Cha v. Canada (Minister of Citizenship and Immigration), 2004 FC 1507 (CanLII)

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IMM-2347-03

2004 FC 1507

Jung Woo Cha (*Applicant*)

v.

Minister of Citizenship and Immigration (*Respondent*)

Indexed as: Cha v. Canada (Minister of Citizenship and Immigration) (F.C.)

Federal Court, Lemieux J.--Montréal, June 30; Ottawa, October 29, 2004.

Citizenship and Immigration -- Exclusion and Removal -- Removal of Visitors -- Applicant citizen of South Korea in Canada on student visa since 1996 -- Convicted in 2001 of driving while over permissible blood alcohol limit -- Following interview, immigration officer preparing report to Minister under Immigration and Refugee Protection Act, s. 44(1) stating applicant inadmissible on grounds of criminality pursuant to Act, s. 36(2)(a) -- Immediately thereafter interviewed by Minister's delegate who found report well-founded, issued deportation order pursuant to Act, s. 44(2) -- Whether Minister's delegate fettered discretion by automatically issuing deportation order -- Context, object, purpose, legislative history of Act considered -- Minister's delegate under obligation to consider particular circumstances of applicant, existence of mitigating circumstances rendering deportation unreasonable -- Here, indictable offence minor violation, deportation order not furthering public interest -- Whether procedural fairness breached -- Relatively high degree of participatory rights warranted at deportation-order-making stage -- Applicant's right to know interview process potentially leading to deportation, right to legal counsel, right to reasonable opportunity to present evidence, breached -- Application allowed.

Construction of Statutes -- Applicant foreign national ordered deported pursuant to Immigration and Refugee Protection Act, s. 44 on grounds inadmissible as result of criminal conviction (Act, s. 36(2)(a)) -- Whether Minister's delegate fettered discretion by automatically issuing deportation order -- Approach to statutory interpretation set out by S.C.C. in Rizzo & Rizzo Shoes Ltd. (Re), reiterated in Glykis v. Hydro-Québec, applied -- Context, object, purpose, legislative history of Act considered -- Term "may" in Act, s. 44 permissive, not mandatory -- Minister's delegate under obligation to consider particular circumstances of applicant, existence of mitigating circumstances rendering deportation unreasonable -- Here, indictable offence minor violation, deportation order not furthering public interest.

Administrative Law -- Procedural fairness -- Applicant foreign national called for interview with immigration officer in relation to 2001 conviction -- Officer preparing report to Minister under Immigration and Refugee

Protection Act, s. 44(1) stating applicant inadmissible on grounds of criminality pursuant to Act, s. 36(2)(a) -- Report found to be well-founded by Minister's delegate, deportation order issued pursuant to Act, s. 44(2) -- Whether procedural fairness breached -- Principles and factors governing procedural fairness, discussed by S.C.C. in Baker v. Canada (Minister of Citizenship and Immigration), Suresh v. Canada (Minister of Citizenship and Immigration) considered, applied -- Purpose of participatory rights within duty of procedural fairness to ensure administrative decisions made using fair, open procedure, appropriate to decision being made -- Relatively high degree of participatory rights warranted at final stage which is making of deportation order -- Finality of determination, consequences of deportation on applicant militating in favour of high degree of participatory rights -- Applicant's right to know interview process potentially leading to deportation, right to legal counsel, right to reasonable opportunity to present evidence, breached.

This was an application for judicial review of a deportation order issued against the applicant by a Minister's delegate on March 17, 2003 pursuant to subsection 44(2) of the *Immigration and Refugee Protection Act*. The applicant, a citizen of South Korea, entered Canada on December 31, 1996 on a student visa. On June 4, 2001, he was convicted of driving while over the permissible blood alcohol limit. Following an interview with the applicant on March 17, 2003, an immigration officer prepared a report to the Minister under subsection 44(1) of the Act stating that the applicant was inadmissible on grounds of criminality pursuant to paragraph 36(2)(*a*) of the Act, having been convicted in Canada of an offence under an Act of Parliament punishable by way of indictment. This report was received by the Minister's delegate, who also interviewed the applicant to determine whether the report was well-founded. The Minister's delegate found that the report was well-founded and served the applicant with a deportation order pursuant to subsection 44(2) of the Act. The applicant sought judicial review of that order. He argued that (1) the Minister's delegate fettered her discretion by issuing a deportation order automatically without looking beyond the fact of the applicant's conviction; and (2) procedural fairness was breached in that he was denied the opportunity to make his case to stay in Canada.

