Date: 20060329

Docket: A-688-04

Citation: 2006 FCA 126

CORAM: **DÉCARY J.A.**
NOËL J.A.
PELLETIER J.A.

BETWEEN:

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Appellant

and

JUNG WOO CHA

Respondent

Heard at Montréal, Quebec, on March 2, 2006.

Judgment delivered at Ottawa, Ontario, on March 29, 2006.

REASONS FOR JUDGMENT OF THE COURT BY: DÉCARY J.A.

CONCURRED IN BY: NOËL J.A.
PELLETIER J.A.

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CORAM: **DÉCARY J.A.**
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BETWEEN:

MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

and

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Respondent

REASONS FOR JUDGMENT

DÉCARY J.A.

[1] This is an appeal from a decision of Lemieux J. (2004 F.C. 1507) quashing the Minister's delegate's decision to issue a deportation order against the respondent. The following questions were certified:

1) What is the scope of the Minister's Delegate's discretion under subsection 44(2) of the *Immigration and Refugee Protection Act* when making a removal order?

2) What is the extent of participatory rights required when a Minister's Delegate is making a decision pursuant to section 44(2) of *the Immigration and Refugee Protection* Act when making a removal order?

[2] At the hearing, counsel for the appellant sought leave to amend the style of cause in order to replace the Minister of Citizenship and Immigration by the Minister of Public Safety and Emergency Preparedness. The amendment was granted, as the administration of the relevant provisions of the *Immigration and Refugee Protection Act* (the Act) (S.C. 2001, c.27) was transferred from the Minister of Citizenship and Immigration to the Minister of Public Safety and Emergency Preparedness pursuant to the *Public Service Rearrangement and Transfer of Duties Act* (R.S. 1985, c.34) and Orders in Council P.C. 2003-2061, 2003-2063 and 2005-0482.

[3] The respondent was represented by counsel in the Federal Court. In this Court his counsel did not file a memorandum of fact and law and he did not appear at the hearing. The respondent was not present either, having left Canada in July 2003 in execution of the deportation order at issue in this appeal.

The facts

[4] The respondent is a foreign national from South Korea who entered Canada in 1996 with a student authorization. He had been on renewed student authorizations ever since his entry. During his seven-year stay in Canada, he never completed any course or program in which he was enrolled as a student. In 2001, he was convicted in Ottawa of driving a vehicle while having a concentration of alcohol in excess of 80 milligrams per 100 milliliters of blood contrary to paragraph 253(b) of the *Criminal Code*, R.S.C. 1985, c. C-46. This offence is punishable by indictment and liable to a term of imprisonment not exceeding five years.

[5] In March 2003, the respondent was asked by telephone to meet with an immigration officer, Mr. Yelle, to discuss his criminal conviction. He met Mr. Yelle on March 17, 2003, at 9:05 a.m. and was asked to provide information about his criminal conviction, the reasons behind his failure to finish any course or program and his financial support in Canada. He was also asked if he had fears of returning to South Korea. His answers, as noted by Mr. Yelle in the file, were as follows:

> I asked him why had he not completed any courses whatsoever since he was in Canada? He replied that his grades were not good enough and that he changed subject courses. I then asked him how could he have been in Canada for over six years and not have anything to show for? He replied "I don't know, I guess I've been lazy".
>
> I then asked what else has he been doing here in Canada for the past six years? He replied that he would stay home on his free time.
>
> Mr. Cha stated that his parents financially support him. They pay his rent of $960.00 a month. Mr. Cha states that he has approximately $3000.00CAD in his bank account and that he doesn't work.
>
> Mr.Cha states that he has no family in Canada and that is family are all in Korea.
>
> Mr. Cha stated that he had no outstanding charges or convictions in Canada or Korea.
>
> I asked Mr. Cha if he had any fears of returning to Korea? He replied "YES" I asked why and he replied that he wanted to finish school and return to Korea and find a job.
>
> I questioned him about his criminal conviction. He stated that he pleaded not guilty because of a technicality. He was later convicted.
>
> (Appeal Book p.41.).

[6] The interview concluded at 9:30 a.m.

[7] Immediately following the interview, Mr. Yelle made a report under subsection 44(1) of the Act, finding the respondent to be inadmissible solely on the ground of criminality as described in

paragraph 36 (2)(*a*) of the Act (Appeal Book p. 22). A copy of the report was given to the respondent.

[8] A few minutes later, the respondent met with the Minister's delegate, Ms. Perreault, to discuss the report. The completed Suggested Proceeding Script of the interview, which started at 9:50 a.m. and concluded at 10:30 a.m., reads as follows:

> My name is LP, and I am an Immigration officer. I have been presented with a report written under subsection 44(1) of the *Immigration and Refugee protection Act* concerning Jung Woo Cha. Are you Jung Woo Cha? Yes.
>
> LP. The purpose of this interview is for me to determine whether this report is well founded. If I determine that it is not, you will be allowed to remain in Canada under the status you currently enjoy. If, however, I find that the report is well founded, I am required by subsection 44(2) of the *Immigration and Refugee Protection Act* to issue a removal order against you. This order would require you to leave Canada immediately or as soon as reasonably practicable. Do you understand? Yes.
>
> LP. The type of removal order that I would issue to you is a Deport. order, in accordance with paragraph 228 of the *Immigration and Refugee Protection Regulations*. Do you understand? Yes. LP. (proceed to explain the effect and consequences of the removal order in question, and then ask the person concerned if he/she understands). Done
>
> Here is a copy of the report made against you. It alleges that you are inadmissible to Canada under S.36(2)(a) of the *Immigration and Refugee Protection Act* because Conv. In CDA DWI (read from report) Do you understand? Yes.
>
> LP. I will begin by asking you some questions concerning the allegations contained in the report. Then, I will consider any evidence the reporting officer has submitted in the support of the report. Thereafter, I will give you an opportunity to present evidence and/or make any explanations concerning the report. Do you understand? Yes.
>
> LP.(conduct your questioning of the person concerned, in relation to the allegations in questions. Start by confirming the person's full and complete name, date of birth, place of birth, country of citizenship, then tailor your questions to the allegations in question. Once you are done, examine any evidence that was submitted in support of the report. Allow the person concerned to view this evidence. Then, give the person concerned the opportunity to present any evidence and/or make any explanations. Record your questions, and the answers provided to them, below. Use an extra sheet of paper if necessary).
>
> Read over report with PC confirmed info. No evidence provided.

