Date: 20061019

Docket: A-464-05

Citation: 2006 FCA 340

CORAM: **LINDEN J.A.**
NADON J.A.
MALONE J.A.

BETWEEN:

SUGENDRAN BALATHAVARAJAN

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard at Toronto, Ontario, on October 18, 2006.

Judgment delivered at Toronto, Ontario, on October 19, 2006.

REASONS FOR JUDGMENT BY: LINDEN J.A.

CONCURRED IN BY: NADON J.A.
MALONE J.A.

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REASONS FOR JUDGMENT

LINDEN J.A.

[1] The appellant, a Convention refugee since 1991, and a permanent resident since 1999, was found to be criminally inadmissible in Canada in 2001 pursuant to paragraph 27(1)(*d*) of the *Immigration Act*, R.S.C. 1985, c. I-2 [repealed] (the "former Act") because he was convicted of possession of an instrument used for breaking and entering contrary to subsection 351(1) of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46. The appellant is a citizen of Sri Lanka. The Deportation Order issued in December 2001 does not indicate a deportation destination. (The

appellant had also been convicted of nine other offences, involving three groups of convictions in 1997 and a further one in 1999.)

[2] The appellant appealed the deportation order to the Immigration Appeal Division (the "IAD") of the Immigration and Refugee Board on the basis that humanitarian and compassionate considerations warranted special relief in light of all the circumstances of the case.

[3] The IAD considered whether the appellant should be granted discretionary relief from the deportation order pursuant to subsection 67(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("IRPA"). In examining whether special relief was warranted, the IAD looked at the factors listed in *Ribic v. Canada (Minister of Employment and Immigration)*, [1985] I.A.B.D. No. 4 (QL), which were confirmed by the Supreme Court of Canada in *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, at para. 77. They are: (i) the seriousness of the offence or offences leading to the deportation; (ii) the possibility of rehabilitation; (iii) the length of time spent in Canada and the degree to which the appellant is established; (iv) family in Canada and the dislocation to that family that deportation would cause; (v) the family and community support available to the appellant; and (vi) the degree of hardship that would be caused to the appellant by his return to his country of nationality.

[4] The IAD denied the appeal. In doing so, it refused to consider the potential hardship the appellant might face if he were removed to Sri Lanka, finding that Sri Lanka was not a "likely

country of removal", given section 115 of IRPA. The Federal Court Judge upheld the IAD's decision but certified the following question:

> Is a Deportation Order, with respect to a permanent resident who has been declared to be a convention refugee, which specifies as sole country of citizenship the country which he fled as a refugee, sufficient without more to establish that country as the likely country of removal so that *Chieu* applies and the IAD is required to consider hardship to the Applicant in that country on an appeal from a Deportation Order?

The Certified Question

[5] The court must decide whether the IAD must consider hardship to a permanent resident who has been issued a deportation order, and who has been declared a Convention refugee, where the deportation order does not specify the country of removal, and where it is uncertain what that country might be. This is a question of law, to be reviewed on a correctness standard: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, at para. 8.

[6] In *Chieu, supra*, the Supreme Court of Canada confirmed, at para.33, that potential foreign hardship can be taken into account by the IAD in deciding whether to uphold a deportation order. Iacobucci J. stated, at para. 32, that the IAD should be able to consider realistic possibilities, such as conditions in the likely country of removal, even where the ultimate country of removal is not known with absolute certainty at the time the appeal is heard.

[7] However, Iacobucci J. also stated, at para.58, that the likely country of removal may not be ascertainable for Convention refugees because section 53 of the former *Immigration Act* (now, section 115 of the IRPA) prohibits a Convention refugee's removal "to a country where the person's life or freedom would be threatened for reasons of race, religion, nationality, membership in a

particular social group or political opinion", unless the individual falls within a particular enumerated class and the Minister is of the opinion that the individual constitutes a danger to the public in Canada, or a danger to the security of Canada. The Court said, "In such cases, there will be no likely country of removal at the time of the appeal and the IAD cannot therefore consider foreign hardship." Consequently, if the IAD cannot ascertain a "likely country of removal", there is no need to consider this issue. When and if a destination country is decided upon, the hardship issue may then be addressed in the appropriate forum.

[8] The appellant points to the decision in *Soriano v. Canada (Minister of Citizenship and Immigration)* (2003), 29 Imm. L.R. (3d) 71 (F.C.T.D.), to contend that the IAD has a duty to consider potential hardship in this case. In *Soriano*, a Convention refugee was the subject of an unexecutable deportation order to El Salvador, the country from which he fled. Campbell J. held, at para. 8, that the IAD erred when it failed to take potential hardship to the applicant into consideration given that the deportation order provided El Salvador was the country of deportation.

[9] *Soriano, supra*, can be distinguished from the case at bar. In *Soriano*, the country of deportation was known. Here, the Minister had not specified the country of deportation, and at the time of the IAD appeal had not taken the necessary steps under subsection 115(2) of the IRPA to remove the appellant. It was, at the time of the IAD appeal, not only unlikely but legally improper to remove the appellant to Sri Lanka. For the IAD to consider potential hardship the appellant might face if deported to Sri Lanka would have been a hypothetical and speculative exercise. This it need not do.

[10] The certified question is, therefore, answered in the negative.

Other Allegations of Error

[11] The appellant further argues that the Judge erred when she affirmed the IAD in its finding that he was a gang member, because it relied on unidentified informant evidence, which was incapable of being tested. It is argued that this was a denial of natural justice. This is in error. These are merely questions of fact and this Court will defer to the Federal Court Judge's decision in the absence of palpable and overriding error: *Housen, supra*, at para. 36.

[12] Section 175 of the IRPA permits the IAD to receive and base a decision on evidence adduced in immigration proceedings that it considers to be credible and trustworthy in the circumstances. The evidence can sometime be tenuous and may include evidence of informants: *Canada (Minister of Citizenship and Immigration) v. Thanabalasingham*, [2004] 3 F.C.R. 523 (T.D.), at para.107; aff'd, [2004] 3 F.C.R. 572 (C.A.). It is up to the IAD, not the Court to decide the weight to be given to the evidence.

[13] The Judge reviewed the evidence presented to the IAD at the discretionary hearing and found, at para. 17, that there was a sufficient evidentiary basis to conclude as the IAD did, the fact of gang membership. The Judge was satisfied that the IAD, in arriving at its decision, considered the contextual circumstances of the appellant's criminal past, including whether it involved gang activity, for the limited purpose of examining the seriousness of the appellant's criminal offences and the degree of alleged rehabilitation. It did not consider the appellant's gang membership for the

basis of a further finding of inadmissibility. The Judge further stated, at para.18, that the "sources relied on [by the IAD] were legitimate."

[14] The appellant has, therefore, failed to demonstrate that the Judge committed a palpable and overriding error in upholding the IAD's decision.

[15] This appeal should therefore be dismissed.

"A.M. Linden"

J.A.

"I agree
M. Nadon J.A."

"I agree
B. Malone J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-464-05
(APPEAL FROM THE ORDER OF SIMPSON J. DATED SEPTEMBER 7, 2005, NO. IMM-3634-04)	
STYLE OF CAUSE:	SUGENDRAN BALATHAVARAJAN v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	October 18, 2006
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DATED:	October 19, 2006

APPEARANCES:

Rocco Galati	FOR THE APPELLANT
Jamie Todd Ladan Shahrooz	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Galati, Rodrigues & Associates Toronto, Ontario	FOR THE APPELLANT
John H.Sims,Q.C. Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT