Federal Court  Cour fédérale

Date: 20091125

Docket: IMM-1448-09

Citation: 2009 FC 1140

Ottawa, Ontario, November 25, 2009

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

JUDE REGINALD ANTONIN

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction and background

[1] In this judicial review application, the Minister of Citizenship and Immigration (the Minister) seeks to quash the February 18, 2009 decision of a member of the Immigration Appeal Division (the tribunal or IAD) who stayed, with conditions, pursuant to paragraph 67(1)(c) and subsection 68(1) of the *Immigration and Refugee Protection Act* (IRPA), the Respondent's deportation to Haïti. Mr. Antonin has been a permanent resident of Canada since 1997, but was declared in 2006 inadmissible on the grounds of serious criminality under subsection 36(1)(a) of that Act, which is the foundation for the deportation order, dated October 23, 2006. Before the IAD,

Mr. Antonin did not contest its legality of the deportation order, confining his appeal to obtaining a stay of his removal to Haïti on humanitarian and compassionate (H&C) grounds.

[2] The Minister submits the IAD's decision is unreasonable because the tribunal "considered irrelevant factors, but failed to consider relevant factors, including the Respondent's violent criminal history when it determined the Respondent was entitled to a stay of deportation; placed too much emphasis on the Respondent's attempts at rehabilitation as of July 2008, while ignoring the evidence of his failed attempts of rehabilitation prior to 2008; and made a finding of hardship without any evidentiary foundation."

[3] Subsections 36(1), 67(1) and section 68 of IRPA reads:

Serious criminality	Grande criminalité
36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	36. (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :
(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;	a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;
…	…
Appeal allowed	Fondement de l'appel
67. (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,	67. (1) Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :

(a) the decision appealed is wrong in law or fact or mixed law and fact;

(b) a principle of natural justice has not been observed; or

(c) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.

a) la décision attaquée est erronée en droit, en fait ou en droit et en fait;

b) il y a eu manquement à un principe de justice naturelle;

c) sauf dans le cas de l'appel du ministre, il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.

Removal order stayed

68. (1) To stay a removal order, the Immigration Appeal Division must be satisfied, taking into account the best interests of a child directly affected by the decision, that sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.

Sursis

68. (1) Il est sursis à la mesure de renvoi sur preuve qu'il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.

Effect

(2) Where the Immigration Appeal Division stays the removal order

(a) it shall impose any condition that is prescribed and may impose any condition that it considers necessary;

(b) all conditions imposed by the Immigration Division are cancelled;

(c) it may vary or cancel any non-prescribed condition imposed under paragraph (a); and

(d) it may cancel the stay, on application or on its own initiative.

Effet

(2) La section impose les conditions prévues par règlement et celles qu'elle estime indiquées, celles imposées par la Section de l'immigration étant alors annulées; les conditions non réglementaires peuvent être modifiées ou levées; le sursis est révocable d'office ou sur demande.

Reconsideration	Suivi
(3) If the Immigration Appeal Division has stayed a removal order, it may at any time, on application or on its own initiative, reconsider the appeal under this Division.	(3) Par la suite, l'appel peut, sur demande ou d'office, être repris et il en est disposé au titre de la présente section.
Termination and cancellation	Classement et annulation
(4) If the Immigration Appeal Division has stayed a removal order against a permanent resident or a foreign national who was found inadmissible on grounds of serious criminality or criminality, and they are convicted of another offence referred to in subsection 36(1), the stay is cancelled by operation of law and the appeal is terminated. [My emphasis throughout.]	(4) Le sursis de la mesure de renvoi pour interdiction de territoire pour grande criminalité ou criminalité est révoqué de plein droit si le résident permanent ou l'étranger est reconnu coupable d'une autre infraction mentionnée au paragraphe 36(1), l'appel étant dès lors classé. [Tous sont mes soulignés.]