> I will now give you my decision on the report. After considering the evidence in support of the report, your answers to my questions, and the explanations that you have given, I have decided that the report is well founded. I am satisfied that you are described as set out in the report, I therefore issue this Dep. Order. Do you understand? Yes.
>
> As previously explained to you, as a consequence of this decision you will have to leave CDA forthwith. Do you understand? Yes.
>
> LP. (if a removal order is issued, prepare the order and serve it on the person concerned. Go over it, and have the person concerned sign it, and give him/her a copy of it. Then advise the person concerned about their right to make an application to the Federal Court, if he/she wishes, within 15 days. Finally, inform the person of the opportunity to apply for PRRA, and have them confirm their intention in writing, on the appropriate letter).
>
> Remarks (if any):
>
> Unable to satisfy M.D. that he should remain in CDA. Does not appear to be serious about his studies. Has been in CDA 6 years no degree. Moves around no H and C's.
>
> LPerreault.
>
> (Appeal Book p. 54-56.)

[9] The Minister's delegate, the same day, issued the deportation order (Appeal Book p.11). The order contains a signed statement by the respondent that he understood the decision and its consequences.

[10] A judicial review of the Minister's delegate's decision was conducted by Lemieux J., who quashed the deportation order. The appellant takes issue, principally, with paragraphs 59 to 62 of the reasons for judgment, which refer to the scope of discretion under subsection 44(2) of the Act, and paragraphs 66 to 68, which deal with the participatory rights of a foreign national against whom a deportation order is made:

> [59] In my view, therefore, the Minister's delegate had an obligation to consider the particular circumstances of the applicant and his conviction to determine if there were any mitigating circumstances which would make it unreasonable to deport him.
>
> [60] I agree with the suggestion made in some quarters that the discretion is to be used in cases where a foreign national has committed a minor violation which technically qualified as a indictable

offence and in respect of which the automatic issuance of a deportation order would not further the public interest.

[61] Such a perspective would suggest that the scope of discretion under section 44(2) of the Act may be limited and should not be regarded as a substitute for the exercise of the Minister's humanitarian and compassionate jurisdiction under section 25 of the Act although there may be common considerations which may be covered by ministerial guidelines.

[62] On the record before me, it certainly seems both the Minister's delegate and the immigration officer thought they had a discretion and could and did consider H&C factors.

…..

[66] Taking into account, in the particular circumstances of this case, which does not engage a point of entry exclusion, I feel a relatively high degree of participatory rights is warranted at the final stage which is the making of a deportation order by the Minister's delegate.

[67] The factors militating in favour of a relatively strong level of procedural fairness when deportation orders are issued by the Minister's delegate are:

(1) The finality of the determination made by the Minister's delegate with no right of appeal to the Immigration Appeal Division, subject to the Federal Court leave and judicial review process;

(2) The severe consequences of deportation on the individual in the applicant's circumstances including the ending of his studies without obtaining a diploma and lifetime exclusion from Canada unless the Minister consents to his return and the lack of discretion in the Minister's delegate to make a deportation order.

[68] In this case, I consider the applicant was owed the following participatory rights, most of which were breached:

(1) An interview with the Minister's delegate which was granted;

(2) Notice that the process he was called in for could lead to a deportation order. That right was breached. He knew the immigration officer wanted to examine him about his conviction but he had no idea what that meant. He was only told about the deportation order during his interview with the Minister's delegate and I infer from the interview process he did not know what consequences could befall him if subject to a deportation order because the consequences were not explained to him.

(3) Notice that he had the right to have legal counsel present during the interview. This right was denied;

(4) A reasonable opportunity to present evidence. The manner the interview process was conducted leads me to conclude he had no such real opportunity because he did not know the case he had to meet including his ability to advance mitigating factors.

[11] Hence the certification of the questions referred to at the beginning of these reasons.

[12] The decision at issue is the one made by Ms. Perreault, the Minister's delegate, pursuant to subsection 44(2) of the Act. While the subsection gives the Minister himself the power to decide, the latter, pursuant to subsection 6(2) of the Act, is allowed to delegate his power and indeed delegated it to the person commonly called "the Minister's delegate". In contrast, the immigration officer who prepared the subsection 44(1) report, Mr. Yelle, is designated pursuant to subsection 6(1). The importance of this distinction will appear later.

[13] This appeal deals with foreign nationals in respect of whom an inadmissibility report was prepared by an immigration officer on the sole ground of criminality in Canada and in respect of whom the Minister's delegate issued a deportation order. The appeal does not deal with permanent residents. Nor does it deal with other grounds of inadmissibility or with the referral of the report to the Immigration Division. I am not purporting to rule on any situation other than the very specific one at issue. I will, occasionally, refer in the course of the reasons to cases in the Federal Court that involved permanent residents inadmissible on grounds of serious criminality in Canada (*Correia v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C. 782; *Leong v. Canada (Solicitor General)*, [2004] F.C. 1126; *Hernandez v. Canada (Minister of Citizenship & Immigration)*, [2005] F.C. 429 and *Kim v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C. 437. Yet, I do not wish to be taken as approving or disapproving the final determination that was made in these cases.

[14] I have consulted the debates in the House of Commons and the testimony in the Standing Committee on Citizenship and Immigration that preceded, in 2001, the adoption of the Act. I have examined, also, the Department Procedures Manual (The Manual) published by Citizenship and Immigration Canada (C.I.C.), in particular chapter 1, ENF, "Inadmissibility", chapter 2, ENF 2, "Evaluating Inadmissibility', chapter 5, ENF 5, "Writing Section 44(1) Reports", chapter 6, ENF 6, "Review of Reports under A 44(1)" and chapter 14, ENF 14/0P19, "Criminal rehabilitation". The Manual is available on the web site of C.I.C. and updated regularly.

[15] It is trite law that these debates, testimony and governmental guidelines are not binding on government institutions and even less so on the courts, but it is accepted that they can offer useful insight on the background, purpose and meaning of the legislation. (*Canada (Information Commissioner) v. Canada (Minister of Citizenship and Immigration)*, 2002 F.C.A. 270, at paragraph 37; *Hernandez* at paragraphs 34 and 35.