Held, the application should be allowed.

(1) The Court had first to determine the scope of discretion under subsection 44(2). The approach to statutory interpretation set out by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*, and reiterated in *Glykis v. Hydro-Québec*, was applied, i.e. 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. Considering the context, object, and purpose of the Act, as well as the legislative history from the *Immigration Act, 1976*, as amended to date, the term "may" in section 44 (an officer may prepare a report to the Minister (44(1)); the Minister may make a removal order (44(2)) was permissive, not mandatory. 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 that would make it unreasonable to deport him. This discretion should be used in cases such as the one at bar, where a foreign national has committed a minor violation that technically qualifies as an indictable offence and in respect of which the automatic issuance of a deportation order would not further the public interest.

(2) The Court reviewed some of the principles and factors governing the content of the duty of fairness and procedural fairness discussed by the Supreme Court in *Baker v. Canada (Minister of Citizenship and Immigration)* and *Suresh v. Canada (Minister of Citizenship and Immigration)*. Clearly the content of the duty of fairness is flexible and variable and must be tailored to the particular circumstances of each case, and "the notion that the purpose of participatory rights [in this case the applicant's right to make his case to stay in Canada] contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker". In these circumstances, which did not involve a point of entry exclusion, a relatively high degree of participatory rights was warranted at the final stage which was the making of a deportation order by the Minister's delegate. Factors militating in favour of a high degree of participatory rights included the finality of the determination and the severe consequences of deportation on an individual like the applicant. The applicant's right to know that the interview process could lead to a deportation order was breached, as was his right to have legal counsel present during the interview and to have a reasonable opportunity to present evidence.

statutes and regulations judicially

considered

Criminal Code, R.S.C., 1985, c. C-46 , s. 253 (as am. by R.S.C., 1985 (4th Supp.), c. 32, s. 59).

Immigration Act, R.S.C., 1985, c. I-2 , s. 27(3) (as am. by S.C. 1992, c. 49, s. 16).
Immigration Act, 1976, S.C. 1976-77, c. 52.
Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 3(1)(*h*),(*i*), 25, 33, 34, 35, 36, 37, 44, 52, 62.
Immigration and Refugee Protection Regulations, SOR/2002-227 , ss. 226, 228(1)(*a*).
Interpretation Act, R.S.C., 1985, c. I-21 , s. 11.

cases judicially considered

applied:

Rizzo & Rizzo Shoes Ltd. (Re), 1998 CanLII 837 (S.C.C.), [1998] 1 S.C.R. 27; (1998), 36 O.R. (3d) 418; 154 D.L.R. (4th) 193; 50 C.B.R. (3d) 163; 33 C.C.E.L. (2d) 173; 221 N.R. 241; 106 O.A.C. 1; *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (S.C.C.), [1999] 2 S.C.R. 817; (1999), 174 D.L.R. (4th) 193; 14 Admin. L.R. (3d) 173; 1 Imm. L.R. (3d) 1; 243 N.R. 22; *Glykis v. Hydro-Québec*, 2004 SCC 60 (CanLII), [2004] 3 S.C.R. 285; (2004), 244 D.L.R. (4th) 277; 325 N.R. 369; 2004 SCC 60; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 (CanLII), [2002] 1 S.C.R. 3; (2002), 208 D.L.R. (4th) 1; 37 Admin. L.R. (3d) 152; 90 C.R.R. (2d) 1; 18 Imm. L.R. (3d) 1; 281 N.R. 1; 2002 SCC 1.

distinguished:

