a previous determination which it made with respect to its own jurisdiction. As I understand the position taken by the applicant, the decision of the Appeal Division dismissing his appeal for lack of jurisdiction amounts to an error of jurisdiction which renders the decision of the Appeal Division a nullity in light of the reasoning in Williams.
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> *Barone v. Canada (Minister of Citizenship and Immigration)* (1986), 38 Imm. L.r. (2d) 93 (I.A.D.)

[36] I note that there is little mention of *Charter* issues in the Decision itself. The Appeal Division merely says at paragraph 17:

> The discretionary jurisdiction of the IAD is of a continuing nature in removal cases under the *Immigration Act*. The IAD has jurisdiction to re-open an appeal from a removal order on discretionary grounds only. Counsel for the Appellant filed a notice of constitutional question prior to the hearing challenging the validity of section 36(1)(a), 44(1) and 48(1) of the current *Immigration and Refugee Protection Act*. This appeal is governed by the *Immigration Act*. Nevertheless, on a re-opening, the Appellant cannot attack the constitutional validity of the removal order[16]

[37] In my opinion, the Appeal Division makes it quite clear that it cannot consider the constitutional validity of the Deportation Order itself. It is also saying that is can only re-open an appeal from the Deportation Order on "discretionary grounds." This suggests to me that the Appeal

Decision decided it would not entertain the *Charter* issues raised by the Applicants and, indeed, believed it did not have the jurisdiction to do so.

[38] As regards the Appeal Division's decision that the constitutional validity of the Deportation Order could not, at that point, be questioned, I believe there is authority to support such a position. See *Almonte* v. *Canada (Minister of Citizenship and Immigration)*, [1995] I.A.D.D. No. 1254 (I.A.D); *Canada (Minister of Citizenship and Immigration) v. Ledwich*, [1998] I.A.D.D. No. 831 (I.A.D.); *Barone v. Canada (Minister of Citizenship and Immigration)* (1996), 38 IMM L.R. (2d) 93 (I.A.D.). However, the Appeal Board's Decision, in so far as it indicates that in exercising its discretion on a re-opening, the Appeal Division must leave the *Charter* out of account entirely, is clearly wrong. Another way of putting this would be to say, as the Respondent suggests, that the Appeal Division had to decide, in exercising its discretion on a re-opening application, "whether the *execution* of the deportation order" would be a violation of the Applicant's *Charter* rights. The Decision is not entirely clear on this matter but, in my opinion, the Appeal Division appears to be saying that it will consider "discretionary grounds only."

[39] As regards the first issue raised by the Applicant, in my opinion, the Appeal Division committed a reviewable error by deciding it could not consider the *Charter* arguments that the Applicant wished to advance as regards the execution of the Deportation Order.

Did the Appeal Division err in law in failing to consider whether or not it ought to have exercised its discretion in accordance with the dictates of the *Charter* as required by the Supreme Court of Canada in *Suresh, supra*?

[40] The Applicant submits that the Appeal Division erred in failing to apply and consider relevant *Charter* issues in the exercise of its discretion. In the case at bar, counsel for the Applicant argues, based on the decision of the Supreme Court of Canada in *Suresh*, *supra*, that the Appeal Division had to exercise its discretion in accordance with the *Charter*. The Applicant says that, given the new evidence that was before the Appeal Division in this case, (evidence that had not been considered either by the previous Appeal Division or this Court in *Romans 1*), the removal of the Applicant would inevitably violate the principles of fundamental justice and the Appeal Division was obliged, therefore, to exercise its discretion in favour of the Applicant.

[41] The Applicant submits that there was clear evidence before the Appeal Division of the following:

1. the Applicant arrived in Canada when he was 18 months old and has lived here all his life;
2. he became ill in Canada;
3. Dr. Hassan testified that the Applicant could not be held responsible for his criminal convictions because he was mentally ill at the material time;
4. the Applicant has not been given proper treatment for his illness in the past;
5. there are proper treatments available now that have a good chance of success;

6. the Applicant has no connections to Jamaica;
7. the mentally ill in Jamaica are subject to systematic abuse;
8. the Bellevue Hospital (the only hospital that could potentially house the Applicant in Jamaica) has limited facilities and is chronically overcrowded and has very limited rehabilitation options; and
9. as a result of these factors, there is a serious risk to the Applicant's life if he is deported to Jamaica.

[42] In these circumstances, the Applicant argues that his removal to Jamaica would necessarily violate the principles of fundamental justice, so that regardless of any other concerns, including risk to the public in Canada, the Appeal Division ought to have exercised its discretion in his favour (see *Suresh, supra*, and *Burns and Rafay v. U.S.*, [2001] 1 S.C.R. 28). The Applicant takes the position that the Decision gives no indication that the Appeal Division even considered these matters.

[43] In reply, the Respondent submits that *Suresh, supra*, is distinguishable from the present facts. The Applicant in the case at bar has not been found to be a Convention refugee. Nor have there been any serious allegations put forward of substantial grounds to believe that the Applicant faces a risk of torture if he is returned to Jamaica. While the *Suresh, supra*, principles may be considered when a removal is contemplated, their applicability is limited in the case at bar because of significant differences of fact.

[44] Besides the constitutional validity of the Deportation Order, Counsel for the Applicant also raised with the Appeal Division the extent to which the *Charter* limited its general discretion in this case and, in particular, the implications of the Supreme Court of Canada decision in *Suresh*, *supra*, for the exercise of that discretion.

[45] The Respondent's argument on this issue is, essentially, that the Appeal Division had no obligation to mention the *Charter* arguments specifically; it merely had to exercise its discretion and perform its statutory duty within the terms of the *Charter* and in accordance with the principles of fundamental justice, which it did.

[46] In my opinion, the Appeal Division should have addressed the extent to which the exercise of its discretion was affected by *Charter* principles, and the implications of *Suresh*, *supra*, for the decision it had to make, particularly in light of the new evidence presented on country conditions in Jamaica and the fate faced by the Applicant if he was returned there. The Respondent's argument that the Appeal Division had no obligation to actually refer to the *Charter* and the *Charter* issues raised by the Applicant around *Suresh*, *supra*, does not, in my opinion, really meet the point raised by the Applicant. This is because it is not clear from the Decision whether the Appeal Division regarded *Charter* issues as relevant in any sense to the exercise of its discretion. Because the impact of the *Charter*, particularly since the decision in *Suresh*, *supra*, was such a significant aspect of the Applicant's argument, the Appeal Division should have addressed these matters in its Decision. In my opinion, its failure to do so constitutes a reviewable error.

[47] The Respondent attempts to distinguish the facts in *Suresh, supra*, from the facts in this case, and indeed they are different. But distinctions of fact do not remove the underlying considerations that *Suresh, supra*, suggests are applicable to decisions of this kind. In *Suresh, supra*, the Supreme Court of Canada said that "as is the case for the substantive aspects of s. 7 in connection with deportation to torture, we look to the common-law factors not as an end in themselves but to inform the s. 7 procedural analysis." (Para. 114). I am not suggesting that the evidence of country conditions in Jamaica and the likely fate awaiting the Applicant are necessarily equivalent to the fate that awaited Mr. Suresh, and I do not agree with Applicant's counsel that, in this case, fundamental justice demanded that the Applicant remain in Canada, irrespective of the risk to the public. But this was an important issue that the Appeal Division should have addressed in deciding whether or not to exercise its discretion. It is not clear from the Decision whether it did so or whether it felt that this was a legal issue associated with the constitutional validity of the Deportation Order that had to be left out of account.

[48] It is my opinion that, in this case, the Appeal Division was not alive to the kind of analysis that *Suresh, supra*, now demands of it. I note that *Suresh, supra*, has been considered and applied in favour of an appellant before the Appeal Division in at least one instance. In *Velupillai v. Canada (Minister of Citizenship and Immigration)*, [2002] I.A.D.D. No. 863, Panelist Egya Sangmuah was faced with an appellant who had been convicted of conspiracy to traffic in heroin and sentenced to a term of eight years imprisonment. A removal order was issued for Mr. Vellupillai, which he appealed, and the Appeal Division noted as follows:

> 26. In Chieu, the Supreme Court of Canada held that, provided an appellant can establish on a balance of probabilities the likely country of removal, the IAD can consider evidence of potential foreign hardship. The appellant submitted that the likely country of removal is Sri Lanka. He has no other country of nationality or right to permanent residence in any other country. He is not a Convention refuge, as he was excluded by the CRDD and is not protected against refoulement. Counsel for the Minister did not dispute that the likely country of removal would be Sri Lanka. The appellant contended that given the links of his co-conspirators to the LTTE and allegations that he is a member of the LTTE he would be at risk of torture and other grave human right violations if he were removed to Sri Lanka. I agree. The CRDD, with its special expertise in these matters, concluded that the appellant would be at serious risk of torture if were to return to Sri Lanka. ... The documentary evidence submitted by the appellant supports this view. ... I note that in Suresh ... the Supreme Court of Canada also held that the removal of an individual to a country where there was a serious risk of torture would in all but the most exceptional circumstances violate the principles of fundamental justice protected by section 7 of the Canadian Charter of Rights and Freedoms. It would be an understatement to say that the potential foreign hardship in this case is severe. This factor weighs heavily against the appellant's removal from Canada.
>
> 27. In conclusion, the appellant has established that on all the circumstances of the case he should not be removed from Canada. I gave considerable weight to potential foreign hardship, the absence of criminal activity on the part of the appellant since 1988 and the best interests of the appellant's children. While I also weighed the circumstances of the offence (including that the appellant knew that he was trafficking in association with LTTE members and that he ought to have known that some portion of the proceeds would be provided to the LTTE) heavily against the appellant, the positive factors outweighed this negative factor. Given the positive factors in this case, including the fact that the appellant is not likely to re-offend, a stay of the execution of the removal order would serve no purpose.
>
> 28. Accordingly, I allowed the appeal on all the circumstances of the case and quashed the removal order dated June 22, 1992.