Relevant statutory provisions

Immigration and Refugee Protection Act 2001, c. 27	**Immigration et la protection des réfugiés, Loi sur l' 2001, ch. 27**
[Assented to November 1, 2001]	**[Sanctionnée le 1er novembre 2001]**
…	…
INTERPRETATION	**DÉFINITIONS ET INTERPRÉTATION**

2. (1) The definitions in this subsection apply in this Act.
…

"foreign national" means a person who is not a Canadian citizen or a permanent resident, and includes a stateless person.

"permanent resident" means a person who has acquired permanent resident status and has not subsequently lost that status under section 46.
…

2. (1) Les définitions qui suivent s'appliquent à la présente loi.
[…]

« étranger » Personne autre qu'un citoyen canadien ou un résident permanent; la présente définition vise également les apatrides.

« résident permanent » Personne qui a le statut de résident permanent et n'a pas perdu ce statut au titre de l'article 46.
[…]

OBJECTIVES AND APPLICATION

3. (1) The objectives of this Act with respect to immigration are
…

(h) to protect the health and safety of Canadians and to maintain the security of Canadian society;

(i) to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks; and
…

OBJET DE LA LOI

3. (1) En matière d'immigration, la présente loi a pour objet :
[…]

h) de protéger la santé des Canadiens et de garantir leur sécurité;

i) de promouvoir, à l'échelle internationale, la justice et la sécurité par le respect des droits de la personne et l'interdiction de territoire aux personnes qui sont des criminels ou constituent un danger pour la sécurité;

PART 1

IMMIGRATION TO CANADA

DIVISION 3

ENTERING AND REMAINING IN CANADA
…

PARTIE 1

IMMIGRATION AU CANADA

SECTION 3

ENTRÉE ET SÉJOUR AU CANADA

25. (1) The Minister shall, upon request of a foreign national who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative, examine the circumstances concerning the foreign national and may grant the

25. (1) Le ministre doit, sur demande d'un étranger interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des

foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.
…

critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.
[…]

DIVISION 4

INADMISSIBILITY

SECTION 4

INTERDICTIONS DE TERRITOIRE

33. The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.
…

33. Les faits — actes ou omissions — mentionnés aux articles 34 à 37 sont, sauf disposition contraire, appréciés sur la base de motifs raisonnables de croire qu'ils sont survenus, surviennent ou peuvent survenir.
[…]

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;

(b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or

b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;

(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.

36. (2) A foreign national is inadmissible on grounds of criminality for

(a) having been convicted in Canada of an offence under an Act of Parliament punishable by way of indictment, or of two offences under any Act of Parliament not arising out of a single occurrence;

(b) having been convicted outside Canada of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, or of two offences not arising out of a single occurrence that, if committed in Canada, would constitute offences under an Act of Parliament;

(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an indictable offence under an Act of Parliament; or

(d) committing, on entering Canada, an offence under an Act of Parliament prescribed by regulations.

36. (3) The following provisions govern subsections (1) and (2):

(a) an offence that may be prosecuted either summarily or by way of indictment is deemed to be an indictable offence, even if it has been prosecuted summarily;

(b) inadmissibility under subsections (1) and (2) may not be based on a conviction in respect of which a pardon has been granted and has not ceased to have effect or been revoked under the Criminal Records Act, or in respect of which there has been a final

36. (2) Emportent, sauf pour le résident permanent, interdiction de territoire pour criminalité les faits suivants :

a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions à toute loi fédérale qui ne découlent pas des mêmes faits;

b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions qui ne découlent pas des mêmes faits et qui, commises au Canada, constitueraient des infractions à des lois fédérales;

c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation;

d) commettre, à son entrée au Canada, une infraction qui constitue une infraction à une loi fédérale précisée par règlement.

36. (3) Les dispositions suivantes régissent l'application des paragraphes (1) et (2) :

a) l'infraction punissable par mise en accusation ou par procédure sommaire est assimilée à l'infraction punissable par mise en accusation, indépendamment du mode de poursuite effectivement retenu;

b) la déclaration de culpabilité n'emporte pas interdiction de territoire en cas de verdict d'acquittement rendu en dernier ressort ou de réhabilitation — sauf cas de révocation ou de nullité — au titre de la Loi sur le casier judiciaire;

determination of an acquittal;

(c) the matters referred to in paragraphs (1)(b) and (c) and (2)(b) and (c) do not constitute inadmissibility in respect of a permanent resident or foreign national who, after the prescribed period, satisfies the Minister that they have been rehabilitated or who is a member of a prescribed class that is deemed to have been rehabilitated;
…

(e) inadmissibility under subsections (1) and (2) may not be based on an offence designated as a contravention under the Contraventions Act or an offence under the Young Offenders Act.
…

DIVISION 5

LOSS OF STATUS AND REMOVAL

44. (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.

(2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.

(3) An officer or the Immigration Division may impose any conditions, including the payment of a deposit or

c) les faits visés aux alinéas (1)b) ou c) et (2)b) ou c) n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui, à l'expiration du délai réglementaire, convainc le ministre de sa réadaptation ou qui appartient à une catégorie réglementaire de personnes présumées réadaptées;
[…]

e) l'interdiction de territoire ne peut être fondée sur une infraction qualifiée de contravention en vertu de la Loi sur les contraventions ni sur une infraction à la Loi sur les jeunes contrevenants.
[…]

SECTION 5

PERTE DE STATUT ET RENVOI

44. (1) S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.

(2) S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi.

