**Date: 20090324**

**Docket: IMM-3084-08**

**Citation: 2009 FC 310**

**Ottawa, Ontario, March 24, 2009**

**PRESENT: The Honourable Mr. Justice Campbell**

**BETWEEN:**

**BALRAJ SINGH RANDHAWA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR ORDER AND ORDER

[1] The present Application challenges the June 10, 2008 decision of a delegate of the Minister (Minister) who found that Mr. Randhawa, a citizen of India who was found to be a convention refugee in Canada on June 18, 1997 at age 22, is inadmissible because of his serious criminality and because he constitutes a danger to the public in Canada pursuant to s. 115(2)(a) of the *IRPA*. The serious criminality finding is based on Mr. Randhawa's conviction for sexual assault on September 18, 2006; the danger opinion is based on his conduct during and subsequent to the crime.

[2] The Minister's decision also includes an opinion that Mr. Randhawa would not be at risk if he is returned to India. During the course of oral argument, Counsel for Mr. Randhawa confirmed that this feature of the decision is not contested.

[3] It is agreed that the standard of review of the Minister's danger opinion is reasonableness as defined by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47 as follows:

> …reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

The Minister's objective under s. 115(2)(a) was to form a danger opinion which meets this standard. For the following reasons I find that this objective was met.

[4] In a very carefully written and well documented decision, the Minister finds that Mr. Randhawa is likely to be a future danger to the public in Canada. In reaching this conclusion, at page 8 of the decision, the Minister correctly acknowledges that the test for determining a danger opinion is found in Justice Strayer's decision in *Williams v. Canada (Minister of Citizenship and Immigration)*, [1997] 2 F.C. 646 (F.C.A.) at para. 29 which deals with the precursor provision to s.115(2)(a) of the *IRPA*:

> In my view the formulation in subsection 70(5) is sufficiently clear for that purpose. In the context the meaning of "public danger" is not a mystery: it must refer to the possibility that a person who has committed a serious crime in the past may seriously be thought to

> be a potential re-offender. It need not be proven indeed it cannot be proven that the person *will* reoffend. What I believe the subsection adequately focuses the Minister's mind on is consideration of whether, given what she knows about the individual and what that individual has had to say in his own behalf, she can form an opinion in good faith that he is a possible reoffender whose presence in Canada creates an unacceptable risk to the public. I lay some stress on the word "unacceptable" because, with the impossibility of proof of future conduct, there is always a risk and the extent to which society should be prepared to accept that risk can involve political considerations not inappropriate for a minister. She may well conclude, for example, that people convicted of narcotics offences have a greater likelihood of recidivism and that trafficking represents a particular menace to Canadian society. I agree with Gibson J. in the *Thompson* case (*Thomson v. Canada (Minister of Citizenship and Immigration*), [1996] F.C.J. No. 1097 (T.D.) that "danger" must be taken to refer to a "present or future danger to the public". But I am reluctant to assert that some particular kind of material must be available to the Minister to draw a conclusion of present or future danger. I find it hard to understand why it is not open to a minister to forecast future misconduct on the basis of past misconduct, particularly having regard to the circumstances of the offences and, as in this case, comments made by one of the sentencing judges. A reviewing court may disagree with the Minister's forecast, or consider that more weight should have been given to certain material, but that does not mean that the statutory criterion is impermissibly vague just because it allows the Minister to reach a conclusion different from that of the Court.
>
> I am therefore satisfied that the expression "danger to the public in Canada" sufficiently directs the Minister to the question which he or she needs to consider, and adequately permits a reviewing court to determine whether he or she has had regard to relevant considerations.
>
> [Emphasis added]

Thus, the test is composed of two elements: the possibility that a person who has committed a serious crime in the past may seriously be thought to be a potential re-offender; and this possibility creates an unacceptable risk to the public.