[49] In my opinion, *Suresh*, *supra*, is an important aspect of the legal framework within which the Appeal Division has to operate in considering appeals from deportation orders. It is not clear to me from the Decision that the Appeal Division regarded these considerations as being within its jurisdiction. Its assertion that its jurisdiction was limited to “discretionary grounds only” leads me to the conclusion that it did not. In my opinion, this was a reviewable error.

Is section 7 of the *Charter* engaged in the appeal process in this case?

[50] The Applicant submits that his appeal engages his section 7 *Charter* rights. Dawson J. found that the Applicant's *Charter* rights were engaged in her judicial review of the previous decision of the Appeal Division in *Romans 1*. The Applicant relies on the analysis of the Supreme Court of Canada in *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, also relied upon by Dawson J. in her decision. The removal of the Applicant will profoundly affect his ability to make the most fundamental decisions about his life and will affect the power of those charged with his care to be able to assist him and care for him.

[51] The Applicant says that the psychological stress that is associated with the enforced removal from the only support system available to him, and the only country that he has ever known, in circumstances where he is extremely vulnerable, is the type of psychological stress contemplated by the Court in *Blencoe, supra*.

[52] The Respondent submits that the deportation of the Applicant, a permanent resident and a serious criminal, complies with section 7 of the *Charter*. The Respondent refers to the judgement of Strayer J.A. in *Williams v. Canada (Minister of Citizenship and Immigration)*, [1997] 2 F.C. 646 (Fed. C.A.), leave to appeal dismissed October 16, 1997, [1997] S.C.C.A. No. 332:

> ... I have difficulty understanding how the refusal of a discretionary exemption from a lawful deportation order, as applied to a non-refugee who has no legal right to be in the country, must be seen as involving a deprivation of liberty. Unless "liberty" is taken to include the freedom to be anywhere one wishes, regardless of the law, how can it be "deprived" by the lawful execution of a removal order?
>
> On the basis of the jurisprudence to date, then, I am unable to conclude that "liberty" includes the right of personal choice for permanent residents to stay in this country where, as the Supreme Court said in Chiarelli:

They have all deliberately violated an essential condition under which they were permitted to remain in Canada.

[53] The Respondent notes that the Federal Court of Appeal, in examining this Applicant's circumstances of removal in *Romans 1*, decided that it did not have to determine whether section 7 was engaged. (*Romans v. Minister of Citizenship and Immigration* 2001, F.C.A. 272). This is the same position that the Supreme Court of Canada took in *Chiarelli v. Canada (Minister of Employment and Immigration),* [1992] 1 S.C.R. 711. In *Chiarelli, supra,* the Supreme Court of Canada determined that it was not necessary, in the context of deciding whether the deportation of criminals complied with the *Charter,* to answer the threshold question as to whether the right of life, liberty and security of the person is engaged by deportation. Rather, it found it sufficient to determine that there was no breach of the principles of fundamental justice.

[54] The Respondent submits that, in *Chiarelli, supra,* the Court unanimously noted that Parliament had the right to enact legislation prescribing the conditions under which non-citizens will be permitted to enter and remain in Canada. Where a permanent resident has violated an essential condition under which non-citizens will be permitted to enter and remain, there can be no breach of fundamental justice in giving practical effect to the termination of a permanent resident's right to remain in Canada. The Respondent further submits that, in the case of a permanent resident, this Court in *Romans 1* has held that deportation is the only way in which to accomplish this.

[55] The Respondent notes that, in *Chiarelli, supra,* the decision was not predicated upon the age or capacity of Mr. Chiarelli. Rather, the court held that "it is not necessary, in order to comply with

fundamental justice, to look beyond the criminal convictions to other aggravating or mitigating circumstances" (at p. 734).

[56] The Respondent further submits that the Applicant's contention that he has an absolute right to remain in Canada, irrespective of his violent conduct and numerous criminal convictions, is also inconsistent with section 6 of the Charter and s. 4(2) of the *Immigration Act*. The Respondent submits that only Canadians have an absolute right to remain in Canada.

[57] The Respondent argues that in *Chiarelli*, *supra*, *Williams*, *supra*, and *Canepa v. Canada (Minister of Employment and Immigration)* (1992), 93 D.L.R. 589 (fed. C.A.), the Federal Court of Appeal has held that the certification of a person as a "danger to the public" does not violate s. 12 of the Charter, even if the person is suffering from mental illness.

[58] The Respondent also argues that the Applicant is erroneously relying on extradition jurisprudence, namely *U.S. v. Burns*, [2001] 1 S.C.R. 283 at para. 65, to assist in the determination of the applicable principles of fundamental justice in the deportation context. The Respondent submits that, in *Burns*, *supra*, this Court reaffirmed a contextual approach in determining what constituted the applicable principles of fundamental justice in the extradition context. The Respondent argues that the decision in *Burns*, *supra*, turned very much on the particular facts of the case, on the particular content of the extradition treaty with the U.S., and on the particular role played by Canada domestically and internationally in abolishing the death penalty.

[59] The Respondent suggests that principles developed within the context of extradition do not automatically apply to the immigration context and that this was recognized by the Supreme Court in *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779.

[60] In *Romans 1*, Dawson J. concluded that the Applicant's s. 7 Charter rights were engaged. The Respondent contends that the Federal Court of Appeal, in examining this Applicant's circumstances of removal, decided that it did not have to determine whether section 7 was engaged (*Romans v. Minister of Citizenship and Immigration* 2001 F.C.A. 272). However, I note that in that decision, Décary J.A. indicated that the Court accepted, for the sake of its discussion, "that section 7 of the Charter is engaged by the deportation of a permanent resident pursuant to paragraph 27(1)(*d*) of the *Immigration Act*."

[61] As Dawson J. pointed out in *Romans 1* at para. 22, the "consequence of the issuance of the (*sic*) deportation order against an individual is profound." In this case it "prohibits Mr. Romans from making the fundamental personal choice to remain in Canada where he receives the love and support of his family, financial support, and the support of his social worker and the health-care system." As a consequence, Dawson J. found that the issuance of a deportation order in the case of the Applicant engaged his s. 7 rights under the *Charter*. In my opinion, those rights remain engaged in a re-opened appeal and the justifications offered by Dawson J. are equally applicable to the matters before me in the case at bar.

If section 7 of the *Charter* is engaged, is the Deportation Order in this case in accordance with the principles of fundamental justice?

[62] The Applicant concedes that in *Romans 1*, Dawson J. concluded there was no breach of fundamental justice because, on the facts before her, there was no basis for distinguishing between this case and that of *Chiarelli*, *supra*. In *Chiarelli*, *supra*, the Supreme Court of Canada concluded that there was no violation of fundamental justice in deporting from Canada a non-citizen who had deliberately violated one of the conditions of his or her admission to Canada.

[63] The Applicant submits that the evidence before the Appeal Division and before this Court now discloses that the Applicant has been mentally ill since he was an adolescent. Dr. Hassan testified that the Applicant's criminal convictions were related to his illness, especially when he was not receiving treatment and was hallucinating. Given this evidence, the Applicant suggests it is not possible to conclude that the Applicant "deliberately" violated one of the conditions of his admission to Canada so that there is now a significant difference between the case at bar and the *Chiarelli*, *supra*, situation.

[64] Moreover, the Applicant submits that new and significant evidence was put before the Appeal Division concerning the appalling conditions awaiting the Applicant as a mentally ill person in Jamaica. Contrary to what was asserted by the Appeal Division in its Decision, there was no evidence at all that would suggest that the Applicant would obtain adequate care for his very serious and complex problems. The letter from the Consul in Jamaica confirmed that there was very limited

rehabilitation available and that the only relevant facility in that country was chronically overcrowded. The psychiatrist who testified indicated that the Applicant's condition was treatable but required sophisticated treatment and drugs. The evidence disclosed that this treatment would not be available in Jamaica. Other documentary evidence disclosed a society in which the chronically mentally ill usually end up in the penal system, where they are subject to abuse and torture. The mentally ill who are not detained are subject to abuse and physical assault in the streets. They are virtually without protection.

[65] The Applicant submits that, as a result of the decisions of the Supreme Court in *Suresh, supra*, and *Burns and Rafay, supra*, it is now beyond dispute that the Applicant's potential treatment in the country of deportation is relevant to a section 7 analysis. This evidence was not before this Court in *Romans 1*. This compelling evidence suggests that the treatment of the Applicant will be as appalling as the potential torture that Mr. Suresh feared. It is as shocking to send the Applicant back to these conditions in circumstances where he is defenceless as it was to send Mr. Burns or Mr. Rafay back to face the possibility of the death penalty.

[66] In *Romans v. Minister of Citizenship and Immigration*, [2001] F.C.J. 1416, the Federal Court of Appeal dismissed the appeal because, on the facts before it, it concluded that the evidence was not sufficient to meet the "shocks the conscience" test as enunciated by the Supreme Court of Canada in *Burns and Rafay*, *supra*.

[67] In this case, the Applicant is mentally ill. As noted, there is a suggestion in the evidence that, given his illness, he cannot be said to have deliberately violated a condition of his admission to Canada. In *Chiarelli, supra*, at page 734, the Supreme Court talked about "the one element common to all persons who fall within the class of permanent residents described in s. 27(1)(*d*)(ii) [of the *Immigration Act*]" as being that they "have all *deliberately* violated an essential condition under which they were permitted in Canada," (emphasis added) so that there can be "no breach of fundamental justice in giving practical effect to the determination of their right to remain in Canada." The Applicant is in a state where he is unable to care for himself. Moreover, he has lived all of his life here in Canada and has no connections to Jamaica. Finally, the evidence discloses he is at considerable risk if he is returned there. Given these factors, the Applicant submits that it would "shock the conscience" to deport him to Jamaica.

[68] The Respondent argues that this Court has already considered and rejected the argument that *Chiarelli*, *supra*, can be distinguished from the present facts on the basis that the Applicant is a product of Canada who, due to his mental illness, is not responsible for his actions. Dawson J. In *Romans*, *1*, specifically referred to the passage in *Chiarelli*, *supra*, dealing with persons who "deliberately violated an essential condition under which they were permitted to remain in Canada" when concluding that *Chiarelli, supra,* was binding upon her. Dawson J. concluded that removing the mentally ill Applicant from Canada would not violate s. 7 of the Charter. There had been compliance with the principles of fundamental justice.