(3) L'agent ou la Section de l'immigration peut imposer les conditions qu'il estime nécessaires,

the posting of a guarantee for compliance with the conditions, that the officer or the Division considers necessary on a permanent resident or a foreign national who is the subject of a report, an admissibility hearing or, being in Canada, a removal order.
…

PART 2

REFUGEE PROTECTION

DIVISION 3

PRE-REMOVAL RISK ASSESSMENT

112. (1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1).
…

PART 4

IMMIGRATION AND REFUGEE BOARD

Provisions that Apply to All Divisions

167. (1) Both a person who is the subject of Board proceedings and the Minister may, at their own expense, be represented by a barrister or solicitor or other counsel.

notamment la remise d'une garantie d'exécution, au résident permanent ou à l'étranger qui fait l'objet d'un rapport ou d'une enquête ou, étant au Canada, d'une mesure de renvoi.
[…]

PARTIE 2

PROTECTION DES RÉFUGIÉS

SECTION 3

EXAMEN DES RISQUES AVANT RENVOI

112. (1) La personne se trouvant au Canada et qui n'est pas visée au paragraphe 115(1) peut, conformément aux règlements, demander la protection au ministre si elle est visée par une mesure de renvoi ayant pris effet ou nommée au certificat visé au paragraphe 77(1).
[…]

PARTIE 4

COMMISSION DE L'IMMIGRATION ET DU STATUT DE RÉFUGIÉ

Attributions communes

167. (1) L'intéressé peut en tout cas se faire représenter devant la Commission, à ses frais, par un avocat ou un autre conseil.

Immigration and Refugee Protection Regulations

SOR/2002-227
…

PART 3

Règlement sur l'immigration et la protection des réfugiés

DORS/2002-227
[…]

PARTIE 3

INADMISSIBILITY

17. For the purposes of paragraph 36(3)(c) of the Act, the prescribed period is five years
…

18.(1) For the purposes of paragraph 36(3)(c) of the Act, the class of persons deemed to have been rehabilitated is a prescribed class.
…

INTERDICTIONS DE TERRITOIRE

17. Pour l'application de l'alinéa 36(3)c) de la Loi, le délai réglementaire est de cinq ans à compter :
[…]

18. (1) Pour l'application de l'alinéa 36(3)c) de la Loi, la catégorie des personnes présumées réadaptées est une catégorie réglementaire.
[…]

PART 13

REMOVAL

PARTIE 13

RENVOI

DIVISION 2
SPECIFIED REMOVAL ORDER

228. (1) For the purposes of subsection 44(2) of the Act, and subject to subsections (3) and (4), if a report in respect of a foreign national does not include any grounds of inadmissibility other than those set out in the following circumstances, the report shall not be referred to the Immigration Division and any removal order made shall be

(a) if the foreign national is inadmissible under paragraph 36(1)(a) or (2)(a) of the Act on grounds of serious criminality or criminality, a deportation order;

(b) if the foreign national is inadmissible under paragraph 40(1)(c) of the Act on grounds of misrepresentation, a deportation order;

(c) if the foreign national is inadmissible under section 41 of the Act on grounds of

(i) failing to appear for further examination or an admissibility hearing under Part 1 of the Act, an

SECTION 2
MESURES DE RENVOI À PRENDRE

228. (1) Pour l'application du paragraphe 44(2) de la Loi, mais sous réserve des paragraphes (3) et (4), dans le cas où elle ne comporte pas de motif d'interdiction de territoire autre que ceux prévus dans l'une des circonstances ci-après, l'affaire n'est pas déférée à la Section de l'immigration et la mesure de renvoi à prendre est celle indiquée en regard du motif en cause :

a) en cas d'interdiction de territoire de l'étranger pour grande criminalité ou criminalité au titre des alinéas 36(1)a) ou (2)a) de la Loi, l'expulsion;

b) en cas d'interdiction de territoire de l'étranger pour fausses déclarations au titre de l'alinéa 40(1)c) de la Loi, l'expulsion;

c) en cas d'interdiction de territoire de l'étranger au titre de l'article 41 de la Loi pour manquement à :

(i) l'obligation prévue à la partie 1 de la Loi de se présenter au contrôle complémentaire ou à l'enquête,

exclusion order,	l'exclusion,
(ii) failing to obtain the authorization of an officer required by subsection 52(1) of the Act, a deportation order,	(ii) l'obligation d'obtenir l'autorisation de l'agent aux termes du paragraphe 52(1) de la Loi, l'expulsion,
(iii) failing to establish that they hold the visa or other document as required under section 20 of the Act, an exclusion order,	(iii) l'obligation prévue à l'article 20 de la Loi de prouver qu'il détient les visa et autres documents réglementaires, l'exclusion,
(iv) failing to leave Canada by the end of the period authorized for their stay as required by subsection 29(2) of the Act, an exclusion order, or	(iv) l'obligation prévue au paragraphe 29(2) de la Loi de quitter le Canada à la fin de la période de séjour autorisée, l'exclusion,
(v) failing to comply with subsection 29(2) of the Act to comply with any condition set out in section 184, an exclusion order; and	(v) l'obligation prévue au paragraphe 29(2) de la Loi de se conformer aux conditions imposées à l'article 184, l'exclusion;
228. (2) For the purposes of subsection 44(2) of the Act, if a removal order is made against a permanent resident who fails to comply with the residency obligation under section 28 of the Act, the order shall be a departure order. …	228. (2) Pour l'application du paragraphe 44(2) de la Loi, si le résident permanent manque à l'obligation de résidence prévue à l'article 28 de la Loi, la mesure de renvoi qui peut être prise à son égard est l'interdiction de séjour. […]
228. (4) For the purposes of subsection (1), a report in respect of a foreign national does not include a report in respect of a foreign national who	228. (4) Pour l'application du paragraphe (1), l'affaire ne vise pas l'affaire à l'égard d'un étranger qui :
(a) is under 18 years of age and not accompanied by a parent or an adult legally responsible for them; or	a) soit est âgé de moins de dix-huit ans et n'est pas accompagné par un parent ou un adulte qui en est légalement responsable;
(b) is unable, in the opinion of the Minister, to appreciate the nature of the proceedings and is not accompanied by a parent or an adult legally responsible for them. ….	b) soit n'est pas, selon le ministre, en mesure de comprendre la nature de la procédure et n'est pas accompagné par un parent ou un adulte qui en est légalement responsable. […]
229.(4) If the Immigration Division makes a removal order against a foreign national with respect to any grounds of inadmissibility that are circumstances set out in section 228,	229.4) Si la Section de l'immigration prend une mesure de renvoi à l'égard d'un étranger pour tout motif d'interdiction de territoire visé par l'une des circonstances prévues à