Correia v. Canada (Minister of Citizenship and Immigration) 2004 FC 782 (CanLII), (2004), 253 F.T.R. 153; 36 Imm. L.R. (3d) 139; 2004 FC 782; *Dehghani v. Canada (Minister of Employment and Immigration)*, 1993 CanLII 128 (S.C.C.), [1993] 1 S.C.R. 1053; (1993), 101 D.L.R. (4th) 654; 10 Admin. L.R. (2d) 1; 20 C.R. (4th) 34; 14 C.R.R. (2d) 1; 18 Imm. L.R. (2d) 245; 150 N.R. 241; *Kindler v. MacDonald*, reflex, [1987] 3 F.C. 34; (1987), 41 D.L.R. (4th) 78; 26 Admin. L.R. (2d) 186; 3 Imm. L.R. (2d) 38; 80 N.R. 388 (C.A.); *Poonawalla v. Canada (Minister of Citizenship and Immigration)* 2004 FC 371 (CanLII), (2004), 248 F.T.R. 206; 2004 FC 371.

referred to:

Cardinal et al. v. Director of Kent Institution, 1985 CanLII 23 (S.C.C.), [1985] 2 S.C.R. 643; (1985), 24 D.L.R. (4th) 44; [1986] 1 W.W.R. 577; 69 B.C.L.R. 255; 16 Admin. L.R. 233; 23 C.C.C. (3d) 118; 49 C.R. (3d) 35; 63 N.R. 353; *Qi v. Canada (Minister of Citizenship and Immigration)* (1995), 33 Imm. L.R. (2d) 57 (F.C.T.D.); *Babcock v. Canada (Minister of Citizenship and Immigration)*, IMM-4504-02, order dated 8/9/03.

authors cited

Sullivan, Ruth. *Sullivan and Driedger on the Construction of Statutes*, 4th ed. Toronto: Butterworths, 2002.

APPLICATION for judicial review of a deportation order issued against the applicant by a Minister's delegate on March 17, 2003 pursuant to subsection 44(2) of the *Immigration and Refugee Protection Act* on the basis that the applicant was a foreign national who is inadmissible under paragraph 36(2)(*a*) of the Act on grounds of criminality. Application allowed.

appearances:

Stewart Istvanffy for applicant.

Caroline Cloutier for respondent.

solicitors of record:

Stewart Istvanffy, Montréal, for applicant.

Deputy Attorney General of Canada for respondent.

The following are the reasons for order rendered in English by

Lemieux J.:

LEGISLATIVE SCHEME AND FACTS

[1]In this judicial review application, Jung Woo Cha (the applicant), a foreign national who was studying in Canada on a student visa, challenges a deportation order issued by a Minister's delegate on March 17, 2003, pursuant to subsection 44(2) of the *Immigration and Refugee Protection Act* [S.C. 2001, c. 27] (the Act).

[2]The Minister's delegate considered well-founded a report which had been transmitted on March 17, 2003, to the Minister by an immigration officer who was of the opinion the applicant was a foreign national in Canada inadmissible under paragraph 36(2)(*a*) of the Act on grounds of criminality, having been found guilty of drunk driving in 2001.

[3]I set out the legislative scheme dealing with inadmissibility and removal relevant to the case of a foreign national which the applicant is. The Act makes substantial distinctions between a permanent resident and a foreign national. Division 5 of the Act is entitled "Loss of Status and Removal". Section 44 is its opening provision headed "Report on Inadmissibility". Subsections 44(1) and (2) read as follows:

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. [Emphasis mine.]

[4]It is clear from this provision if the Minister is of the opinion a subsection 44(1) inadmissibility report is well-founded, the Minister is authorized to refer that report to the Immigration Division for a hearing except in the case of a permanent resident which is not relevant to this case and except in circumstances prescribed under the *Immigration and Refugee Protection Regulations* [SOR/2002-227] (the Regulations) in the case of a foreign national where the Minister can make the removal order.

[5]Paragraph 228(1)(*a*) of the Regulations is the applicable provision in prescribing the circumstances under subsection 44(2) of the Act the Minister may make a removal order when dealing with foreign nationals and reads:

228. (1) For the purposes of subsection 44(2) of the Act, and subject to subsection (3), 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; [Emphasis mine.]

[6]It is clear from this provision if a subsection 44(1) report in respect of a foreign national alleges inadmissibility only on criminality, and the Minister's delegate considers it well-founded, any removal order made must be a deportation order.