[69] The Respondent argues that the principles of fundamental justice applicable here are grounded in the societal and legislative context of immigration law and are derived from the basic tenets of our legal system, a system that does not provide non-Canadians with an unqualified right to remain in Canada.

[70] The Respondent further argues that the process followed in this case fully complied with the principles of fundamental justice. An adjudicator issued the Deportation Order following an inquiry at which the Applicant was present and able to present evidence and make submissions. The Deportation Order was subject to an appeal to the Appeal Division on legal and equitable grounds in a hearing *de novo*. The Appeal Division may receive new evidence and is not bound to consider only the evidence that was before the adjudicator who issued the Deportation Order. At the hearing of his appeal, the Applicant was afforded the opportunity to make oral submissions, to be represented by counsel, to have a designated representative appointed, to present fresh evidence, to call witnesses to testify on his behalf and to submit any documentation he wished the Appeal Division to consider.

[71] I have reviewed the decision of Dawson J. in *Romans, 1*. In that case, the Applicant had argued that the situation was distinguishable from *Chiarelli*, *supra*, because the Applicant was a product of Canada and, because of his mental illness, he was "not responsible to the same extent for his action." Dawson J. came to the following conclusions on these issues:

> 26. With respect to the prior decision of the Supreme Court in Chiarelli, Mr. Romans submitted that the Charter is a living document so that Chiarelli must be reconsidered today in light of recent jurisprudence. In any event, Chiarelli was said to be distinguishable because Mr. Chiarelli came to Canada as an adolescent of 15 years of

age and hence was not a product of Canada. This was said to be distinguishable from Mr. Romans' situation. Mr. Romans is a product of Canada and due to his mental illness he is not responsible to the same extent for his actions.

27. Finally, reference was made by Mr. Romans to the decision of the Supreme Court of Canada in Kindler v. Canada (Minister of Justice), [1991] 2 S.C.R. 779 where in the context of extradition it was noted that there would be circumstances where extradition would violate section 7 of the Charter if the treatment to be received in the receiving state would shock the values of Canadians.

28. Despite the compelling argument of Mr. Romans' counsel, I am unable to distinguish the decision of the Supreme Court of Canada in Chiarelli which is binding upon me. I cannot conclude that the Supreme Court's decision was predicated upon the age or capacity of Mr. Chiarelli.

29. In Chiarelli the Supreme Court unanimously noted, at page 733, that Parliament has the right to enact legislation prescribing the conditions under which non-citizens will be permitted to enter and remain in Canada. The Court ruled at page 734 that:

> One of the conditions Parliament has imposed on a permanent resident's right to remain in Canada is that he or she not be convicted of an offence for which a term of imprisonment of five years or more may be imposed. This condition represents a legitimate, non-arbitrary choice by Parliament of a situation in which it is not in the public interest to allow a non-citizen to remain in the country. The requirement that the offence be subject to a term of imprisonment of five years indicates Parliament's intention to limit this condition to more serious types of offences. It is true that the personal circumstances of individuals who breach this condition may vary widely. The offences which are referred to in s. 27(1)(d)(ii) also vary in gravity, as may the factual circumstances surrounding the commission of a particular offence. However there is one element common to all persons who fall within the class of permanent residents described in s. 27(1)(d)(ii). They have all deliberately violated an essential condition under which they were permitted to remain in Canada. In such a situation, there is no breach of fundamental justice in giving practical effect to the termination of their right to remain in Canada. In the case of a permanent resident, deportation is the only way in which to accomplish this. There is nothing inherently unjust about a mandatory order. The fact of a deliberate violation of the condition imposed by s. 27(1)(d)(ii) is sufficient to justify a deportation order. It is not necessary, in order to comply with fundamental justice, to look beyond this fact to other aggravating or mitigating circumstances.

30. This, in my view, is conclusive of the issue of whether Mr. Romans' removal violates section 7 of the Charter.

31. As for reliance upon Kindler, I note that Kindler predates Chiarelli, and I do not see how the express ruling in Chiarelli can be said to be modified by the Court's earlier decision. As well, rulings from the extradition context must be applied with great care to the present circumstances because extradition involves those accused, not convicted, of offences.

[72] Once again, Applicant's counsel has introduced new evidence and has raised extremely able arguments to ask this Court to reach a different conclusion from the one reached by Dawson J. in *Romans*, *supra*. I have, in any event, considerable reservations about his assertion that Dr. Hassan's

evidence now shows the Applicant was not responsible for his crimes. However, having undertaken the same exercise as Dawson J., and after reviewing the jurisprudence, I cannot see how the new evidence adduced by the Applicant concerning his mental capacity can help him on this issue.

[73] The evidence concerning the impact of his mental illness on the crimes he was convicted of is, at bottom, a capacity issue and, to borrow the words of Dawson J. in *Romans 1*, "I cannot conclude that the Supreme Court's decision was predicated upon the age or capacity of [the Applicant]." *Chiarelli, supra*, is also binding upon me and is conclusive of this issue. However, as regards the new evidence of country conditions I feel that *Chiarelli, supra*, does not tie the Court's hands and this was a matter that was not before Dawson J. in *Romans 1*.

[74] The Court in *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 indicated as follows:

> 54. While the instant case arises in the context of deportation and not extradition, we see no reason that the principle enunciated in Burns should not apply with equal force here. In Burns, nothing in our s. 7 analysis turned on the fact that the case arose in the context of extradition rather than refoulement. Rather, the governing principle was a general one -- namely, that the guarantee of fundamental justice applies even to deprivations of life, liberty or security effected by actors other than our government, if there is a sufficient causal connection between our government's participation and the deprivation ultimately effected. We reaffirm that principle here. At least where Canada's participation is a necessary precondition for the deprivation and where the deprivation is an entirely foreseeable consequence of Canada's participation, the government does not avoid the guarantee of fundamental [page36] justice merely because the deprivation in question would be effected by someone else's hand.
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> ...
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> 56. While this Court has never directly addressed the issue of whether deportation to torture would be inconsistent with fundamental justice, we have indicated on several occasions that extraditing a person to face torture would be inconsistent with

fundamental justice. As we mentioned above, in Schmidt, supra, La Forest J. noted that s. 7 is concerned not only with the immediate consequences of an extradition order but also with "the manner in which the foreign state will deal with the fugitive on surrender, whether that course of conduct is justifiable or not under the law of that country" (p. 522). La Forest J. went on to specifically identify the possibility that the requesting country might torture the accused and then to state that "[s]ituations falling far short of this may well arise where the nature of the criminal procedures or penalties in a foreign country sufficiently shocks the conscience as to make a decision to surrender a fugitive for trial there one that breaches the principles of fundamental justice enshrined in s. 7" (p. 522).

...

58. Canadian jurisprudence does not suggest that Canada may never deport a person to face treatment elsewhere that would be unconstitutional if imposed by Canada directly, on Canadian soil. To repeat, the appropriate approach is essentially one of balancing. The outcome will depend not only on considerations inherent in the general context but also on considerations related to the circumstances and condition of the particular person whom the government seeks to expel. On the one hand stands the state's genuine interest in combatting terrorism, preventing Canada from becoming a safe haven for terrorists, and protecting public security. On the other hand stands Canada's constitutional commitment to liberty and fair process. This said, Canadian jurisprudence suggests that this balance will usually come down against expelling a person to face torture elsewhere.

...

77. ... In Canada, the balance struck by the Minister must conform to the principles of fundamental justice under s. 7 of the Charter. It follows that insofar as the Immigration Act leaves open the possibility of deportation to torture, the Minister should generally decline to deport refugees where on the evidence there is a substantial risk of torture.

78. We do not exclude the possibility that in exceptional circumstances, deportation to face torture might be justified, either as a consequence of the balancing process mandated by s. 7 of the Charter or under s. 1. (A violation of s. 7 will be saved by s. 1 "only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics and the like": see Re B.C. Motor Vehicle Act, supra, at p. 518; and New Brunswick (Minister of Health and Community Services) v. G. (J.), [1999] 3 S.C.R. 46, at para. 99.) Insofar as Canada is unable to deport a person where there are substantial grounds to believe he or she would be tortured on return, this is not because Article 3 of the CAT directly constrains the actions of the Canadian government, but because the fundamental justice balance under s. 7 of the Charter generally precludes [page47] deportation to torture when applied on a case-by-case basis. We may predict that it will rarely be struck in favour of expulsion where there is a serious risk of torture. However, as the matter is one of balance, precise prediction is elusive. The ambit of an exceptional discretion to deport to torture, if any, must await future cases.

79. In these circumstances, s. 53(1)(b) does not violate s. 7 of the Charter. What is at issue is not the legislation, but the Minister's obligation to exercise the discretion s. 53 confers in a constitutional manner.

> 129. We conclude that generally to deport a refugee, where there are grounds to believe that this would subject the refugee to a substantial risk of torture, would unconstitutionally violate the Charter's s. 7 guarantee of life, liberty and security of the person. This said, we leave open the possibility that in an exceptional case such deportation might be justified either in the balancing approach under ss. 7 or 1 of the Charter. ...

[75] In light of this, I regard the basic issue before me on this question raised by the Applicant as being whether, in light of the new evidence adduced by the Applicant and his supporters concerning the fate awaiting him in Jamaica, the appropriate "fundamental justice balance" was reached in the Decision, bearing in mind that the Supreme Court has said in *Suresh*, *supra*, that "the fundamental justice balance under s. 7 of the *Charter* generally precludes [page 47] deportation to torture when applied on a case-by-case basis."

[76] I recognize, of course, that it is not the intention of the Minister in this case to deport the applicant to face torture and that there is room for debate concerning what he does actually face if deported to Jamaica. But my reading of the Decision suggests to me that the Member does not really confront this issue and fails to take into account the implications of *Suresh, supra,* for the situation before him.