[5] With respect to both elements of the *Williams* test, the Minister provides the following reasons for decision:

> Although there were no weapons involved, Mr. Randhawa had sexual intercourse with an unwilling and semi-conscious victim. The circumstances surrounding the offence where he and another man lured an innocent victim to an apartment, fed her a lethal amount of alcohol then abused the girl, in my mind [sic], amounts to a gang rape. The assault appears to have been premeditated, deliberate and purposeful and from the Judge's sentencing comments, have clearly altered and disfigured this girl's life.
>
> Although I recognize this is his one offence and conviction, I find the circumstances surrounding this sole conviction, along with Mr. Randhawa's observed lack of remorse and apparent inability or unwillingness to accept responsibility for these actions, lead me to conclude, on balance, that Mr. Randhawa is a possible re-offender. There are several indicators from reports on record including the Reasons for Sentence that Mr. Randhawa denied involvement in the offence and reported, despite clear forensic evidence to the contrary, that he never touched the victim. The Sentence Planning report, under Motivation, remarks:
>
> "He reported he is aware there is a problem with his lifestyle, behaviour and the resulting consequences but indicated he is innocent and is appealing the sentence and conviction."
>
> While I acknowledge Correctional Services Canada's reports that he has a low recidivist score, perhaps when compared to a "typical" repeat sexual offender, however I find the manner in which he committed this offence, particularly in the breach of trust involved and in his apparent inability to – even in this extreme a case – differentiate between willing consent and sexual assault, lead me to conclude that he could likely commit another similar assault.
>
> I have also carefully considered all submissions from counsel, and have reviewed the relevant factors outlined in the Immigration policy manuals of ENF 28, which counsel cited in his submissions. I refer particularly to 7.4 which aside from other factors to consider, states:
>
> > A single conviction may rarely sustain a danger finding, and must clearly demonstrate that the person poses a present or future risk of danger to the public,

> as evidenced by the nature and circumstances of the offence. The jurisprudence indicates that it is possible to base a danger opinion on a single serious conviction where sufficient evidence exists.
>
> In rendering my decision that Mr. Randhawa is a danger to the public in Canada, I am fully cognizant of the fact that I am basing my decision on a single serious conviction. Despite other positive reinforcements in Mr. Randhawa's life and surroundings, I am satisfied on balance, based on the factual circumstances regarding this conviction; that Mr. Randhawa is likely to re-offend and constitutes a danger to the public in Canada and particularly a danger to vulnerable women in Canadian society.
> [Emphasis added]
>
> (Decision, pp. 8 - 9)

[6] It is clear that the Minister's opinion places heavy weight on Mr. Randhawa's criminality in the past as a predictor of his potential criminality in the future. It is obvious that the Minister had the evidence respecting the sexual assault conviction very much in mind in reaching the decision under review. In reaching a conclusion on the present Application I find it is important to fully state this evidence so that its impact can be understood; in my opinion, it supplies a solid grounding for the decision under review:

> **PART III – DANGER ASSESSMENT**
>
> **Consideration of Inadmissibility**
>
> One of the elements under paragraph 115(2)(a) of IRPA expressly requires that the person who is the subject of a danger opinion be inadmissible on grounds of serious criminality. Paragraph 36(1)(a) of IRPA describes inadmissibility for serious criminality where a permanent resident or a foreign national has been convicted in Canada of an offence under an Act of Parliament punishable by a maximum terms of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than 6 months has been imposed. Mr. Randhawa was convicted of Sexual Assault contrary to s. 271(1)(a)

of the Criminal Code of Canada (CCC) and received a sentence of two years and six months. I am satisfied that Mr. Randhawa is inadmissible for serious criminality.

**Danger Information**

The circumstances underlying the offence for Mr. Randhawa's sexual assault conviction dated September 18th, 2006, is summarized in the Reasons for Sentence (Reasons for Sentence before Madam Justice Epstein, December 14, 2006), as follows:

On November 15th, 2002, Mr. Randhawa and the co-accused sexually assaulted a grade 12 female student. The co-accused had had a one-month relationship with the victim which ended two weeks prior to the assault. The co-accused contacted the victim while she was at school to advise her that he would be coming to pick her up so that she could assist a friend of his, Mr. Randhawa, with translation at a government office. The victim wanted to bring along some friends but the co-accused insisted that she accompany him and Mr. Randhawa alone. The victim reluctantly agreed and travelled in Mr. Randhawa's car to the government office and assisted Mr. Randhawa by translating between the English and Punjabi language.