[4] Both parties agree the IAD has a discretionary power under subsection 68(1) of IRPA to stay Mr. Antonin's removal based on what is commonly referred to as the "*Ribic* factors" which were approved by the Supreme Court of Canada in *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84 (*Chieu*), where Justice Iacobucci wrote the following on behalf of the Court at paragraph 40:

> 40 Employing such a broad approach to s. 70(1)(b), the I.A.D. itself has long considered foreign hardship to be an appropriate factor to take into account when dealing with appeals brought under this section. In *Ribic*, *supra*, at pp. 4-5, the I.A.B. summarized the relevant factors to be considered under its discretionary jurisdiction pursuant to what is now s. 70(1)(b) of the *Act*:
>
> > In each case the Board looks to the same general areas to determine if having regard to all the circumstances of the case, the person should not be removed from Canada. These circumstances include the seriousness of the offence or offences leading to the deportation and the possibility of rehabilitation or in the alternative, the circumstances surrounding the failure to meet the conditions of admission which led to the deportation order. The Board looks to the

> length of time spent in Canada and the degree to which the appellant is established; family in Canada and the dislocation to that family that deportation of the appellant would cause; the support available for the appellant not only within the family but also within the community and the degree of hardship that would be caused to the appellant by his return to his country of nationality. While the general areas of review are similar in each case the facts are rarely, if ever, identical.
>
> This list is illustrative, and not exhaustive. The weight to be accorded to any particular factor will vary according to the particular circumstances of a case. While the majority of these factors look to domestic considerations, the final factor includes consideration of potential foreign hardship. [My emphasis.]

[5] The parties also agree the standard of review a decision of a member of the IAD is the standard of reasonableness in accordance with the Supreme Court of Canada's teaching in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 (*Dunsmuir*), where Justices Bastarache and LeBel explained at paragraph 47 what the content of a reasonable decision:

> 47 Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of [page221] 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. [My emphasis.]

[6] *Dunsmuir* must be read with the Supreme Court of Canada's decision, released on March 6, 2009, in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (*Khosa*), which has a

significant impact on this case since *Khosa* dealt with the exercise by the IAD of its discretion not to stay a deportation pursuant to the very paragraphs which concerns us here - paragraphs 67(1)(c) and 68(1) of IRPA.

Facts

[7] Jude Reginald Antonin (the Applicant) was born in Haïti in 1986. At the age of 11, he landed in Canada in 1997 as a permanent resident, with his father who passed away 1 ½ years later. His mother did not accompany them to Canada and has been, for some time, a resident of the United States. Little is known of the circumstances in which Mr. Antonin was brought up. He has relatives in Canada and started high school here.

(1) The 2003 convictions

[8] His criminal activities began when he was 16 or 17. His first conviction was in Youth Court in Ottawa on April 4, 2003 for an incident which arose on February 14, 2003 when he was arrested for shoplifting at a Hudson's Bay store. He stole a watch and earrings valued at $38.49. He resisted arrest; was charged and pleaded guilty to charges of theft under $5,000; assault causing bodily harm and simple assault. He was sentenced to 2 months open custody and put on probation for a year.

[9] That same year, he was charged and convicted in Youth Court in Ottawa of mischief after he was observed on the grounds of St-Laurent Plaza carrying a 20 inch piece of metal fashioned into a machete. He was swinging that piece of metal violently striking trees and posts. He threatened verbally a security guard. He was charged with: (1) breach of probation; (2) possession of a weapon for a dangerous purpose; and, (3) uttering threats. His probation was extended to 18 months.

(2) The 2004 convictions

[10] There were two convictions in 2004 in Adult Court in Ottawa. The first was on July 6, 2004 for disturbing the peace for which he received a suspended sentence taking into account his pre-sentence incarceration. The second was on December 6, 2004 for theft less than $5000.00 and failure to appear for which he was sentenced for one (1) day for each offence to be served concurrently (credit for eighteen (18) days pre-sentence incarceration) and probation for twelve (12) months.

(3) The 2005 convictions

[11] In Adult Court in Ottawa, on January 11, 2005, he was convicted for possession of crack cocaine and failure to comply with his probation for which he received concurrent suspended sentences on account of pre-trial incarceration with twelve (12) months probation.

[12] The next series of convictions were in the Montreal Courts after he moved to that city sometime in early 2005.