[77] The Applicant presents an extremely difficult case. He is a danger to himself and the Canadian public, but he is also extremely vulnerable and faces grave danger and possible death if returned to Jamaica. He just cannot look after himself and needs the support of his mother and others. He needs dramatic medical intervention. He has been in Canada since he was a small child. It is a matter of mere oversight on the part of his mother that he is not a Canadian citizen. The

applicable provincial laws should have been used long ago to ensure that he gets the treatment he needs for his illness and to ensure that he is detained in an appropriate institution until he ceases to be a danger to himself and the public.

[78] The Immigration system is not equipped to deal with the exigencies of this situation. It doesn't have the flexibility. Yet the Minister must ensure that the public is protected. Hence, the crude expedient of deportation and the sorry state of affairs before the Court is this application.

[79] The Decision itself reveals the Member grappling with these irreconcilables but, taking everything into account, he concludes that the Applicant appears to be doomed wherever he is and so he might as well be in Jamaica where he will not pose a threat to the Canadian public. A decision has to be made. In this regard, the words of Joyal J. in *Fernandes v. Canada (M.C.I.)*, [1995] F.C.J. No. 1619 should be born in mind:

> The Appeal Division, in dealing with an appeal from a deportation order as in the case at bar, is exercising equitable jurisdiction. This, or course, is meant to alleviate what might be termed the harshness of the law which more often than not can only speak in black or white terms. Seized of such an appeal, the Appeal Division must of necessity maintain a judicious respect for both the rule of law and the humanitarian and compassionate considerations involved. This is not easy and it is obvious, as in the case before me, that it imposes on the members of the Appeal Division particular attention to all of the circumstances. Sooner or later, however, the Appeal Division has to make up its mind one way or the other. Naturally, the tribunal's decision will not always win a popularity contest. Yet to the extent that the tribunal thoroughly applied its mind and carefully weighed all of the evidence before it, that decision merits respect.
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> 15. The Board, in dealing with an appeal from a deportation order as in the case at bar, is exercising equitable jurisdiction. This, of course, is meant to alleviate what might be termed the harshness of the law which more often than not can only speak in black or white terms. Seized of such an appeal, the Board must of necessity maintain a judicious respect for both the rule of law and the humanitarian and compassionate considerations involved. This is not easy and it is obvious, as in the case before me, that it imposes on the members of the Board particular attention to all of the

> circumstances. Sooner or later, however, the board has to make up its mind one way or the other.
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> 16. Naturally, the tribunal's decision will not always win a popularity contest. Yet to the extent that the tribunal thoroughly applied its mind and carefully weighed all of the evidence before it, that decision merits respect.

[80] As I shall discuss later, I do not believe that the Member had the power to order that the Applicant be detained indefinitely until he receives the medical and other attention he needs under provincial law to ensure he is no longer a danger to the public. So, a choice had to be made, and, unless the Applicant's support group ensure that he does get the assistance he needs to ensure he is no longer a danger to the public, that choice will have to be made again.

[81] I do not believe the fundamental justice balance was adequately considered by the Member in this case and that, with particular regard to *Suresh*, *supra*, and the Applicants s. 7 *Charter* rights, I believe it needs to be considered again. But I do not accept the argument of Applicant's counsel that, if it is done properly, only one result is possible. In all of the circumstances of this case, public safety must remain a significant issue while the Applicant remains capable of refusing treatment and placing himself at large. The Respondent says that the appropriate balancing was done, but I am not happy with a conclusion that says "I am not persuaded, on a balance of probabilities, that the conditions on the streets of Jamaica are such that the hardship faced by the appellant would be significantly worse than that he faced in Canada." This conclusion seems perverse to me in light of the evidence that was before the Member on the conditions that confront the mentally ill in Jamaica and, in contrast, the support that the Applicant has available to him in Canada. The Applicant is an extremely vulnerable human being. He cannot take care of himself. He is clearly

better off in Canada, in my opinion. Whether, when these considerations are balanced against the dangers he poses to others, the Deportation Order is in accordance with the principles of fundamental justice, still requires determination. But the issue should not be evaded by pretending that what the Applicant confronts in Jamaica is not significantly worse than he faces in Canada.

Did the Appeal Board err in law in concluding that it did not have jurisdiction to order the Applicant detained until such a time as he obtained the necessary treatment?

[82] The Applicant submits that the Appeal Division unduly fettered its discretion when it concluded that it did not have the jurisdiction to order him detained and to impose conditions that would adequately protect the public. The Appeal Division noted that it considered the imposition of these conditions but concluded it did not have the jurisdiction to act in the way suggested by the Applicant. However, it is submitted that, in reaching this conclusion, the Appeal Division interpreted its powers on granting a stay in an unduly restrictive manner. This appeal was decided under the former *Immigration Act*. The power to impose terms and conditions is set out in section 74 (2) of the former Act, a provision similar to that contained in *IRPA*:

74(2) Where the Appeal Division disposes of an appeal by directing that execution of a removal order or conditional removal order be stayed, the person concerned shall be allowed to come into or remain in Canada under such terms and conditions as the Appeal Division may determine and the Appeal Division shall review the case from time to time as it considers necessary or advisable.	74(2) En cas de sursis d'exécution de la mesure de renvoi ou de renvoi conditionnel, l'appelant est autorisé à entrer ou à demeurer au Canada aux éventuelles conditions fixées par la section d'appel. Celle-ci réexamine le cas en tant que de besoin.

[83] The Applicant submits that there is nothing in the wording of this section that would restrict the Appeal Division's power to impose conditions when granting a stay. The power is to grant such

terms and conditions as it “may determine”. The Appeal Division is vested with all the powers of a court of record and there is nothing in the wording of this section to prevent it from ordering the Applicant’s detention until such time as he is certified by a psychiatrist as not being a danger to the public. Moreover, the Applicant argues that the dicta of the Supreme Court of Canada in *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.J. No. 1 are instructive of the scope of the Appeal Division’s jurisdiction in this regard:

> 46. Parliament has structured the I.A.D. to provide robust procedural guarantees to individuals who come before it and to provide a significant degree of administrative flexibility to I.A.D. board members and staff. The I.A.D. is a court of record (s. 69.4(1)) with broad powers to summon and examine witnesses, order the production of documents, and enforce its orders (s. 69.4(3)). A removal order appeal is essentially a hearing *de novo*, as evidence can be received that was not available at the time the removal order was made. The I.A.D. has liberal rules of evidence, and may "receive such additional evidence as it may consider credible or trustworthy and necessary for dealing with the subject-matter before it" (s. 69.4(3)(c)). Written reasons must be provided for the disposition of an appeal under ss. 70 or 71 when such reasons are requested by either of the parties to the appeal (s. 69.4(5)). As with the statutory stay, Parliament has not provided similar procedural guarantees for decisions by the Minister.
>
> 47. Furthermore, the remedial powers of the I.A.D. are very flexible. Pursuant to s. 73(1) of the Act, the I.A.D. can dispose of an appeal made pursuant to s. 70 in three ways: by allowing it; by dismissing it; or, if exercising its equitable jurisdiction under ss. 70(1)(b) or 70(3)(b), by directing that execution of the order be stayed. When a removal order is quashed, the I.A.D. has the power to make any other removal order or conditional removal order that should have been made (s. 74(1)). When a removal order is stayed, the I.A.D. may impose any terms and conditions it deems appropriate, and review the case from time to time as it considers necessary (s. 74(2)). Stays may be cancelled or amended by the I.A.D. at any time (s. 74(3)). When a stay is cancelled, the appeal must be either dismissed or allowed, although the I.A.D. retains its powers under s. 74(1) to substitute a different removal order.

[84] The Applicant submits that, given these dicta, the Appeal Division clearly erred in concluding that, when granting a stay, its jurisdiction prevented it from ordering the continued detention of the Applicant.

[85] In reply, the Respondent argues that imposing a term and condition in order to grant the Applicant a stay of execution of the Deportation Order is, in effect, to grant the Applicant a reprieve from removal. If the Applicant chooses to violate the terms and conditions of the stay, the Appeal Division can use the violation as a factor in whether it chooses to exercise its discretion in the Applicant's favour. If a "condition" of a stay is mandatory detention, this is not a condition at all, but is tantamount to being a term of potentially indefinite imprisonment. The Respondent's position is that Parliament specifically repealed the Appeal Division's jurisdiction to detain, or even supervise detention orders as a result of various amendments from 1976 through 1992. The Respondent submits that the Appeal Division no longer has any authority regarding detention of appellants so that the Applicant's arguments are simply misplaced.

[86] From 1992 to June 28, 2002 (when the *Immigration Act* was superceded by the *IRPA*), the jurisdiction to detain was contained in s. 103 of the *Immigration Act*, an extraordinary power to be exercised by Senior Immigration Officers and Adjudicators alone.

[87] The Respondent argues that the Applicant is wrong in suggesting that s. 74(2) of the former *Immigration Act* conferred upon the Appeal Division the jurisdiction to detain the Applicant. The Respondent contends that there was no statutory authority under s. 74(2) to permit the Appeal Division to order a person detained as a "term and condition" where a stay of execution of a removal order was granted pursuant to s. 74(1).

[88] The Respondent contends that under the former *Immigration Act*, the extraordinary power to detain an individual (on an ongoing basis) was granted to Adjudicators under s. 103(3) where there was explicit statutory authority, and not section 74(2), which merely spoke of ordinary "terms and conditions":

(3) Where an inquiry is to be held or is to be continued with respect to a person or a removal order or conditional removal order has been made against a person, an adjudicator may make an order for

(a) the release from detention of the person, subject to such terms and conditions as the adjudicator deems appropriate in the circumstances, including the payment of a security deposit or the posting of a performance bond;

(b) the detention of the person where, in the opinion of the adjudicator, the person is likely to pose a danger to the public or is not likely to appear for the inquiry or its continuation or for removal from Canada; or

(c) the imposition of such terms and conditions as the adjudicator deems appropriate in the circumstances, including the payment of a security deposit or the posting of a performance bond.