Afterwards, despite the victim's insistence that she wanted to return to school, the two men took her to the apartment of the co-accused. Once these, Mr. Randhawa retrieved a bottle of rum from his car. The co-accused poured the alcohol into some cola and pressured the victim to drink it. The victim became increasingly drunk. The co-accused then took the victim into the bedroom and fed her more alcohol. As the victim was passing out, she felt the sensation of the co-accused putting his penis into her vagina. The victim, at some point, opened her eyes and discovered Mr. Randhawa on top of her. She could not comprehend what he was doing as she was too disoriented.

Later that evening, the victim's parents filed a missing persons report. Through the assistance of the victim's friends, the police eventually found the apartment in which the co-accused was living. Upon gaining entry to the apartment, the police found the victim in a sofa bed where there was evidence of vomit, blood, and urine. The police could not wake the victim up. An ambulance took her to the hospital where a sexual assault kit was performed.

The next morning, the police obtained and executed a search warrant on the apartment. They found the victim's bra and underwear, and the two used condoms in the garbage can. The tests results disclosed the sperm of the co-accused in the victim's vagina and rectum. A DNA analysis of the two condoms revealed that semen on one condom was that of the co-accused and on the other to be that of Mr. Randhawa. The toxicologist determined that the victim's blood alcohol level around the time of the assault was between 210 milligrams to 340 milligrams of alcohol per 100 millilitres of blood. (Ontario Superior Court of Justice Toronto Region Reasons for Sentence against Mr. Balraj Singh Randhawa, December 14th, 2006, 3-6)

According to the Reasons for Sentence,

> "Mr. Randhawa has no relevant previous involvement with the criminal justice system. The exception to the scant nature of the information available about Mr. Randhawa from the pre-sentence report is that it demonstrates he has absolutely no insight into the severity of his conduct. I refer to 2 paragraphs…" Mr. Randhawa presented himself as the victim in the current offence and implicated the victim in the substantiation of evidence that lead to the charge against him. The subject indicated to this writer that the victim misinterpreted his actions and implied that his behaviours were more than admirable.
>
> Mr. Randhawa was unwilling to accept responsibility towards aspects of the charge before the courts, however fully acknowledged and accepted his guilty plea and presented no remorse for his actions.
>
> The other facts relevant to my determination of a fit sentence comes from the Victim Impact Statement [the victim] prepared. She sets out the ways in which the assault has changed her, not only the way she feels but also, in a profound way, her future. In addition to expressing feelings of despondency and despair, [the victim] identifies what I will refer to as the cultural impact of being violated. [The victim's] parents were so horrified at what happened that they forced her to leave school and arranged for her

immediately to marry. [The victim] appears to have accepted this fate but says “she never wanted to have her life be like this.

The impact on the victim was profound. All violations of this nature result in serious consequences the victim was caused additional harm however because of her membership in the East Indian Community. In addition to suffering the emotional and psychological consequences of such a despicable and degrading assault, she lost her opportunity to continue her education and at a young age found herself in an arranged marriage.

These aggravating factors put this offence at the high end of the spectrum and seriousness particularly in light of the fact that there are virtually no mitigating factors. While Mr. Randhawa did plead guilty, he did so at the last minute, putting [the victim] in the position of having to relive her horror at the preliminary inquiry.

I should make it clear that while the absence of remorse on the part of Mr. Randhawa cannot be considered an aggravating factor, the clear absence of remorse he demonstrated in these circumstances disentitles him to any leniency.

The agreed upon facts make it clear that Mr. Randhawa and the co-accused manipulated [the victim] into a position whereby they could violate her. Mr. Randhawa, by providing the car, obtaining the alcohol from the car, being in the apartment while the co-accused repeatedly sexually assaulted the victim and then by having his way with her as well participated in a very significant manner in this heinous and degrading sexual assault.