the Immigration Division shall make	l'article 228, elle prend, selon le cas :
(a) the removal order that the Minister would have made if the report had not been referred to the Immigration Division under subsection 44(2) of the Act; or	a) la mesure de renvoi que le ministre aurait prise si l'affaire ne lui avait pas été déférée en application du paragraphe 44(2) de la Loi;
(b) in the case of a foreign national described in paragraph 228(4)(a) or (b), the removal order that the Minister would have made if the foreign national had not been described in that paragraph. …	b) dans le cas de l'étranger visé aux alinéas 228(4)a) ou b), la mesure de renvoi que le ministre aurait prise si l'étranger n'avait pas été visé à ces alinéas. […]
DIVISION 3 **STAY OF REMOVAL ORDERS**	**SECTION 3** **SURSIS**
232. A removal order is stayed when a person is notified by the Department under subsection 160(3) that they may make an application under subsection 112(1) of the Act, …	232. Il est sursis à la mesure de renvoi dès le moment où le ministère avise l'intéressé aux termes du paragraphe 160(3) qu'il peut faire une demande de protection au titre du paragraphe 112(1) de la Loi. […]
233. A removal order made against a foreign national, and any family member of the foreign national, is stayed if the Minister is of the opinion under subsection 25(1) of the Act that there exist humanitarian and compassionate considerations, or public policy considerations, and the stay is effective until a decision is made to grant, or not grant, permanent resident status	233. La décision du ministre prise au titre du paragraphe 25(1) de la Loi selon laquelle il estime que des circonstances d'ordre humanitaire existent ou que l'intérêt public le justifie emporte sursis de la mesure de renvoi visant l'étranger et les membres de sa famille jusqu'à ce qu'il soit statué sur sa demande de résidence permanente.

The standard of review

[16] Lemieux J. applied the right standard of review when he determined that questions pertaining to the scope of the duty of fairness attract a standard of correctness. With respect to the scope, if any, of the Minister's delegate discretion in subsection 44(2) of the Act, that is a question

of law which also attracts the standard of correctness. The judge having applied the proper standards, the role of this Court is to determine whether he made an error of law in the answers he gave to the two questions he certified.

Principles of statutory interpretation

[17] As noted by Deschamps J. in *Glykis v. Hydro-Québec*, [2004] 3 S.C.R. 285, at paragraph 5,

> A statutory provision must be read in its entire context, taking into consideration not only the ordinary and grammatical sense of the words, but also the scheme and object of the statute, and the intention of the legislature.

The provision at issue and the use of the word "may"

[18] The provision at issue is subsection 44 (2) of the Act. At its face, that provision, by using the word "may", grants the Minister's delegate the discretion to exercise or not to exercise the power he has under that subsection to issue himself a removal order against a foreign national.

[19] In *Ruby v. Canada (Solicitor General)* (C.A.), [2000] 3 F.C. 589, at pp. 623 to 626, Létourneau J.A. reminded us that the use of the word "may" is often a signal that a margin of discretion is given to an administrative decision maker. It can sometimes be read in context as "must" or "shall", thereby rebutting the presumptive rule in section 11 of the *Interpretation Act* (R.S.C. 1985, c. I-21) that "may" is permissive. It can also be read as no more than a signal from the legislator that an official is being empowered to do something. Even when "may" is read as

granting discretion, all grants of discretion are not created equal: depending on the purpose and object of the legislation, there may be considerable discretion, or there may be little.

[20] In the case at bar, the Minister does not take the position that "may" should be read as "shall". The Minister argues, rather, that the discretion of the Minister's delegate not to issue a removal order is a very narrow one that should be exercised in the rarest of circumstances.

[21] Subsection 44(2) of the Act applies to all grounds of inadmissibility. These grounds encompass such diverse areas as security, human or international rights violations, serious criminality, criminality, organized criminality, health, financial reasons, misrepresentation and non-compliance with the Act. The complexity of the facts at issue varies from ground to ground. Some grounds have legal components, others not. The subsection applies to permanent residents and to foreign nationals, who are not usually subject to the same treatment under the terms of the Act. The subsection applies both to the power of the Minister's delegate to refer the report to the Immigration Division and to his power to issue the removal order himself.

[22] The scope of the discretion, therefore, may end up varying depending on the grounds alleged, on whether the person concerned is a permanent resident or a foreign national and on whether the report is referred or not to the Immigration Division . There may be a room for discretion in some cases, and none in others. This is why it was wise to use the term "may".

<u>General considerations on the object of the statute and the intention of the legislature</u>

[23] Immigration is a privilege, not a right. Non-citizens do not have an unqualified right to enter or remain in the country. Parliament has the right to enact legislation prescribing the conditions under which non-citizens will be permitted to enter and remain in Canada. As a result, the Act and the Regulations treat citizens differently than permanent residents, who in turn are treated differently than Convention refugees, who are in turn treated differently than other foreign nationals. (*Chieu v. Canada (M.C.I.)*, [2002] 1 S.C.R. 84, at paragraph 57; *Chiarelli v. Canada (M.E.I.)*, [1992] 1 R.C.S. 711 at pages 733, 734; *Medovarski v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 39 at paragraph 46). It is fair to say that compared to other types of non-citizens, foreign nationals who are temporary residents receive little substantive and procedural protection throughout the Act.

[24] Parliament has made it clear that criminality of non-citizens is a major concern. Two of the objectives of the Act are criminality driven:

> ― The protection of the health and safety of Canadians and the maintenance of the security of Canadian society (paragraph 3(1)(h) of the Act).
>
> ― The promotion of international justice and security… by the denial of access to Canadian territory to persons who are criminals or security risks (paragraph 3(1) (i)) of the Act).

The Supreme Court of Canada has recently stated that the objectives stated in the new Act indicate an intent to prioritize security and that this objective is given effect, *inter alia*, by removing applicants with criminal records from Canada. Parliament has demonstrated a strong desire in the

new Act to treat criminals less leniently than under the former Act. (*Medovarski*, supra, at paragraph 10).

[25] One of the conditions Parliament has imposed on a non-citizen's right to remain in Canada is that he or she not be convicted of certain criminal offences (section 36 of the Act). As observed by Sopinka J. in *Chiarelli*, supra, at p. 734, commenting on the former *Immigration Act,*

> 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.
>
> [my emphasis]

Inadmissibility on grounds of serious criminality and criminality

[26] The purpose of section 36 is clear: non-citizens who commit certain types of criminal offences inside and outside Canada are not to enter, or remain, in Canada.