(3) Dans le cas d'une personne devant faire l'objet d'une enquête ou d'une enquête complémentaire ou frappée par une mesure de renvoi ou de renvoi conditionnel, l'arbitre peut ordonner:

a) soit de la mettre en liberté, aux conditions qu'il juge indiquées en l'espèce, notamment la fourniture d'un cautionnement ou d'une garantie de bonne exécution;

b) soit de la faire garder, s'il croit qu'elle constitue vraisemblablement une menace pour la sécurité publique ou qu'à défaut de cette mesure, elle se dérobera vraisemblablement à l'enquête ou à sa reprise ou n'obtempérera pas à la mesure de renvoi;

c) soit de fixer les conditions qu'il juge indiquées en l'espèce, notamment la fourniture d'un cautionnement ou d'une garantie de bonne exécution.

[89] The Respondent further contends that explicit procedural protections governing ongoing detention under s. 103(3) were contained in subsection 103(6), which required that the reasons for detention be reviewed by an adjudicator on a regular basis. Section 103(6) contained no authority for adjudicators to detain any person, including psychiatric patients, for their own protection:

(6) Where any person is detained pursuant to this Act for an examination, inquiry or removal and the examination, inquiry or removal does not take place within forty-eight hours after that person is first placed in detention, or where a decision has not been made pursuant to subsection 27(4) within that period, that person shall be brought before an adjudicator forthwith and the reasons

(6) Si l'interrogatoire, l'enquête ou le renvoi aux fins desquels il est gardé n'ont pas lieu dans les quarante-huit heures, ou si la décision n'est pas prise aux termes du paragraphe 27(4) dans ce délai, l'intéressé est amené, dès l'expiration de ce délai, devant un arbitre pour examen des motifs qui pourraient justifier une prolongation de sa

for the continued detention shall be reviewed, and thereafter that person shall be brought before an adjudicator at least once during the seven days immediately following the expiration of the forty-eight hour period and thereafter at least once during each thirty day period following each previous review, at which times the reasons for continued detention shall be reviewed.

garde; par la suite, il comparaît devant un arbitre aux mêmes fins au moins une fois:

a) dans la période de sept jours qui suit l'expiration de ce délai;

b) tous les trente jours après l'examen effectué pendant cette période.

[90] The Respondent submits that fundamental principles of statutory interpretation would militate against an interpretation of s. 74(2) of the *Immigration Act* that would confer extraordinary power to detain an individual where there is no explicit statutory authority for it nor any procedural protections as contained in s. 103.

[91] The Respondent contends that the Applicant appears to be arguing that the Appeal Division had the jurisdiction to order "indefinite detention" of the Applicant pending a highly speculative course of treatment to cure his schizophrenic condition.

[92] The Respondent submits that Rothstein J. in *Sahin v. Canada (Minister of Citizenship and Immigration)*, [1995] 1 F.C. 214 cautioned against there being authority under the *Immigration Act* to indefinitely detain a person. Immigration detention is an extraordinary restraint and should not be indefinite. Rothstein J. enumerated a non-exhaustive list of criteria for adjudicators to consider when considering detention under section 103(6) of the *Immigration Act*. None of these criteria, enumerated at para. 30, suggest the power to order someone detained to obtain psychiatric treatment or for their protection:

> (1) Reasons for the detention, i.e. is the applicant considered a danger to the public or is there a concern that he would not appear for removal. I would think that there is

> a stronger case for continuing a long detention when an individual is considered a danger to the public.
>
> (2) Length of time in detention and length of time detention will likely continue. If an individual has been held in detention for some time as in the case at bar, and a further lengthy detention is anticipated, or if future detention time cannot be ascertained, I would think that these facts would tend to favour release.
>
> (3) Has the applicant or the respondent caused any delay or has either not been as diligent as reasonably possible. Unexplained delay and even unexplained lack of diligence should count against the offending party.
>
> (4) The availability, effectiveness and appropriateness of alternatives to detention such as outright release, bail bond, periodic reporting, confinement to a particular location or geographic area, the requirement to report changes of address or telephone numbers, detention in a form that could be less restrictive to the individual, etc.

[93] The Respondent contends that if this Court accepts the Applicant's argument, subsection 74(2) of the *Immigration Act* could provide the Appeal Division with the authority to indefinitely detain persons to receive psychiatric treatment at its pleasure with none of the protections mandated by statute nor jurisprudence. The Respondent submits that this would be contrary to the clear legislative intent of Parliament to carefully circumscribe the extraordinary power to detain by the protective mechanism contained in subsection 103(6) of the *Immigration Act*.

[94] The Respondent concludes that the Appeal Division correctly held that detention of the mentally ill falls within provincial authority, such as under the *Ontario Mental Health Act*. The Federal *Immigration Act* contains no authority for the Appeal Division to order an indefinite psychiatric detention.

[95] I agree with the Respondent's interpretation of the Appeal Board's powers of detention.

[96] I have not been able to identify any previous applications of s. 74(2) of the *Immigration Act* that support the Applicant's argument in this case that it could be used to support the Appeal Division's discretionary powers relating to the granting of detention orders in the way suggested by the Applicant. The rules of statutory interpretation obligate me to consider the more specifically applicable provision in the *Immigration Act* to be the appropriate provision to apply in this case.

[97] Neither s. 103(3) or 103(6) of the *Immigration Act* describe any sort of circumstances that would approximate to those of the Applicant, wherein the person subject to detention is being detained for their own benefit. As the Respondent argues, this could arguably lead to indefinite detention. It is possible that Parliament did not anticipate circumstances such as those faced by the Applicant, but it would be dangerous for the Appeal Division or this Court to confer such a broad jurisdiction on the Appeal Division in relation to detention. Section 103(6) of the *Immigration Act* provides important procedural protections when the examination, inquiry, or removal of a person cannot take place promptly. The Appeal Division would surely be overstepping its jurisdiction in setting terms and conditions that implicate a provincial statute and/or provincial agencies without the requisite statutory authorization.

[98] Even though a limited detention may benefit the Applicant in this case and may be possible under s. 74(2), I find that the Appeal Division did not err in law in determining that it did not have jurisdiction to order the Applicant detained until such a time as he obtained the necessary treatment.

Did the Appeal Division err in law in the manner in which it exercised its jurisdiction in this case?

[99] Finally, the Applicant submits that the Appeal Division erred in the exercise of its discretion by concluding that, although conditions in Jamaica were not as good as they were in Canada, the Applicant would obtain treatment. The Appeal Division addressed this issue as follows:

> Having regard to all the evidence presented, I am persuaded, on a balance of probabilities, that conditions for the mentally ill in prisons, hospitals and on the streets of Jamaica are worse than those existing in Canada. The appellant has endured hardship on the streets in Canada. I am not persuaded, on a balance of probabilities, that the conditions on streets of Jamaica are such that the hardship faced by the appellant would be significantly worse than that he faced in Canada.

[100] The Applicant submits that, in making this finding, the Appeal Division ignored and indeed did not even mention all of the significant evidence related to country conditions that clearly established the Applicant's life and security would be placed at risk in Jamaica. The Appeal Division ignored the fact that there was now a psychiatrist committed to caring for the Applicant, that the psychiatrist had developed a treatment plan, that he stated the Applicant had committed to obtain the treatment, that there were new drugs available in Canada and that, within a year of treatment, there was a higher than fifty percent chance that the Applicant would be able to function effectively in a half-way house. The Appeal Division concluded that there was a chance that the Applicant would be allowed to go out in public and would pose a public risk. In making that finding, the Applicant says the Appeal Division ignored the evidence of Dr. Hassan who said he would certify the Applicant if his condition remained as it was, i.e. if he was still a danger to himself

and others. Dr. Hassan made it clear that the Applicant had been neglected by the mental health system in the past and that his criminality was the product of inadequate treatment. By concluding that there would not, in effect, be any difference if the Applicant were deported, the Appeal Division ignored the evidence of terrible conditions in Jamaica and ignored the evidence of potential treatment in Canada. The Applicant submits that by suggesting that he "wouldn't know the difference," the Appeal Division displayed a lack of understanding of the situation of the mentally ill. The Appeal Division appears to suggest that, because the Applicant is mentally ill, he doesn't feel anything, so that, wherever he is, he will not be in a materially different position. It is submitted that there was no evidence to suggest that, if the Applicant were in detention in Jamaica, in circumstances where he was subject to physical and sexual abuse, he would not suffer from abuse. The Applicant submits that this finding is patently unreasonable.

[101] In reply, the Respondent submits that the Appeal Division's decision was reasonable and was made with regard to the evidence before it.

[102] The Respondent points out that, contrary to the assertions of the Applicant, Dr. Hassan never undertook to certify the Applicant for involuntary admission. Dr. Hassan spoke of hypothetical situations and specifically indicated that he would not be the doctor who would look after the Applicant in the event that he was involuntarily admitted to a facility. Dr. Hassan indicated that if the Applicant were released from detention he would have the authority to assess the Applicant, but there were no guarantees. Dr. Hassan had made no attempt to have the Applicant certified and placed in protective psychiatric detention and considered that immigration detention was sufficient

to prevent the Applicant hurting himself and others. Dr. Hassan also stated that if the Applicant voluntarily went to hospital he could not be forcibly confined and would be at liberty as a patient. Were the Applicant not forcibly confined it would be up to the Applicant to show up for his medication. Dr. Hassan indicated there was a risk that the Applicant would disappear onto the streets and fail to take the suggested medication.

[103] The Respondent submits that the Appeal Division was sensitive to the Applicant's specific situation as a mentally ill person. The Applicant has previously demonstrated that he will refuse to take medication and will walk away from hospitals and live on the streets when he is not in immigration detention pending his deportation. There is no guarantee that the Applicant will be forcibly detained in a psychiatric facility or that he will respond to, or even take, medication that might alleviate some of his psychotic tendencies. The Applicant views his very supportive Canadian family as a threat. It was open to the Appeal Division to determine that, with no guarantees that the Applicant can be forcibly treated in Canada, and using his past behaviour as an indicator, if the Appellant is not deported to Jamaica, he may very well end up on the streets in Canada. His symptoms might be alleviated by new medication, but there is no evidence he will be permanently cured.