1) On May 12, 2005, he was convicted of theft of less than $5000.00 and sentenced to one (1) week in prison and two (2) years probation.

2) On July 12, 2005, he was also convicted of another theft of less than $5000.00; and he received a suspended sentence but a probation for two (2) years was imposed.

3) On November 2005, he was convicted on two counts of obstructing two peace officers, fined $300.00 for each count, credited for one (1) month pre-sentence incarceration and put on probation for one year.

(4) The 2006 convictions

[13] On February 13, 2006, Mr. Antonin was convicted of his most violent and serious offences for crimes which he committed in 2005 in Montreal. These charges, convictions and sentences were:

- breaking, entering and uttering threats – sentenced to one (1) year in prison;

- uttering threats (two (2) counts), mischief (two (2) counts), obstruction of justice, criminal and harassment – sentenced to six (6) months prison on each count and probation for three (3) years;

- mischief and armed assault – six (6) months for each count to be served concurrently;

- breach of probation (two (2) counts) – sentenced to one (1) month incarceration to be served concurrently; and,

- uttering threats – sentenced to one (1) month in prison and probation for two (2) years with credit on account of pre sentence incarceration.

[14] Most of these crimes, for which he was convicted in 2006, arose out of his turbulent relationship with a woman he was living with in Montreal. The other 2006 charges and convictions relate to an unconnected incident which occurred in a restaurant.

[15] It was the 2006 convictions that led to his being found criminally inadmissible under section 36(1)(a) of IRPA and the consequent deportation order.

[16] I summarize the balance of the relevant facts as follows:

1) Mr. Antonin was paroled from prison in October 2006. He was immediately arrested by CBSA on October 16, 2006 to ensure his presence at his hearing to determine his inadmissibility on account of serious criminality. On October 23, 2006, he was released from detention, on conditions, after his inadmissibility hearing. He appealed the consequent deportation order to the IAD but failed to appear at a scheduled hearing since he had moved to the Ottawa Region without notifying immigration officials in Montreal of this change in breach of his release from detention conditions.

2) He was arrested by Montreal police, on August 22, 2007, on suspicion of driving while under the influence of alcohol. Immigration officials were advised since they had issued an arrest warrant for breach of his October 2006 release conditions. On detention review held on August 24, 2007, he was determined to be both a flight risk and a danger to the public by Commissioner Dubé of the Immigration Division. Nonetheless, he was subsequently

released from detention on conditions in order to enable him to clear the issue of his October 23, 2006 deportation order he had appealed to the IAD, which appeal had been in limbo.

3) In September 2007, Montreal police ran a routine check-up on Mr. Antonin. They inquired of his status at Immigration Canada. It was discovered a valid warrant for his arrest was outstanding. CBSA had been searching for him but could not find him because he had been living in various shelters in Ottawa. He was finally located and arrested in October 2007 by CBSA Officials in Ottawa for breach of release conditions. A detention review was conducted by Commissioner Tordoff who maintained his detention. She also concluded he was a danger to the public because of his convictions. She noted he was not taking his prescription anti psychotic medications. She found him to be a flight risk because of his difficulty in complying with his release conditions. She noted he was a person who needed some kind of structure in order to ensure compliance with any release conditions. [My emphasis.] He did not have a fixed address in Ottawa; had no money; did not tell the IAD of his changes of address. She refused to give credence to information before her, Mr. Antonin had some kind of association or friendship with a criminal gang in Ottawa.

4) Mr. Antonin underwent another detention review on November 19, 2007. He was released on strict conditions, one of which was on account of a new development; he would be a resident of Harvest House in Ottawa which ran a strictly supervised program whereby he was confined to that facility for the first 3 months. He was arrested again in late 2007, early 2008 for breach of condition and ultimately released into the community in July 2008 under a supervised probation order. He has not since been arrested nor charged with an offence.

The teachings in *Khosa*

[17] As previously mentioned, the Supreme Court of Canada's recent March 6, 2009 decision in *Khosa* is very relevant to the case before me and attest to the significant level of deference owed to the IAD when reviewing the application of the "*Ribic* factors" in situations where a permanent resident to Canada seeks a stay of a valid removal order which would send that person back to his/her country of nationality with whom the ties had been cut.