[7]Inadmissibility is dealt with under Division 4 of the Act. Section 33 is its opening provision and reads:

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. [Emphasis mine.]

[8]Section 34 of the Act deals with security, section 35 concerns human or international rights violations, subsection 36(1) relates to serious criminality by either a permanent resident or a foreign national while subsection 36(2) concerns only a foreign national and provides that such a person is inadmissible on grounds of criminality for having been convicted in Canada of an offence under an Act of Parliament punishable by way of indictment, and section 37 has as its subject matter organized crime.

[9]Paragraph 36(2)(*a*) of the Act reads:

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;

[10]The marginal note for section 52 of the Act reads "No return without prescribed authorization", and the section states that "[I]f a removal order has been enforced, the foreign national shall not return to Canada, unless authorized by an officer or in other prescribed circumstances."

[11]Section 226 of the Regulations states a deportation order obliges the foreign national to obtain a written authorization in order to return to Canada at any time after the deportation order was enforced.

[12]For completeness, I note under section 62 of the Act a foreign national of the applicant's status in Canada cannot appeal a removal order to the Immigration Appeal Division which has power to stay a deportation order after taking into account humanitarian and compassionate [H & C] considerations.

[13]Finally, I set out section 25 of the Act, for which the marginal note reads "Humanitarian and compassionate considerations":

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 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.

(2) The Minister may not grant permanent resident status to a foreign national referred to in subsection 9(1) if the foreign national does not meet the province's selection criteria applicable to that foreign national.

FACTS

[14]The applicant was born in the Republic of South Korea on December 12, 1977, and is a citizen of that country.

[15]On December 31, 1996, he entered Canada at Vancouver and was issued a student authorization valid until September 30, 1997. His student visa has been continuously renewed since then.

[16]While on his student visa, he was, on June 4, 2001, convicted under section 253 [as am. by R.S.C., 1985 (4th Supp.), c. 32, s. 59] of the *Criminal Code* [R.S.C., 1985, c. C-46] for an incident that happened on April 16, 2000, in the City of Ottawa, when he was charged with infractions of paragraphs 253(*a*) and (*b*) of the *Criminal Code*. No one was hurt and there was no accident but he was convicted of driving while over the permissible alcohol limit. He was fined $1,150 and his licence was suspended.

[17]When he moved to Ottawa, he started in Commerce at Carleton University but discontinued those studies. His most recent studies were at Algonquin College as an automotive power technician.

[18]In his affidavit, sworn June 4, 2003, he states he had one semester left to earn his diploma in August 2003. The June 4, 2001 conviction is his only one.

[19]On March 17, 2003, the following events occurred sequentially:

(a) at 9:05 a.m., he was interviewed at the offices of Citizenship and Immigration in Ottawa by immigration officer Marc Yelle, whose recorded notes dated March 20, 2003, were attested to by him as being correct. One of the matters he discussed with the applicant was his criminal conviction;

(b) After the interview, Marc Yelle immediately prepared a report to the Minister under subsection 44(1) of the Act stating the applicant was a foreign national who has been authorized to enter Canada and who, in his opinion, is inadmissible pursuant to paragraph 36(2)(*a*) of the Act in that there are reasonable grounds to believe he is a foreign national and is inadmissible on grounds of criminality for having been convicted in Canada of an offence under an Act of Parliament punishable by way of indictment.

(c) In his notes to file, he stated the interview ended at 9:30 a.m., and his recommendation was a removal order be issued for the following reasons:

-- Was convicted of operating a motor vehicle while impaired.

-- Has not obtained any educational Diplomas or degrees in the past 6 years from any recognized universities or colleges.

-- Has a history of not completing any post-secondary courses.

(d) At the bottom of Mr. Yelle's notes, in handwriting, the following is found:

17 MAR 03

Reviewed officer's notes

I concur with recommendation

L. Perreault

[20]Lisa Perreault (now MacIntyre), was the Minister's delegate in this matter. She received Marc Yelle's subsection 44(1) inadmissibility report. She interviewed the applicant by asking questions following a "suggested A-44 proceeding script". This form states the applicant was interviewed by her on March 17, 2003, commencing at 9:50 a.m. The script is in typewritten form with appropriate blanks which the interviewer is to fill in.