[104] With regret, the Respondent submits that no amount of sensitive balancing will assure the safety of the Canadian public or the amelioration of the Applicant's suffering. The treatment course suggested by the Applicant's witness was based upon speculation. There was no assurance that the

Applicant would be willing and able to comply with any of the terms suggested, and it is not within the Appeal Division's jurisdiction to impose psychiatric detention or forcible psychiatric treatment.

[105] The Respondent submits it was open to the Appeal Division to conclude that there was insufficient evidence presented by the Applicant to the Appeal Division to make an informed decision on the situation of street people in Canada *vis-à-vis* those in Jamaica. The Applicant failed to discharge his onus of presenting evidence of harm suffered by psychiatric patients in Canada, either in institutions or on the streets, to enable the Appeal Division to contextualize the documentary evidence concerning the mistreatment of psychiatric patients or homeless people in Jamaica. Unfortunately, the mistreatment of homeless people, including murder, is not unknown in Canada. Ultimately the Applicant's dispute is with the probative value or weight accorded by the Appeal Division in assessing the documentary evidence in light of all of the circumstances of the Applicant's case. The Respondent submits that such a dispute regarding evidentiary weight does not warrant intervention by this Court.

[106] I have already indicated that the Appeal Division failed to address the Applicant's s. 7 *Charter* rights, the implications of *Suresh*, *supra*, and the appropriate fundamental justice balance for the case before it.

[107] I have also indicated that I believe the Member was perverse in his conclusions that the hardships faced by the Applicant in Jamaica would not be significantly worse than he faced in Canada where the Applicant has a support group and the possibility of treatment.

[108] In this sense, then, I believe the Appeal Division did err in law in the manner in which it exercised its jurisdiction.

[109] I do, however, consider it is incumbent upon the Applicant and his supporters to demonstrate that he will be taken care of in such a way that he will not pose a danger to the Canadian public. He has demonstrated in the past that he is quite capable of walking away from his family and the medical facilities where he is placed. His treatment and confinement cannot be based upon speculation. These will be matters of vital concern when this matter comes up for re-determination.

[110] Counsel are requested to serve and file any submissions with respect to certification of a question of general importance within seven days of receipt of these Reasons for Order. Each party will have a further period of three days to serve and file any reply to the submission of the opposite party. Following that, an Order will be issued.

"James Russell"

J.F.C.

[111] The Respondent submits that the IAD decision was reasonable and was made with regard to the evidence before it.

[112] The Respondent contends that contrary to the argument made by the Applicant, the witness Dr. Hassan never undertook to certify the Applicant for involuntary admission. The Respondent submits that Dr. Hassan spoke of hypothetical situations and specifically indicated that he would not be the Doctor who would look after the Applicant in the hypothetical situation that he was involuntarily admitted to a facility. The Respondent submits that Dr. Hassan had made no attempt to have the Applicant certified and placed in protective psychiatric detention and considered that the immigration detention was sufficient to prevent the Applicant from hurting himself and not hurting others. The Respondent notes that Dr. Hassan also stated that if the Applicant voluntarily went to hospital he could not be forcibly confined and would be at liberty as a patient. Were the Applicant not forcibly confined, it would be up to the Applicant to show up for his medication. Dr. Hassan indicated there was a risk that the Applicant would disappear into the streets and get off the suggested medication.

[113] The Respondent submits that the IAD was sensitive to the Applicant's specific situation as mentally ill person. The Applicant has previously demonstrated that he will refuse to take medication and will walk away from hospitals and live on the streets when he is not in immigration detention, as a danger to the Canadian public, pending his deportation. There is no guarantee that the Applicant will be forcibly detained in a psychiatric facility or that he will respond to or even take medication that might alleviate some of his psychotic tendencies. The Respondent submits that the Applicant views his very supportive Canadian family as a threat. The Respondent submits that it was open for the IAD to determine that, with no guarantee that the Applicant can be forcibly treated in Canada, and with his past behaviour as an indicator, if the Applicant is not deported to Jamaica, he may very well end up in the streets in Canada. The Respondent submits that the Applicant's symptoms might be alleviated by new medication but there is no evidence that he will be permanently cured.

[114] The Respondent disputes the implication that the Applicant's schizophrenic condition was somehow a product of Canada rather than a genetic or congenital condition.

[115] The Respondent further submits that no amount of sensitive balancing will assure the safety of the Canadian public or the amelioration of the Applicant's suffering. The Respondent submits that the treatment course suggested by the Applicant's witness was based upon speculation. There was no assurance that the Applicant would be willing and able to comply with any of the terms suggested and the Respondent submits that it is not within the IAD's jurisdiction to impose psychiatric detention or forcible psychiatric treatment.

[116] The Respondent submits that it was open for the IAD to conclude that there was insufficient evidence presented by the Applicant to the Appeal Division to make an informed decision on the situation of street people in Canada vis-a-vis those in Jamaica. The Respondent submits that the Applicant failed to discharge his onus of presenting evidence of harm suffered by psychiatric patients in Canada either in institutions or on the streets in order for the IAD to be able to contextualize the documentary evidence concerning the mistreatment of psychiatric patients or homeless people, including murder, is not unknown in Canada. The Respondent submits that ultimately the Applicant's dispute is with the probative value or weight accorded by the IAD in assessing the documentary evidence in light of all the circumstances of the Applicant's case. The Respondent submits that such dispute regarding evidentiary weight does not warrant intervention by this Court.

ANALYSIS

Did the Appeal Division err in law in concluding that it could not consider the Charter on a reopened appeal?

[117] The Applicant argues that the Appeal Division in this case concluded that it did not have Charter jurisdiction because its power to reopen only derived from its ongoing equitable jurisdiction and that it could not consider legal issues on the reopened appeal. The Applicant submits that it is abundantly clear that every tribunal must always apply the law in accordance with the Charter.

[118] The Applicant further submits that there is no doubt that the Appeal Division has jurisdiction to consider and apply the Charter (*Armadale Communications v. Canada (Minister of Employment and Immigration)* [1991] 3 F.C. 242). As indicated by Hugessen J.A. for the unanimous Federal Court of Appeal in *Armadale*:

> ¶ 5 The Immigration Act gives to the adjudicator extensive powers to decide important questions of law and of fact. Specific reference may be made to section 32 [as am. by R.S.C., 1985 (3rd Supp.), c. 30, s. 5; (4th Supp.), c. 28, ss. 11, 36] (decisions as to who shall be permitted to remain in the country and, if not permitted, as to how and when they should be obliged to leave), section 46.02 [as enacted by R.S.C., 1985 (4th Supp.), c. 28, s. 14] (decisions as to who is eligible to make a refugee claim and, if eligible, as to whether such claim has a credible basis) and section 103 [as am. idem, s. 27] (decisions as to detention) but there are many others as well. Indeed the very decision here under attack is specifically required to be made by the adjudicator and raises important issues of publicity of hearings, freedom of the press and fundamental justice. In addition the adjudicator is, by section 45 [as am. idem, s. 14], the presiding officer at the first stage or screening inquiry for all refugee claimants. It is not without significance that the other member of the tribunal over which the adjudicator presides is a member of the Immigration and Refugee Board. The adjudicator is also vested by section 112 with all the powers of a commissioner under Part I of the Inquiries Act [R.S.C., 1985, c. I-11].
>
> ¶ 6 Many of the decisions which an adjudicator is called upon to make, alone or together with a member of the Board, are of critical importance to the persons concerned and can have significant impact on rights which are protected and guaranteed by the Charter. Indeed, all decisions relating to persons seeking admission to Canada are specifically required to be made in accordance [page248] with the Charter (see paragraph 3(f)). In those circumstances, I think that it is reasonable to conclude that an adjudicator is vested with the "practical capability" to decide questions of law including questions touching the application and supremacy of the Charter.

[119] The Applicant in this case further submitted that every tribunal and court in Canada has an obligation to act in accordance with and apply the Charter as the Charter is the Supreme Law of Canada and all other legislation must give way to the Charter. In *Suresh v. Canada (Minister of Citizenship and Immigration) [2002] 1 S.C.R. 3,* the Supreme Court noted:

> ¶ 77 The Minister is obliged to exercise the discretion conferred upon her by the Immigration Act in accordance with the Constitution. This requires the Minister to balance the relevant factors in the case before her.

...

> In Canada, the balance struck by the Minister must conform to the principles of fundamental justice under s. 7 of the Charter. It follows that insofar as the Immigration Act leaves open the possibility of deportation to torture, the Minister should generally decline to deport refugees where on the evidence there is a substantial risk of torture.

[120] The Applicant argues that given this *dicta*, the Appeal Division was clearly wrong in concluding that it did not have the jurisdiction to consider Charter arguments. While it might well be the case that the Appeal Division could not consider other legal issues that were previously decided in the former appeal, that reasoning can never apply to the Charter as the Appeal Division must always apply the Charter. The Appeal Division clearly erred in declining jurisdiction and in denying the Applicant the opportunity to present evidence on Charter issues.

[121] The Respondent counters that the Appeal Division's decision was made in a manner consistent with the Charter. At issue is not the constitutional validity of the deportation order, rather determining whether the execution of the deportation order would be in violation of section 7 of the Charter.

[122] The Respondent submits that the Appeal Division did not err in determining that it lacked the jurisdiction to reconsider the legal validity of the deportation order. The Respondent submits that the Applicant stated the issue correctly in his response submissions to the Appeal Division on this issue of jurisdiction:

> ... if the Board concludes that it does not have legal jurisdiction, it must consider legal issues at this point, it must consider the Charter when it exercises its equitable jurisdiction and exercise that jurisdiction in a manner consistent with the Charter.

[123] This is a correct statement of the Appeal Division's relationship with the Charter. As a government actor, the Appeal Division is required to exercise its jurisdiction in a manner consistent with the Charter. The determinative issue in this case is whether the Appeal Division in fact exercised its discretion in this manner. The Decision itself does not indicate that the Appeal Division actually concluded in a broad manner that it could not consider the Charter on a reopened appeal.

[124] Therefore, I do not find that the Appeal Division erred in law by concluding that it could not consider the Charter on a reopened appeal, because the Appeal Division in fact did not make such a conclusion.