[18] In *Shaath v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 731 (*Shaath*), I wrote the following at paragraphs 36 and 37 about the *Khosa* case:

> **36** The *Khosa* case involved an appeal by the Minister of Citizenship and Immigration from a decision of the Federal Court of Appeal applying the reasonable standard, which set aside a decision of the Chief Justice of the Federal Court who had refused to intervene to quash a decision of a three member panel of the IAD, who declined, on humanitarian and compassionate grounds, to quash or stay a deportation order issued against him as a result of his guilty plea of criminal negligence causing death during a road racing incident in Vancouver.
>
> **37** Mr. Khosa is a citizen of India who immigrated to Canada in 1996 with his parents at the age of 14. He was a permanent resident of Canada at the time of his criminal conviction.

[19] In *Shaath* above, I assessed the impact of *Khosa* on an attempt to block the execution of a valid removal order on the basis of paragraph 67(1)(c) of IRPA. [As an aside, in *Shaath* at paragraph 39, I mentioned the impact which *Khosa* had on the interpretation to be given to section 18.1(4)(d) of the *Federal Courts Act*, which enables the setting aside of a decision of a federal tribunal where it was "based its decision or order on an erroneous finding of fact that it made in a

perverse or capricious manner or without regard to the material before it.”] Justice Binnie explained this point at paragraph 46 in *Khosa*:

> "More generally, it is clear from s. 18.1(4)(d) that Parliament intended administrative fact finding to command a high degree of deference."; adding: "This is quite consistent with Dunsmuir. It provides legislative precision to the reasonableness standard of review of factual issues in cases falling under the Federal Courts Act." [My emphasis.]

[20] I take from Justice Binnie’s majority decision in *Khosa*, the following principles:

(1) The meaning of the reasonableness standard:

> **59** Reasonableness is a single standard that takes its colour from the context. One of the objectives of Dunsmuir was to liberate judicial review courts from what came to be seen as undue complexity and formalism. Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (Dunsmuir, at para. 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome. [My emphasis.]

(2) The purpose of the IAD:

> **56** As to the purpose of the IAD as determined by its enabling legislation, the IAD determines a wide range of appeals under the IRPA, including appeals from permanent residents or protected persons of their deportation orders, appeals from persons seeking to sponsor members of the family class, and appeals by permanent residents against decisions made outside of Canada on their residency obligations, as well as appeals by the Minister against decisions of the Immigration Division taken at admissibility hearings

(s. 63). A decision of the IAD is reviewable only if the Federal Court grants leave to commence judicial review (s. 72).

(3) The intent of Parliament in enacting paragraph 67(1)(c):

> **57** In recognition that hardship may come from removal, Parliament has provided in s. 67(1)(c) a power to grant exceptional relief. The nature of the question posed by s. 67(1)(c) requires the IAD to be "satisfied that, at the time that the appeal is disposed of ... sufficient humanitarian and compassionate considerations warrant special relief". Not only is it left to the IAD to determine what constitute "humanitarian and compassionate considerations", but the "sufficiency" of such considerations in a particular case as well. Section 67(1)(c) calls for a fact-dependent and policy-driven assessment by the IAD itself. As noted in *Prata v. Minister of Manpower and Immigration*, [1976] 1 S.C.R. 376, at p. 380, a removal order [My emphasis.]
>
> > establishes that, in the absence of some special privilege existing, [an individual subject to a lawful removal order] has no right whatever to remain in Canada. [An individual appealing a lawful removal order] does not, therefore, attempt to assert a right, but, rather, attempts to obtain a discretionary privilege. [Emphasis added.]