It is shocking that Mr. Randhawa has shown absolutely no insight into the seriousness of his conduct.” (Ibid, pgs. 7-9, 11-13)

According to the CSC Criminal Profile Report,

> The offender denied any involvement in the current offence. Accordingly, the offender stated that he is currently planning on appealing his conviction and sentence and as such, he chose not to discuss the details of the charge.
>
> Although Randhawa indicated that he views sexual offending is wrong he had difficulty in identifying when someone may be interested in sex. He responded that he was unsure if it is acceptable to have sex with someone if they are intoxicated. He stated that some people prefer to have sex when they are drinking. He stated that some women may lie about being sexually assaulted to save themselves from embarrassment.
>
> Overall, Randhawa presents as a low risk for sexual recidivism…
>
> Based on the above Randhawa's level of risk to re-offend violently or in general is assessed as low. (CSC Criminal Profile Report for Mr. Balraj Randhawa, February 19th, 2007, 1, 5, 7)
>
> Randhawa was unable to write the CAAT because his English skills are not sufficient to allow him to do so.
>
> Randhawa claims to have completed Grade X in the community in India (Punjab) 1991. He was needed to work on the family farm so he did not attend as often as he would have liked. He came to Canada in 1995. He has not taken any formal ESL classes.
>
> He was employed at a bakery for approximately six months until he was incarcerated. He thinks that he will be able to return to that job if he is released soon enough. (CSC Correctional Plan for Mr. Randhawa Balraj, February 19th, 2007, 3)

(Decision, pp. 3 – 6)

[7] Two primary arguments are advanced by Counsel for Mr. Randhawa with respect to the first element of the test in *Williams*.

[8] The first argument is that the Minister neglected to consider the fact that Mr. Randhawa did not re-offend while at large during the four years between his arrest and conviction. I cannot find that this fact was neglected; it appears that the Minister did not give it any weight in the analysis for an obvious reason; it proves nothing in the longer term which was the Minister's primary concern.

[9] The second argument concerns the fact that two risk analyses were done; one in two parts by the Corrections Service of Canada (CSC), and the one by the Minister.

[10] The CSC risk opinion is contained in two CSC documents. The first is a "risk evaluation" dated February 19, 2007, performed by the Millhaven Assessment Unit at the time of Mr. Randhawa's intake into the corrections system and specifically referred to in the Minister's statement of the evidence. The instrument used in the evaluation and the results are as follows:

> The STATIC-99 is an instrument designed to assist in the prediction of sexual and violent recidivism for sexual offenders. Hanson and Thornton 1999) developed this measure based on follow-up studies from Canada and the United Kingdom with a total sample size of 1,301 sexual offenders. The STATIC-99 consists of 10 items and produces estimates of future risk based upon the number of risk factors present in any one individual. The risk factors include prior sexual offences, current non-sexual violence, a history of non-sexual violence, number of previous sentencing dates, age less than 25 years old, having male victims, never lived with a lover for two continuous years, history of non-contact sex offences, having unrelated victims, and having stranger victims.

> Randhawa scored MEDIUM-LOW (2) on this measure. Individuals with these characteristics, on average, sexually re-offend at 9% over five years and 13% over ten years. The rate for any violent recidivism (including sexual) for individuals with these characteristics is, on average 17% over five years and 25% over ten years.