[27] The section distinguishes between the criminality of permanent residents and that of foreign nationals. It distinguishes between offences committed in Canada and offences committed outside Canada. It distinguishes between offences that are qualified as "serious" (an offence punishable by a maximum term of imprisonment of at least ten years or an offence for which a term of imprisonment of more than six months has been imposed) and offences which, for lack of a better word, I will describe as "simple" (an offence punishable by way of indictment or two offences not arising out of a single occurrence).

[28] Parliament, therefore, wanted certain persons having committed certain offences in certain territories to be declared inadmissible, whatever the sentence imposed. Subsections 36(1) and 36(2) of the Act have been carefully drafted. Nothing was left to chance nor to interpretation.

[29] Little attention, if any, has been paid in the debates or in the decided cases to subsection 36(3) of the Act. Yet, this subsection is in my view determinant when assessing the respective role of immigration officers and Minister's delegates in admissibility proceedings.

[30] As I read subsection 36(3), Parliament has provided a complete, detailed and straightforward code which directs the manner in which immigration officers and Minister's delegates are to exercise their respective powers under section 44 of the Act. Hybrid offences committed in Canada are to be treated as indictable offences regardless of the manner in which they were prosecuted (paragraph (*a*)). Convictions are not to be taken into consideration where pardon has been granted or where they have been reversed (paragraph (*b*)). Rehabilitation may only be

considered in defined circumstances (paragraph (*c*)). The relative gravity of the offence and the age of the offender will only be a relevant factor where the *Contraventions Act,* S.C. 1992, c.47 and the *Young Offenders Act,* R.C.S. 1985, c.Y-1 apply (paragraph (*e*)).

[31] The way rehabilitation has been dealt with is revealing. Persons convicted of offences outside Canada can avoid inadmissibility if they satisfy the Minister's delegate (not the immigration officer) that they have gone five years without being convicted of a subsequent offence or if they are a member of a class described in the Regulations (paragraph 36(3)(*c*) of the Act and sections 17 and 18 of the Regulations). Foreign nationals who have been convicted in Canada of two or more offences that may be prosecuted summarily can avoid inadmissibility if it has been at least five years since the day after the completion of the imposed sentences (section 18.1 of the Regulations).

[32] Age and mental condition are also factors which, pursuant to paragraph 228(4) of the Regulations, will have to be considered by the Minister's delegate (not by the immigration officer) before making a removal order against a foreign national.

[33] As I see it, in so far as foreign nationals convicted of certain offences in Canada are concerned, the immigration officer, once he is satisfied that a foreign national has been convicted of offences described in paragraph 36(1)(*a*) or 36(2)(*a*) of the Act, is expected to prepare a report under subsection 44(1) of the Act, unless a pardon has been granted, unless the convictions have been reversed, unless the inadmissibility resulted from the conviction of two offences that may only be prosecuted summarily and the foreign national have not been convicted in the five years

following the completion of the imposed sentences, or unless the offence is designated as a contravention under the *Contraventions Act* or an offence under the *Young Offenders Act*.

[34] When a report prepared by an immigration officer against a foreign national does not include any grounds of inadmissibility other than serious or simple criminality in Canada, the Minister's delegate is expected under subsection 228(1) of the Regulations to make a deportation order if he is of the opinion that the report is well-founded (i.e. that the immigration officer correctly found that all the requirements described above have been met) and if he is further satisfied that no rehabilitation within the meaning of section 18.1 of the Regulations has taken place and that the foreign national meets the age and mental condition requirements set out in paragraph 228(4) of the Regulations.

[35] I conclude that the wording of sections 36 and 44 of the Act and of the applicable sections of the Regulations does not allow immigration officers and Minister's delegates, in making findings of inadmissibility under subsections 44(1) and (2) of the Act in respect of persons convicted of serious or simple offences in Canada, any room to manoeuvre apart from that expressly carved out in the Act and the Regulations. Immigration officers and Minister's delegates are simply on a fact-finding mission, no more, no less. Particular circumstances of the person, the offence, the conviction and the sentence are beyond their reach. It is their respective responsibility, when they find a person to be inadmissible on grounds of serious or simple criminality, to prepare a report and to act on it.

[36] This view is consistent with that expressed by Sopinka J. in *Chiarelli* (supra). To paraphrase him, this condition (of not committing certain offences in Canada) 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. It is true that the personal circumstances of the criminals may vary widely. It is true that the offences vary in gravity, as may the factual circumstances surrounding the commission of a particular offence. But the fact is, they all deliberately violated an essential condition under which they were permitted to remain in Canada. It is not necessary to look beyond this fact to other aggravating or mitigating circumstances.

[37] It cannot be, in my view, that Parliament would have in sections 36 and 44 of the Act spent so much effort defining objective circumstances in which persons who commit certain well defined offences in Canada are to be removed, to then grant the immigration officer or the Minister's delegate the option to keep these persons in Canada for reasons other than those contemplated by the Act and the Regulations. It is not the function of the immigration officer, when deciding whether or not to prepare a report on inadmissibility based on paragraph 36(2)(*a*) grounds, or the function of the Minister's delegate when he acts on a report, to deal with matters described in sections 25 (H&C considerations) and 112 (Pre-Removal Assessment Risk) of the Act (see *Correia* at paragraphs 20 and 21; *Leong* at paragraph 21; *Kim* at paragraph 65; *Lasin v. Canada (Minister of Citizenship and Immigration)*, [2005] FC 1356 at paragraph 18).

[38] The intent of Parliament is clear. The Minister's delegate is only empowered under subsection 44(2) of the Act to make removal orders in prescribed cases which are clear and

non-controversial and where the facts simply dictate the remedy. According to the *Manual* (ENF 6, paragraph 3), it is precisely because there was nothing else to consider but objective facts that the power was given to the Minister's delegate to make the removal order without any need to pursue the matter further before the Immigration Division. In the circumstances, the use of the word "may" does not attract discretion. "May" is no more than an enabling provision, nothing more, to use the words of Létourneau J.A. in *Ruby* (supra), "than a signal from the legislator that an official is being empowered to do something". It may be that the Minister or his delegate, as part of their executive responsibilities, will prefer to suspend or defer making the deportation order, where, for example, the person is already the subject of a deportation order, has already made plans to leave Canada or has been called as a witness in a forthcoming trial.