(4) The issue before the IAD:

> **58** The respondent raised no issue of practice or procedure. He accepted that the removal order had been validly made against him pursuant to s. 36(1) of the *IRPA*. His attack was simply a frontal challenge to the IAD's refusal to grant him a "discretionary privilege". The IAD decision to withhold relief was based on an assessment of the facts of the file. The IAD had the advantage of conducting the hearings and assessing the evidence presented, including the evidence of the respondent himself. IAD members have considerable expertise in determining appeals under the *IRPA*. Those factors, considered altogether, clearly point to the application of a reasonableness standard of review. There are no considerations that might lead to a different result. Nor is there anything in s. 18.1(4) that would conflict with the adoption of a "reasonableness" standard of review in s. 67(1)(*c*) cases. I

> conclude, accordingly, that "reasonableness" is the appropriate standard of review.

(5) Why *Khosa*'s appeal was allowed:

After describing the reasonableness standard "having in mind the considerable deference owed to the IAD and the broad scope of the discretion conferred by the IRPA, there is no basis for the Federal Court of Appeal to interfere with the IAD decision to refuse special relief in this case", Justice Binnie then commented on Justice Fish's opinion to allow the appeal and responded:

> **61** My colleague Fish J. agrees that the standard of review is reasonableness, but he would allow the appeal. He writes:
>
> > While Mr. Khosa's denial of street racing may well evidence some "lack of insight" into his own conduct, it cannot reasonably be said to contradict - still less to outweigh, on a balance of probabilities - all of the evidence in his favour on the issues of remorse, rehabilitation and likelihood of reoffence. [para. 149] I do not believe that it is the function of the reviewing court to reweigh the evidence.
>
> **62** It is apparent that Fish J. takes a different view than I do of the range of outcomes reasonably open to the IAD in the circumstances of this case. My view is predicated on what I have already said about the role and function of the IAD as well as the fact that *Khosa* does not contest the validity of the removal order made against him. He seeks exceptional and discretionary relief that is available only if the IAD itself is satisfied that "sufficient humanitarian and compassionate considerations warrant special relief". The IAD majority was not so satisfied. Whether we agree with a particular IAD decision or not is beside the point. The decision was entrusted by Parliament to the IAD, not to the judges.

[21] I wrote the following paragraphs in *Shaath* on other points Justice Binnie made in *Khosa*:

46 In the balance of his reasons, Justice Binnie stressed the importance for the IAD to give proper reasons, reviewed the IAD's decision, found that both the majority and minority disclosed in their reasons "with clarity the considerations in support of both points of view ... differing largely at the factual level on different interpretations of Mr. Khosa's expression of remorse". Justice Binnie wrote at the end of paragraph 64 of his reasons:

> ... It seems evident that this is the sort of factual dispute which should be resolved by the IAD in the application of immigration policy, and not reweighed in the courts. [My emphasis.]

47 He stated the IAD considered each of the *Ribic* factors and "it rightly observed that the factors are not exhaustive and that the weight to be attributed to them will vary from case to case". He wrote the majority "reviewed the evidence and decided that, in the circumstances of this case, most of the factors did not militate strongly for or against relief."

48 He commented "the weight to be given to the respondent's evidence of remorse and his prospects for rehabilitation depended on an assessment of his evidence in the light of all the circumstances of the case." He concluded:

> The issue before the IAD was not the potential for rehabilitation for purposes of sentencing, but rather whether the prospects for rehabilitation were such that, alone or in combination with other factors, they warranted special relief from a valid removal order. The IAD was required to reach its own conclusions based on its own appreciation of the evidence and it did so. [My emphasis.]

49 His overall conclusion is expressed at the end of paragraph 67 in these terms:

> However, as emphasized in Dunsmuir, "certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions" (para. 47). In light of the deference properly owed to the IAD under s. 67(1)(c) of the IRPA, I cannot, with respect, agree with my colleague Fish J. that the decision reached

> by the majority in this case to deny special discretionary relief against a valid removal order fell outside the range of reasonable outcomes. [My emphasis.]

[22] As stated the *Ribic* factors where endorsed by the Supreme Court of Canada's decision *Chieu*. I commented in *Shaath* briefly on that case:

> **50** The Supreme Court of Canada's 2002 decision in *Chieu* also involved the exercise of the IAD's discretionary power under section 70(1)(b) of the now repealed Immigration Act. In previous jurisprudence, this section had been interpreted to confer upon the tribunal discretionary or equitable jurisdiction to quash or stay a removal order. In *Chieu*, the Supreme Court applied the correctness test because the issue before it was a question of law whether the IAD had erred in not taking into account the factor of foreign hardship if Mr. Chieu was returned to Cambodia. The IAD for various reasons had held it could not take into account this factor. The Supreme Court held this was an error of law.