A second instrument was also used in this evaluation, the STABLE - 2000, with the conclusion reached that the STATIC - 99 fairly represents Mr. Randhawa's risk as medium - low. This is the recommendation which resulted:

> Overall, Randhawa presents as a LOW risk for sexual recidivism, and appears suitable for a low intensity sexual offender treatment program such as the one available at Pittsburgh Institution.
>
> […]
>
> Based on the above Randhawa's level of risk to re-offend violently or in general is assessed as low.
>
> (Tribunal Record, pp. 508 – 509, p. 511)

[11] The second evaluation is a "pre-program assessment" dated June 11, 2007 performed at the time of Mr. Randhawa's intake into the Pittsburgh Institution. The focus of this assessment was Mr. Randhawa's needs while serving his sentence with the result being that he was placed in the medium - low needs category. Taking into account the Millhaven intake report and the needs testing performed, the following opinion was also expressed:

> Overall, taking into account both static and dynamic risk and need factors and being constrained to provide an overall risk rating in one of three categories (Low, Moderate, or High), we consider Mr. Randhawa's risk for sexual re-offence to be in the low risk range.
>
> (Tribunal Record, p. 49)

[12] In reaching the opinion that Mr. Randhawa is “a possible re-offender” and “could likely commit another similar offence” (Decision, p. 8, p. 9), the Minister considers a number of factors. There is no challenge to the point that these factors are appropriate to consider; however, the argument made by Counsel for Mr. Randhawa is that, since the same factors were previously considered in the CSC evaluations to come to the opinion that the risk is low, it was not open to the Minister to use the same factors to come to the conflicting opinion that the risk is high. As I understand it, the point of the argument is that, if it holds, the CSC opinion of low risk of re-offending should have resulted in a finding by the Minister on the second element of the test in *Williams* that Mr. Randhawa is not a danger to the public in Canada.

[13] However, during the course of oral argument, Counsel for Mr. Randhawa admitted that, had the Minister simply found that low risk is unacceptable risk, it would be difficult to argue that a finding that Mr. Randhawa is a danger to the public in Canada is unreasonable. This properly constitutes an acknowledgement of what is obvious: the CSC opinion is evidence that Mr. Randhawa is a possible re-offender.

[14] I find that it was certainly open to the Minister to reach a conclusion on the issue of risk of re-offending based on all the evidence on the record, including the CSC opinion, which is what occurred. Both the CSC and the Minister express an opinion that Mr. Randhawa is a person who has committed a serious crime in the past, and may seriously be thought to be a potential re-offender. Corrections places the statistical chance that Mr. Randhawa will sexually re-offend at 9% over five years and 13% over ten years, and the rate for any violent recidivism (including sexual) for

individuals with his characteristics is, on average, 17% over five years and 25% over ten years. On an analysis of the evidence of Mr. Randhawa's actual conduct during and subsequent to the crime, the Minister places the chance that Mr. Randhawa will sexually re-offend at "likely". The Minister is entitled to this opinion. In any event, while the opinions are different, since they both clearly cross the "possibility" evidentiary threshold set by Justice Strayer, I find that they are not in conflict. Therefore, I dismiss Counsel for Mr. Randhawa's second argument.

[15] As to the second element of the test, as Justice Strayer says, it is for the Minister to determine whether Mr. Randhawa's presence in Canada creates an unacceptable risk to the public. In my opinion, in the decision under review the Minister has done just that in the following words:

> In rendering my decision that Mr. Randhawa is a danger to the public in Canada, I am fully cognizant of the fact that I am basing my decision on a single serious conviction. Despite other positive reinforcement in Mr. Randhawa's life and surroundings, I am satisfied on balance, based on the factual circumstances regarding this conviction, that Mr. Randhawa is likely to re-offend and constitutes a danger to the public in Canada and particularly a danger to vulnerable women in Canadian society.
>
> (Decision, p. 9)

The Minister's danger opinion shows justification, transparency, and intelligibility and is certainly within a range of possible acceptable outcomes which are defensible in respect of the facts and law. As a result, I find that the decision is not made in reviewable error.

## ORDER

Accordingly, for the reasons provided, the present Application is dismissed.

There is no question to certify.

"Douglas R. Campbell"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-3084-08 |
| **STYLE OF CAUSE:** | BALRAJ SINGH RANDHAWA v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | MARCH 18, 2009 |
| **REASONS FOR ORDER AND ORDER BY:** | CAMPBELL J. |
| **DATED:** | MARCH 24, 2009 |

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| Ms. Talitha A. Nabbali | FOR THE RESPONDENT |

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