[39] To the extent that Lemieux J. suggested that the Minister's delegate could look at the gravity of the offence, and the particular circumstances of Mr. Cha and his conviction in determining not to issue the removal order, he was in error. It is simply not open to the Minister's delegate to indirectly or collaterally go beyond the actual conviction. To do so would ignore Parliament's clearly expressed intent that the breaking of the condition of non-criminality be determinative.

[40] Should a foreign national wish to invoke humanitarian and compassionate considerations, he would be at liberty to make a request to the Minister pursuant to sections 25 of the Act and 66 to 69 of the Regulations or to seek a stay of the removal order pursuant to section 233 of the Regulations. He will also be able to avail himself of the Pre-Removal Risk Assessment proceeding pursuant to section 112 of the Act and 233 of the Regulations. No such requests were made by Mr. Cha.

[41] I appreciate that before the Standing Committee the Minister and senior bureaucrats have expressed the view that personal circumstances of the offender would be considered at the front end of the process before any decision is taken to remove them from Canada (see *Hernandez* at paragraph 18). I also appreciate that the Manual contains some statements to the same effect (see *Hernandez* at paragraphs 20 to 23). However, these views and statements were all expressed or made in respect of permanent residents convicted of serious offences in Canada. No such assurances were given by specific reference to foreign nationals. I need not, therefore, decide what weight, if any, I would have given to such assurances in the circumstances of the present case. Whether weight was properly given to such assurances in *Hernandez* (where the issue was the scope of the Minister's delegate's discretion to refer a report of inadmissibility in respect of permanent residents to the Immigration Division), is a question better left for another day. I note that questions were certified in Hernandez, but the appeal has been abandoned (A-197-05).

The participatory rights

[42] In assessing the duty of fairness, one has to review the five factors set out by the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paragraphs 21-28. They are:

a) the nature of the decision being made and the procedures followed in making it;

b) the nature of the statutory scheme;

c) the importance of the decision to the individual affected;

d) the legitimate expectation of the individual challenging the decision; and

e) the choices of procedures made by the agency.

a) Nature of decision and procedures

[43] As was said by the Supreme Court in *Baker* at paragraph 23, the more the process provided for, the function of the decision-maker, the nature of the decision made and the determination that must be made to reach a decision resemble judicial decision making, the more likely it is that the procedural protection will be extensive.

[44] In the case at bar, we are at the very heart of typically routine administrative decisions where what is essentially at issue is the ascertainment of certain objective facts pertaining to the criminal conviction in Canada of foreign nationals. We are as far removed as we can possibly be from a judicial decision making process. It is precisely because the decision to be made in respect of serious or simple criminality in Canada of a foreign national is straightforward and fact-driven that, according to the manual, the responsibility for taking it has been assigned to the Minister's delegate (ENF 6, paragraph 3). The decision is so much a matter of routine verifications that when dealing with the onus of proof, the Manual explains that the onus is either reasonable grounds or balance of probabilities with respect to all grounds of inadmissibility except those of serious or simple criminality, for which the question of onus is not even mentioned (ENF 1).

[45] These are purely administrative decisions which attract a minimal duty of fairness.

b) Nature of statutory scheme and

c) Importance of the decision

[46] Contrary to the cases decided so far (*Correia, Leung, Hernandez*) in which the foreign national had the opportunity to challenge both the immigration officer's report and the Minister's delegate's decision before the Immigration Division, in this case the foreign national's only opportunity to challenge the immigration officer's report is when he appears before the Minister's delegate. Given that the Minister's delegate both confirms the immigration officer's report and makes the removal order, his decision is determinative of inadmissibility and the foreign national's only opportunity to challenge the immigration officer's report is when he appears before the Minister's delegate. Considering the impact of the decision on his stay in Canada and the fact that this is really his last chance (apart from judicial review) to prevent a finding of inadmissibility from being made against him, this factor points to a higher duty of fairness than that observed in cases where the report is referred to the Immigration Division.

[47] That being said, however, and even though the decision is ultimately important to the foreign national, the fact is that he came to Canada under a student permit renewable, we were told, every six months, that he was permitted as a matter of privilege to stay in Canada for a certain duration and subject to certain conditions, never had and could never have had any expectation that he would be allowed to remain in Canada and has breached a major condition of his right of entry. The decision to deport was totally predictable in his circumstances and unless he is in a position to question the objective fact of his criminal conviction or put himself within the limited exceptions open to him (pardon etc.) which are themselves readily and objectively ascertainable, the decision

will stand. There is no need, here, for a long or complex hearing. This factor points to a lower duty of fairness.

[48] Furthermore, even though the issue of inadmissibility has been determined, *a* foreign national can still seek a stay of the removal order on H&C considerations (section 233 of the Regulations) or in the course of a Pre-Removal Risk Assessment (section 232 of the Regulations). He is therefore not out of the country yet, and not out of remedies. This factor also points to a lower degree of fairness.

d) Legitimate expectations of the person challenging the decision

[49] The Department Procedures Manual has set out rules that decision-makers are expected to follow. Chapter ENF 6, at page 10 of the October 31, 2005 version, contemplates the making of notes and the completion of forms in as much details as possible; the need to inform the persons concerned of the nature of the allegations made against them, to give them a reasonable opportunity to respond and to note and take into account any representations made; and the conduct of interviews in the presence of the persons concerned or, in certain circumstances, by telephone.

[50] A claimant has every reason to believe that these rules will be followed. These rules, however, are those found at the lower end on the continuum of procedural protection.

e) The choice of procedure by the decision-maker

[51] The statute leaves to the decision-maker the ability to choose its own procedure. That choice, according to *Baker* at paragraph 27, is to be respected.