The IAD's decision

[23] At the start of its reasons, the tribunal signalled it was well aware of "the series of criminal convictions" which were the foundation of his inadmissibility to remain in Canada; "that they were a bit long to list" and focussed on the criminal convictions in 2006 for which he was sent to prison and noted "those crimes were violent in nature, not only crimes against property."

[24] It observed the basis for the applicant's 67(1)(c) argument was "mainly that his psychiatric condition and his hope for rehabilitation since receiving help for that psychiatric condition" plus the risk he would incur should he be returned to Haiti … where Mr. Antonin no longer has any connection as the most significant members of his extended family (uncle, aunt and grandmother) all reside in Ottawa and his mother living in the United States.

[25] The tribunal examined the establishment factor, "one of the factors in the *Ribic* decision". It concluded "the panel can lay to rest" that factor giving credence to the Minister's argument his criminal record was very lengthy. It noted once again the sentences he received "particularly those that he received in February 2006, did take into account his recidivism". [My emphasis.] On this factor, the member of the IAD concluded by writing: "the appellant has accumulated no significant assets, has not acted in a law abiding and productive way during his years in Canada, has not made use of the educational facilities and possibilities of employment that Canada offered him during his stay here."

[26] It then tackled "the question of rehabilitation and remorse" and referred to three medical document put in evidence which according to the IAD member "indicate that since the appellant has been receiving his medication and has been receiving ongoing treatment for his psychiatric condition, he has began making serious steps on the way to rehabilitation and changing his lifestyle". Those documents were from his probation officer, a letter from Ms. Mitchell, a registered nurse with the Royal Ottawa Health Centre group and a December 22, 2008 letter from Dr. Brathwaite who is a psychiatrist at the Forensic Treatment Program which Mr. Antonin had been attending under the supervision of Ms. Mitchell.

[27] The tribunal quoted at length this evidence which established Mr. Antonin was compliant with the conditions of his one year of supervised probation issued in 2008; had received significant help from the Ottawa Branch of the Canadian Mental Health Association (CMHA) who had taken Mr. Antonin under its wing, was living at Anderson House in a supervised environment, was off

drugs and alcohol, was regularly attending class to obtain his high school diploma and was staying away from past dubious acquaintances.

[28] It referred to and quoted extracts of counsel for the Minister's arguments why the developments referred to above were insufficient to allow special relief: (1) while recognizing the appellant's chance of relapsing, committing further offences seemed to be reduced if he took his medication, the Minister was concerned his past history showed he was inconsistent in taking his medicine and there was no guarantee how long he would be residing at Anderson House; and, (2) while submitting the tribunal could not ignore Mr. Antonin's mental health issues in assessing the humanitarian and compassionate grounds, counsel for the Minister said there was nothing in the evidence which suggests that his situation could change significantly even if all assistance was offered. The Minister was not convinced he would take advantage of the various mental health resources available unless imposed [i.e. were a condition of his stay].

[29] It did not accept the Minister's arguments. It was of the view his mental health affected his behaviour since arriving in Canada and this was exacerbated by the lack of family support in his early years here. In its view, based on the medical reports, his criminality would not have been as serious had he been given access to proper health care at an earlier date. It was persuaded the medical evidence "shows that he has accepted help and treatment and guidance the CMHA, Alexander House and other social activities." According to it, "his acceptance at last, when faced not only with deportation but also with the availability of resources is one of the reliable facts that this panel must accept in evidence".

[30] The other fact which the tribunal took into account had to do with his past associations, and in particular, his association with members of a street gang in Ottawa. The tribunal found there was no evidence before it which "would directly implicate Mr. Antonin as a member of an organized criminal group and if there had been such evidence, no stay would have been possible." On the evidence, the tribunal "was inclined to believe that at best the appellant was a subject of interest for this criminal organization as he could be used as a tool to further their criminal enterprise." That finding lead the tribunal to wonder why the requested stay should be limited to 3 years because the street gang still existed and, after 3 years was over, Mr. Antonin could be "available to the pressures from this criminal organization once again."