Did the Appeal Division err in law in failing to consider whether or not it ought to have exercised its discretion in accordance with the dictates of the Charter as required by the Supreme Court of Canada in *Suresh*?

[125] The Respondent submits that *Suresh* is distinguishable from the present facts. The Applicant has not been found to be a Convention refugee, nor have there been any serious allegations put forward of substantial grounds to believe that the Applicant faces a risk of torture were he to remain in Jamaica. While the *Suresh* principles may be considered in light of removal, the Respondent argues that its applicability is limited due to significantly different factual circumstances.

[126] I agree that the Applicant does not face torture *per se* upon return to Jamaica, however, I do note that *Suresh* is not a decision that can be restricted to cases involving refugee claimants that risk torture upon return to their country of origin. In support of this proposition, I draw attention to the important principle enunciated by the Court in Suresh namely, that the guarantee of fundamental justice applies even to deprivations of life, liberty or security effected by actors other than our government, if there is a sufficient causal connection between our government's participation and the deprivation ultimately effected.

[127] I note that the following excerpts from Suresh are demonstrative of this principle:

> ¶ 52 We may thus conclude that Canadians reject government-sanctioned torture in the domestic context. However, this appeal focuses on the prospect of Canada expelling a person to face torture in another country. This raises the question whether s. 7 is implicated at all. On one theory, our inquiry need be concerned only with the Minister's act of deporting and not with the possible consequences that the expelled refugee may face upon arriving in the destination country. If our s. 7 analysis is confined to what occurs on Canadian soil as a necessary and immediate result of the Minister's decision, torture does not enter the picture. If, on the other hand, our analysis must take into account what may happen to the refugee in the destination country, we surely cannot ignore the possibility of grievous consequences such as torture and death, if a risk of those consequences is established.
>
> ¶ 53 We discussed this issue at some length in Burns, supra. In that case, the United States sought the extradition of two Canadian citizens to face aggravated first degree murder charges in the state of Washington. The respondents Burns and Rafay [page35] contested the extradition on the grounds that the Minister of Justice had not sought assurances that the death penalty would not be imposed. We rejected the respondents' argument that extradition in such circumstances would violate their s. 12 right not to be subjected to cruel and unusual treatment or punishment, finding that the nexus between the extradition order and the mere possibility of capital punishment was too remote to engage s. 12. We agreed, however, with the respondents' argument under s. 7, writing that "[s]ection 7 is concerned not only with the act of extraditing, but also the potential consequences of the act of extradition" (para. 60 (emphasis in original)). We cited, in particular, Canada v. Schmidt, [1987] 1 S.C.R. 500, at p. 522, in which La Forest J. recognized that "in some circumstances the manner in which the foreign state will deal with the fugitive on surrender, whether that course of conduct is justifiable or not under the law of that country, may be such that it would violate the principles of fundamental justice to surrender an accused under those circumstances". In that case, La Forest J. referred specifically to the possibility that a country seeking extradition might torture the accused on return.

> ¶ 54 While the instant case arises in the context of deportation and not extradition, we see no reason that the principle enunciated in Burns should not apply with equal force here. In Burns, nothing in our s. 7 analysis turned on the fact that the case arose in the context of extradition rather than refoulement. Rather, the governing principle was a general one -- namely, that the guarantee of fundamental justice applies even to deprivations of life, liberty or security effected by actors other than our government, if there is a sufficient causal connection between our government's participation and the deprivation ultimately effected. We reaffirm that principle here. At least where Canada's participation is a necessary precondition for the deprivation and where the deprivation is an entirely foreseeable consequence of Canada's participation, the government does not avoid the guarantee of fundamental justice merely because the deprivation in question would be effected by someone else's hand.
>
> ¶ 55 We therefore disagree with the Federal Court of Appeal's suggestion that, in expelling a refugee to a risk of torture, Canada acts only as an "involuntary intermediary" (para. 120). Without Canada's action, there would be no risk of torture. Accordingly, we cannot pretend that Canada is merely a passive participant. That is not to say, of course, that any action by Canada that results in a person being tortured or put to death would violate s. 7. There is always the question, as there is in this case, of whether there is a sufficient connection between Canada's action and the deprivation of life, liberty, or security.

[128] The Supreme Court of Canada in Suresh went on to discuss the concept of balancing, and in particular, taking into account the circumstances and conditions of the particular person whom the government seeks to expel:

> ¶ 58 Canadian jurisprudence does not suggest that Canada may never deport a person to face treatment elsewhere that would be unconstitutional if imposed by Canada directly, on Canadian soil. To repeat, the appropriate approach is essentially one of balancing. The outcome will depend not only on considerations inherent in the general context but also on considerations related to the circumstances and condition of the particular person whom the government seeks to expel. On the one hand stands the state's genuine interest in combatting terrorism, preventing Canada from becoming a safe haven for terrorists, and protecting public security. On the other hand stands Canada's constitutional commitment to liberty and fair process. This said, Canadian jurisprudence suggests that this balance will usually come down against expelling a person to face torture elsewhere.

Is section 7 engaged in the appeal process in this case?

[129] The Applicant submits that this appeal engages the section 7 rights of the Applicant. Dawson J. found this to be the case in the previous decision of the IAD. The Applicant relies on the analysis of the Supreme Court of Canada in *Blencoe v. British Columbia (Human Rights Commission) [2000] 2 S.C.R. 307*, also relied upon by Dawson J. The Applicant argues that the removal of the Applicant will profoundly affect his ability to make the most fundamental decisions about his life , and will affect the power of those charged with his care to be able to assist him and caring for him. In *Blencoe*, Bastarache J. quoted from *Longeuil* with approval:

> The foregoing discussion serves simply to reiterate my general view that the right to liberty enshrined in s. 7 of the Charter protects within its ambit the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference. I must emphasize here that, as the tenor of my comments in B. ®.) should indicate, I do not by any means regard this sphere of autonomy as being so wide as to encompass any and all decisions that individuals might make in conducting their affairs. Indeed, such a view would run contrary to the basic idea, expressed both at the outset of these reasons and in my reasons in B. ®.), that individuals cannot, in any organized society, be guaranteed an unbridled freedom to do whatever they please. Moreover, I do not even consider that the sphere of autonomy includes within its [page342] scope every matter that might, however vaguely, be described as "private". Rather, as I see it, the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence. As I have already explained, I took the view in B. ®.) that parental decisions respecting the medical care provided to their children fall within this narrow class of inherently personal matters. In my view, choosing where to establish one's home is, likewise, a quintessentially private decision going to the very heart of personal or individual autonomy.

[130] The Applicant submits that based on this analysis, the Applicant’s section 7 liberty interest and security of the person interest is engaged. The Applicant contends that the psychological stress that is associated with the enforced removal from the only support system that the Applicant has and the only country that the Applicant has ever known in circumstances where the Applicant is

extremely vulnerable is most certainly the type of psychological stress contemplated by the Court in *Blencoe*.

[131]

If section 7 is engaged, is the deportation order in this case in accordance with the principles of fundamental justice?

[132] *(note to Russell J. - an important issue to clarify, mostly from the Applicant - is how he reconciles his extradition precedents with the different nature of deportation orders)*

[133] The Respondent submits that it does not offend the principles of fundamental justice to deport serious criminals from Canada. The Respondent contends that is not necessary, in order to comply with fundamental justice, to look to other aggravating or mitigating circumstances surrounding the criminal convictions giving rise to the removal order.

[134] The Respondent contends that if the deportation of the Applicant engages section 7 of the Charter, the deportation does not violate section 7 rights as the decision to remove the Applicant was arrived at in a manner consistent with the principles of fundamental justice.

[135] The Applicant concedes that in the judicial review of the first decision at the Federal Court Trial Division, Dawson, J. concluded that there was no breach of fundamental justice because on

the facts before her there was no basis for discriminating between this case and that of *Chiarelli*. As alluded to earlier, in *Chiarelli*, the Supreme Court of Canada concluded that there was no violation of fundamental justice in deporting from Canada a non-citizen who had deliberately violated one of the conditions of his or her admission to Canada.

[136] The Applicant submits that the evidence now before the Court discloses that the Applicant was mentally ill since he was an adolescent. Dr. Hassan testified that the Applicant's criminal convictions were related to his illness, especially when he was not receiving treatment and was in a hallucinating status. Given this evidence it is not possible to conclude that the Applicant deliberately violated one of the conditions of his removal.

[137] Moreover, the Applicant submits that new evidence was put before this Appeal Division about the appalling conditions awaiting the Applicant as a mentally ill person in Jamaica. In this regard, the Applicant relies on the summary of the documentary evidence that was filed. The Applicant submits that this is evidence that the previous Appeal Division and court sitting on judicial review did not consider, clearly indicating that the Applicant would be at grave risk if deported to Jamaica.

[138] Contrary to what was asserted by the Appeal Division in its decision, there was no evidence at all that would suggest that the Applicant would obtain adequate care for his very serious and complex problem. The letter to the Minister's counsel from the designated Immigration Officer in

Kingston, Jamaica confirmed that there was very limited rehabilitation potential for the Applicant at the only facility in Jamaica, which also suffered from chronic overcrowding.

[139] The psychiatrist who testified, Dr. Hassan, indicated that the problem of the Applicant was treatable but required sophisticated treatment and drugs. The evidence disclosed that this treatment would not be available in Jamaica. The other documentary evidence disclosed a society in which the chronically mentally ill usually ended up in the penal system where they were subject to abuse and torture. The mentally ill that were not detained were subject to abuse and physical assault on the street. They were virtually without protection.

[140] The Applicant submits that as a result of the decisions of the Supreme Court in *Suresh* and *Burns and Rafay*, it is now beyond dispute that the potential treatments available in the country of deportation are relevant to a section 7 analysis. This evidence was not before the Court in the previous judicial review. This compelling evidence suggests that the treatment of the Applicant will be as appalling as the potential torture that Suresh feared. The Applicant submits that it is as shocking to send him back to these conditions in circumstances where he is defenceless as it would be to send Burns or Rafay back to the possibility of the death penalty.