[52] In the end, I respectfully disagree with Lemieux J's conclusion, at paragraph 66, that "a relatively high degree of participatory rights is warranted". The review of the five *Baker* factors lead, quite to the contrary, to the conclusion that a relatively low degree of participatory rights is warranted. I am satisfied that the following participatory rights meet the requirements of the duty of fairness:

- provide a copy of the immigration officer's report to the person
- inform the person of the allegation(s) made in the immigration officer's report, of the case to be met and of the nature and possible consequences of the decision to be made
- conduct an interview in the presence of the person, be it live, by videoconference or by telephone
- give the person an opportunity to present evidence relevant to the case and to express his point of view

[53] I take issue with the Judge's finding that notice must be given that the person has the right to legal counsel.

[54] Absent a Charter right to be notified of a right to counsel on arrest or detention (section 10(*b*) of the *Charter*), I have found no authority for the proposition that a person is entitled as of right to be notified before a hearing that he or she has either a statutory right or a duty-of-fairness right to counsel. Once a person is sufficiently informed of the object and possible effects of a

forthcoming hearing ─ absent sufficient notice, the decision rendered will in all likelihood be set aside ─ the decision-maker is under no duty to go further.

[55] It may be sound practice in certain cases to give notice in advance that counsel may be retained, but there is no duty to do so unless the statute requires it. The responsibility lies with the person to seek leave from the decision-maker to be accompanied by counsel or to come at the hearing accompanied by counsel. If leave is denied or if counsel is not allowed to be present, that could become an issue in a judicial review of the decision ultimately rendered. Should the reviewing court be of the view that the duty of fairness included in the circumstances of the case the right to counsel, the decision might well be set aside.

[56] I note that in *Ha v. Canada* (F.C.A.), [2004] 3 F.C. 195, where this Court recently examined the right to counsel in a duty-of-fairness context, the appellants had informed the visa officer that they would be accompanied by a counsel who would only observe and take notes. The visa officer did not allow counsel to attend the interview. In the circumstances the Court found a breach of the duty of fairness and went on to state at paragraph 65:

> … this Court is not saying that the duty of fairness will always require the attendance of counsel. Visa officers are required to consider the particular circumstances of each case.

Ha is no authority for the proposition that the visa officer had the duty to inform the persons that they had a right to have a counsel present. The initiative must come from the persons concerned.

[57] It is interesting, here, to observe the evolution throughout the years of the statutory provisions dealing with the right to counsel in inadmissibility hearings.

[58] Up until 1992, there was a duty under section 30 of the former *Immigration Act* to inform the persons concerned of their right to counsel. The Act went as far as providing for legal representation in certain circumstances at the Minister's expense (see section 30 as amended by R.S.C. 1985, c. 28 (4th Supp), s.9).

[59] In 1992, section 30 was amended to read as follows:

> 30. Every person with respect to whom an inquiry is to be held shall be informed of the person's right to obtain the services of a barrister or solicitor or other counsel and to be represented by any such counsel at the inquiry and shall be given a reasonable opportunity, if the person so desires, to obtain such counsel at the person's own expense.
>
> (1992, SC c.49, section 19)

[60] In the recent *Immigration and Refugee Protection Act,* the right to be informed of one's right to counsel in inadmissibility matters has disappeared and the right to counsel has been preserved only with respect to hearings before the Immigration Division (see subsection 167(1) of the Act). There is no provision concerning the right to counsel in proceedings before the immigration officer or the Minister's delegate under subsections 44(1) and (2) of the Act.

[61] Since Mr. *Cha* did not seek leave to have counsel present during the interview or to attend accompanied by counsel, I do not have to decide whether in the circumstances of the case the Minister's delegate would have breached the duty of fairness had he refused to let counsel in.

[62] That being said, however, I agree with Lemieux J. that in the case at bar the original failure to notify Mr. Cha of the purpose of the interview with the immigration officer constituted a breach of a duty of fairness.

[63] The sequence of events is revealing. Mr. Cha was called by Mr. Yelle, the immigration officer, sometime before March 14, 2003 and informed that the purpose of the interview scheduled for March 17, 2003, was to discuss his criminal conviction. Mr. Cha was not informed that his status as a foreign national authorized to be in Canada would be questioned.

[64] On March 17, 2003 Mr. Cha was interviewed by Mr. Yelle. The interview started at 9:05 a.m. and ended at 9:30 a.m. Mr. Yelle immediately prepared an inadmissibility report.

[65] The report was immediately sent to Ms. Perreault, the Minister's delegate. Ms. Perreault interviewed Mr. Cha twenty minutes later. The interview lasted from 9:50 a.m. to 10:30 a.m., at which time Mr. Cha was informed that a deportation order was being issued against him.

[66] In these circumstances it was open to Lemieux J. to find that the absence of a proper notice of the purpose of the first meeting with the immigration officer, amounted to a breach of the duty of fairness.

[67] This is not, however, the end of the matter. Breaches of the duty of fairness do not automatically lead to the setting aside of an administrative decision. (see *Mobil Oil Canada Ltd. v. Canada Newfoundland Offshore Petroleum Board,* [1994] 1 S.C.R. 202, at 228; *Correia*, supra, at paragraph 36). Mr. Cha was represented by counsel in the Federal Court. In the affidavit he filed in support of his application for judicial review, he recognized that he had been convicted because he "was over the legal limit for alcohol" (Appeal Book p. 13). He or his counsel did not suggest that he had been pardoned, that the offence fell under the *Young Offenders Act* or that he was under 18 years of age or unable to appreciate the nature of the proceeding. As a new hearing before a different Minister's delegate could only result, again, in the issuance of a deportation order, to order a new hearing would be an exercise in futility.

DISPOSITION

[68] I would allow the appeal, set aside the decision of the Federal Court, dismiss the application for judicial review and restore the deportation order issued against Mr. Cha.

"Robert Décary"
J.A.

"I agree
Marc Noël J.A."

"I agree
J.D. Denis Pelletier J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-688-04
STYLE OF CAUSE:	MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS v. JUNG WOO CHA
PLACE OF HEARING:	MONTREAL, QUEBEC
DATE OF HEARING:	MARCH 2, 2006
REASONS FOR JUDGMENT BY:	DÉCARY J.A.
CONCURRED IN BY:	NOËL AND PELLETIER JJ.A.
DATED:	MARCH 29, 2006

APPEARANCES:

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SELF REPRESENTED – DID NOT APPEAR	FOR THE RESPONDENT

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