[31] Considering the entire evidence before him, the fact there was no guarantee of a cure of a medical condition and where the evidence showed some social pressures still will continue to exist "the pressure of a stay should remain as long as is feasible". The tribunal concluded a five year stay to be appropriate with conditions "which address not only the continuity of medical treatment, but also regular reporting that he is in compliance with his doctor's order and conditions which would specifically address his past associations.

[32] It concluded writing:

> [22] Minister's representative referred to guarantees. There are no guarantees. The panel member is not in a position to underwrite the appellant's future activities, nor is his psychiatrist able to do so. The best we can do is make the conditions as clear as possible so that all professionals involved with the appellant are aware of the consequence of his non-compliance with the conditions. It is one thing to face one day of jail because a person has not respected a probation order; it is another thing all together different to be sent to

> a country such as Haiti after 11 or 12 years of living in Canada, and being in need of specific medical treatment.
>
> [23] I have in the past dismissed appeals where evidence did show a psychiatric condition and where the appellant showed a profile of violent crime or continued risk to the Canadian public. I would distinguish the decisions that I have rendered in like manner from the present case for two reasons: the first reason has to do with the very young age of this appellant when he came to Canada and the lack of proper supervision or aid when it first became apparent that he was encountering serious behavioural problems. It would seem that this appellant simply fell through the cracks of our social and judicial network. The second factor, which distinguishes this case from others, is that the medical evidence available shows that there is a solid hope of rehabilitation, as the appellant continues his treatment and continues to receive the aid which is now being offered him.
>
> [24] In my view, the combination of these two factors, with the usual factor of the hardship that a mental health patient would encounter should he be returned to Haiti at this particular time are sufficient to warrant special relief. [Emphasis mine.]

[33] The conditions imposed included obligations:

- not to commit any criminal offences;
- extensive reporting;
- access to medical treatment; and,
- not knowingly associate with individuals who have a criminal record.

Conclusions

[34] It is useful to recall what *Khosa* said about the IAD's role in section 67(1)(c) IRPA cases. Parliament has entrusted the IAD to determine what constitute "humanitarian and compassionate considerations [and] the sufficiency of such considerations in a particular case." Such determination is a fact-dependant and policy-driven assessment by the IAD itself. Its decision is owed deference.

Reviewing courts cannot substitute their own appreciation of the appropriate solution but must determine if the result reached by the IAD falls within “a range of possible, acceptable outcomes which are defensible in respect of the facts and law.” “The IAD had the advantages of conducting the hearings and assessing the evidence presented including of the respondent himself.” Members of the IAD have considerable expertise in determining appeals under IRPA.

[35] I also refer to another Supreme Court of Canada decision involving the possible exercise of a discretionary stay on H&C grounds in *Boulis v. Canada (Minister of Manpower and Immigration)*, [1974] S.C.R. 875 at page 885, where Justice Laskin, as he then was, wrote that the reasons of the then Immigration Appeal Board were “not to be read microscopically” [and] “it is enough if they show a grasp of the issues that are raised by [the relevant statutory disposition] and of the evidence addressed to them, without detailed reference. The record is available as a check on the Board's conclusions.”

[36] In the same vein is the Supreme Court of Canada’s decision in *Woolaston v. Canada (Minister of Manpower and Immigration)*, [1973] S.C.R. 102, when again Justice Laskin, as he then was, wrote he was unable to conclude the Board had ignored the evidence in the form of the testimony by a witness which was in the record but was not mentioned in its reasons.

[37] Some of the irrelevant facts which the Minister mentioned in his written argument were: (1) the lack of dependable authority figure in the early years of his life in Canada; (2) when considering rehabilitation, the fact his violent past was attributable to his mental illness and his lack of family

support; and, (3) when considering the length of the stay of five (5) years, it reasoned it needs that length to isolate or protect him from an Ottawa street gang.