[141] In this case, the Applicant is mentally ill. As noted, the evidence suggests that given his illness, he cannot be said to have deliberately violated a condition of his admission to Canada. He is in a state where he is unable to care for himself. Moreover, he has lived all of his life here in

Canada and has no connection to Jamaica. Finally, the evidence discloses he is at grave risk if he returned there.

[142] The Applicant is a product of Canada, unlike Chiarelli, for example, who had spent less time in Canada than in his country of origin at the time of his first conviction for a serious offence in Canada. In this case, the Applicant has his loving and caring family in Canada, and no family members of note in Jamaica. Clearly, there are financial costs in keeping the Applicant in Canada as well as public interest considerations relating to the effective enforcement of the *Immigration Act*. However, these considerations are outweighed by the competing consideration of protecting the life and safety of the Applicant, who is an extremely vulnerable person.

[143] Surely this is the type of circumstance where s. 7 of the Charter is engaged to apply to a non-citizen. To allow a mentally ill person who has lived in Canada since he was 18 months of age to be deported to a country where he would be subject to inevitable hardship or death is unconscionable and does not serve to reinforce the integrity of Canada's immigration system.

Did the Appeal Division err in law in concluding that it did not have jurisdiction to order the Applicant detained until such a time as he obtained the necessary treatment?

[144] The Applicant submits that the Appeal Division unduly fettered its discretion when it concluded that it did not have the jurisdiction to order Mr. Romans detained and to impose

conditions which would adequately protect society. The Appeal Division noted that it considered the imposition of these conditions but concluded that it did not have the jurisdiction.

[145] The Applicant submits that there is nothing in the wording of section 74(2) of the *Immigration Act* which would restrict the tribunal's power in terms of the power to impose conditions when granting a stay. The Applicant argues that power is to grant such terms and conditions as it "may determine". The Applicant submits that the IAD is vested with all the powers of a Court of Record and there is nothing in the wording of this section that would restrict the IAD so that it could not impose a condition requiring Mr. Romans detention until such time as he is certified as not being a danger by a psychiatrist.

[146] The dicta of the Supreme Court of Canada in *Chieu v. Canada (Minister of Citizenship and Immigration)* [2002] S.C.J. No. 1 is instructive as to the scope of the Appeal Division's jurisdiction:

> ¶ 46 Parliament has structured the I.A.D. to provide robust procedural guarantees to individuals who come before it and to provide a significant degree of administrative flexibility to I.A.D. board members and staff. The I.A.D. is a court of record (s. 69.4(1)) with broad powers to summons and examine witnesses, order the production of documents, and enforce its orders (s. 69.4(3)). A removal order appeal is essentially a hearing de novo, as evidence can be received that was not available at the time the removal order was made. The I.A.D. has liberal rules of evidence, and may "receive such additional evidence as it may consider credible or trustworthy and necessary for dealing with the subject-matter before it" (s. 69.4(3)©)). Written reasons must be provided for the disposition of an appeal under ss. 70 or 71 when such reasons are requested by either of the parties to the appeal (s. 69.4(5)). As with the statutory stay, Parliament has not provided similar procedural guarantees for decisions by the Minister.
>
> ¶ 47 Furthermore, the remedial powers of the I.A.D. are very flexible. Pursuant to s. 73(1) of the Act, the I.A.D. can dispose of an appeal made pursuant to s. 70 in three ways: by allowing it; by dismissing it; or, if exercising its equitable jurisdiction under ss. 70(1)(b) or 70(3)(b), by directing that execution of the order be stayed. When a removal order is quashed, the I.A.D. has the power to make any other removal order or conditional removal order that should have been made (s. 74(1)). When a removal order is stayed, the I.A.D. may impose any terms and conditions it deems appropriate,

> and review the case from time to time as it considers necessary (s. 74(2)). Stays may be cancelled or amended by the I.A.D. at any time (s. 74(3)). When a stay is cancelled, the appeal must be either dismissed or allowed, although the I.A.D. retains its powers under s. 74(1) to substitute a different removal order.

[147] The Respondent submits that under the *Immigration Act*, the IAD lacked the jurisdiction to order the Applicant to be detained. Moreover, the Respondent indicated that the IAD could not order the Applicant detained in a psychiatric facility as such detentions fall within provincial jurisdiction that is governed by the *Ontario Mental Health Act*.

[148] The Respondent contends that under the *Immigration Act*, the extraordinary power to detain an individual (on an ongoing basis) was granted to Adjudicators under section 103(3) where there was explicit statutory authority, and not section 74(2) which merely spoke of ordinary "terms and conditions":

> 103 (3) Where an inquiry is to be held or is to be continued with respect to a person or a removal order or conditional removal order has been made against a person, an adjudicator may make an order for
>
> (a) the release from detention of the person, subject to such terms and conditions as the adjudicator deems appropriate in the circumstances, including the payment of a security deposit or the posting of a performance bond;
>
> (b) the detention of the person where, in the opinion of the adjudicator, the person is likely to pose a danger to the public or is not likely to appear for the inquiry or its continuation or for removal from Canada; or
>
> (c) the imposition of such terms and conditions as the adjudicator deems appropriate in the circumstances, including the payment of a security deposit or the posting of a performance bond.

[149] The Respondent further explained that explicit procedural protections governing ongoing detention under s. 103(3) were contained in subsection 103(6) which required that the reasons for

detention be reviewed by an adjudicator on a regular basis. Section 103(6) contained no authority for adjudicators to detain any person, including psychiatric patients, for their own protection.

> (6) Where any person is detained pursuant to this Act for an examination, inquiry or removal and the examination, inquiry or removal does not take place within forty-eight hours after that person is first placed in detention, or where a decision has not been made pursuant to subsection 27(4) within that period, that person shall be brought before an adjudicator forthwith and the reasons for the continued detention shall be reviewed, and thereafter that person shall be brought before an adjudicator at least once during the seven days immediately following the expiration of the forty-eight hour period and thereafter at least once during each thirty day period following each previous review, at which times the reasons for continued detention shall be reviewed. The Respondent submits that fundamental principles of statutory interpretation would militate against an interpretation of s. 74(2) that would confer the extraordinary power to detain an individual where there is no explicit statutory authority for it nor any procedural protections as contained in section 103.

[150]

[151] *(ask Respondent to clarify regarding successive parliamentary amendments restricting IAD jurisdiction to detain)*

[152]

Did the Appeal Division err in law in the manner in which it exercised its jurisdiction in this case?

[153] Finally, the Applicant submits that the Appeal Division erred in the exercise of its discretion. the Appeal Division concluded that although conditions in Jamaica were not as good as they were in Canada the Applicant would still obtain treatment. The Appeal Division concluded:

> Having regard to all the evidence presented, I am persuaded, on a balance of probabilities, that conditions for the mentally ill in prisons, hospitals and on the streets of Jamaica are worse than those existing in Canada. The appellant has endured hardship on the streets in Canada. I am not persuaded, on a balance of probabilities, that the conditions on streets of Jamaica are such that the hardship faced by the appellant would be significantly worse than that he faced in Canada.

[154] The Applicant submits that in making this finding the Appeal Division ignored and indeed did not even mention all of the evidence related to the country conditions which clearly established that the Applicant's life and security would be placed at risk in Jamaica. The Applicant argues that the Appeal Division ignored the fact that there was now a psychiatrist committed to caring for the Applicant, that the psychiatrist had developed a treatment plan, that he had stated that the Applicant committed to obtain the treatment, that there were new drugs available in Canada and that with a year of treatment there was a higher than fifty percent chance that the Applicant would be able to function effectively in a half way house. The Appeal Division concluded that there was a risk that the Applicant would be allowed to go out in society and pose a hazard.

[155] In making that finding the Appeal Division ignored the evidence of Dr. Hassan when he stated that he would certify the Applicant if his condition remained as it was, i.e. if he was still a danger to himself and others. Dr. Hassan made it clear that the Applicant had been neglected by the mental health system in the past and that his criminality was the product of inadequate treatment. By concluding that there would not in effect be a difference for the Applicant if he were deported, the Appeal Division ignored the evidence of horrible conditions in Jamaica and ignored the evidence of potential treatment in Canada.

[156] The Applicant submits that by suggesting that Mr. Romans "wouldn't know the difference", the Appeal Division displayed an incredible lack of understanding of the situation of the mentally ill. The Appeal Division appears to suggest that because Mr. Romans is mentally ill he doesn't feel anything so that wherever he is he will not be in a significantly different position. It is submitted that there was no evidence to suggest that if Mr. Romans were in detention in Jamaica in circumstances where he was subject to physical and sexual abuse he would not suffer from abuse. The Applicant submits that this finding is patently unreasonable.

[157] The Respondent contends that the Appeal Division did not err in refusing to re-open the question of the legal (i.e. constitutional) validity of a deportation order. The Respondent argues that the Applicant cannot, after accepting the legal validity of a deportation order in a prior hearing and before this Court, claim that the Appeal Division has the jurisdiction to revisit the issue of the legal validity of the deportation order that led to the IAD appeal. The Respondent contends that the issue is not the constitutional validity of admissibility provisions that led to the issuance of a deportation order, but whether the Appeal Division , in considering the grounds of the Applicant's appeal against being removed, has determined that removal of the particular Applicant in light of the particular circumstances of his case would not violate the Charter.

[158] I find that the Appeal Division acted in a patently unreasonable manner in downplaying the disparities between the conditions the Applicant would face if deported to Jamaica and the conditions he would be subject to in Canada, particularly in light of the testimony of Dr. Hassan. Notably, the Appeal Division did not pay sufficient heed to the fact that the Applicant has no support

network in Jamaica and appears to have no inherent ability to survive in such a different environment than Canada, particularly in light of his mental disability and the fact that he receives social assistance in Canada which enhances his prospects here.

[159] *(did Dr. Hassan propose to assume responsibility of the Applicant - will he re-sign the involuntary admission certificate of the Applicant until treatment reaches some sort of successful conclusion? was this before the Appeal Division?)*

ORDER

THIS COURT ORDERS that the decision to dismiss the appeal is quashed and that this matter is remitted back for redetermination by a differently constituted panel.