[38] Instances of ignoring the evidence were: (1) ignoring his failures in his rehabilitation efforts prior to July 2008, namely, breaches of his prohibition orders after his deportation order had been issued; (2) his arrest in November 2007 after his release from Harvest House; and, (3) his inability to deal with his addiction problem.

[39] The Minister argued the IAD failed to take into account the policies and objectives of IRPA, one of which was to protect the safety of Canadians.

[40] The Minister also touched upon the issue of the weighing of the factors, for example, the overweighting of rehabilitation factor and giving insufficient weight to his violent past.

[41] In oral argument, the Minister's counsel stressed: (1) the IAD did not consider all of the *Ribic* factors and therefore erred in the balancing; (2) the IAD erred in its approach to the stay; in effect the IAD subverted the purpose of a stay by attempting to fix a social problem, namely, that of Mr. Antonin who suffered because he had been abandoned as a child; (3) the IAD ignored the seriousness of the offences Mr. Antonin committed; there was no discussion why his violent crimes were mitigated; (4) it was selective in its consideration of the rehabilitation factor; (5) it ignored the facts related to his failures to rehabilitate; (6) it took into account irrelevant matters such as why he fell into the cracks of the system, the issue of the Ottawa street gang and the length of his stay; and, (7) there was no evidence of mental health hardship if returned to Haïti.

[42] Having read the record, the transcript of the hearings before the IAD, the written arguments which was submitted to the member of the IAD as well as the IAD's decision as a whole, I cannot accede to the Minister's argument. It did not ignore the evidence or relevant factors. The tribunal was well aware of the "series of crimes he was convicted" and the ones which "all ended up with prison sentences of six (6) months; six (6) counts at six (6) months and one (1) count at twelve (12) months were crimes that were violent in nature." The IAD was also well aware of his past failure at rehabilitation from the medical reports and from the report of his probation officer. Dr. Brathwaite's letter of December 22, 2008 is compelling. She treated him as early as November 30, 2007. The IAD member was well aware of the Minister's submissions before him; he quoted extracts from them.

[43] A review of the transcript shows the IAD member was so sensitive about Mr. Antonin's past violent crimes and his failures that he adjourned the April 23, 2008 hearing to ensure that the witness from the Canadian Mental Health Association was fully briefed about his past and could provide the tribunal with meaningful probative evidence as to the future.

[44] The central thrust of this case, according to the tribunal, focused on the prospects of Mr. Antonin's rehabilitation and the fundamental change in his lifestyle now that he had in place a support system which was so lacking in the past and which had been identified on immigration detention reviews as contributing to his criminality or breaches of probation. The questions the member of the IAD asked during the hearings was to ensure this support system would reasonably continue to be in place in the future so that the beneficial effects and the unusual length of the stay

of five (5) years with stringent conditions could enure to Mr. Antonin's benefit. On the evidence before him, the IAD was so satisfied.

[45] I give credence to the Minister's argument the tribunal did not have direct testimony before it on the state of mental health care for bi-polar individuals in Haïti. This was an error on the part of the IAD but in the scheme of the balancing is not determinative.

[46] In my view, what the Minister deems as irrelevant facts are not so; their aims was to test and understand why earlier on in his young life in Canada, Mr. Antonin did what he did – he essentially was on his own; now his is not. It was this factor – continued medical support, continued guidance, continued assistance from the CMHA which convinced the tribunal Mr. Antonin had turned the page. The member of the IAD was entitled to come to this conclusion on the evidence before him and it is not the function of this Court to reweigh the evidence to come to a different conclusion. The outcome reached by the IAD is one which in my view if defensible both in fact and law.

[47] In short, this case essentially turned on the weighing of the rehabilitation and remorse factor against the seriousness of the crimes he committed in the past. The tribunal heard the evidence and weighed the factors. It performed the function entrusted to it by Parliament.

[48] For these reasons, the Minister's appeal is dismissed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed. No certified question was proposed.

"François Lemieux"

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Judge

FEDERAL COURT

SOLICITORS OF RECORD

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