[21]I summarize the script as follows:

(1) The Minister's delegate identifies herself and states she has been presented with a report under subsection 44(1) of the Act concerning Jung Woo Cha and asks whether the applicant is Jung Woo Cha. Lisa Perreault writes in "yes".

(2) The next paragraph states that "the purpose of this interview is for me to determine whether this report is well founded. If I determine 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 will require you to leave Canada immediately or as soon as reasonably practicable. Do you understand?" (Emphasis mine.) Lisa Perreault writes "yes".

(3) The next paragraph reads "The type of removal order I would issue to you is a deportation order, in accordance with paragraph 228 of the Immigration and Refugee Protection Regulations. Do you understand?" Lisa Perreault writes "yes". In brackets are contained the following typed words "(proceed to explain the effects and

consequences of the removal order in question, and then ask person concerned if he/she understands)". Lisa Perreault writes "done".

(4) Paragraph 4 of the script reads: "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 conviction in CDA DWI [driving while impaired] (read from report). Do you understand?" Lisa Perreault writes "yes".

(5) The next paragraph reads: "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 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?" Lisa Perreault writes "yes".

(6) In brackets the following is typed in the script: "(conduct your questioning of the person concerned, in relation to the allegations in questions [*sic*]. 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)." Lisa Perreault wrote in "read over report with PC confirmed info. No evidence provided".

(7) The following is next and is typewritten: "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" she wrote in, "well founded".

(8) "I am satisfied that you are" she wrote in "described" as set out in the report. "I therefore" she wrote in "issue this Dep Order". "Do you understand?" Lisa Perreault writes "yes".

(9) The next typed paragraph reads: "A [*sic*] previously explained to you, as a consequence of this decision you will have to leave CDA forthwith. Do you understand?" Lisa Perreault writes: "yes".

(10) Below that paragraph in brackets the following is typed in: "(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)". Lisa Perreault writes "Done, yes to PRRA will take papers with him".

[22]The script indicates the interview was concluded at 10:30 a.m. The script is signed by Lisa Perreault. Under the heading "Remarks (if any)" Lisa Perreault wrote the following:

Unable to satisfy MD that he should remain in CDA. Does not appear to be serious about his studies. Has been in CDA six years. No degree. Moves around. No H & C's. [Signed Lisa Perreault]

[23]The applicant filed an affidavit in support of his judicial review application. He was not cross-examined. He makes the following points:

(1) In paragraph 9, he was called into Immigration Canada in Ottawa on March 17, 2003, but states did not know what the interview would be about.

(2) In paragraph 10, he was not informed of his right to a lawyer and was not asked anything about himself or his circumstances in Canada.

(3) In paragraph 11, he met Marc Yelle who presented him a report he had been found guilty of a criminal offence and also presented him with a copy of the deportation order.

(4) In paragraph 12, he was not asked at any time to make any representations or to explain anything; everything seemed to be completely automatic and it did not really matter what he would say.

(5) In the next paragraph, the only questions he was asked were about his birth date, when he first entered Canada and "fairly routine questions like that".

(6) In paragraph 14, "they also asked me to explain a little about my school history since I came to Canada and I explained to them what institutions I have been at and what I had studied".

(7) In paragraph 15, before he went to the interview, he called to ask why he was being called; he was told it was about "my drunk driving conviction but I was not told anything about the possibility of a deportation order".

(8) In the next paragraph he had no idea what was happening to him when he went for the interview; he was left waiting for 30 minutes while Mr. Yelle talked "with some boss"; he did not know what "the whole thing was about".

(9) At paragraph 17 "I was then told that they were giving me a deportation order and that I was barred from Canada for life. This was a great shock to me, no one had said anything about such a possibility".

(10) He concludes by stating he has many people who are prepared to testify to his good character and states "I do not think I have been treated fairly".

[24]Marc Yelle filed an affidavit. He was not cross-examined. He confirms he interviewed the applicant on March 17, 2003 and issued a report against him. During the interview, he took notes which are included in the file as "notes to file" dated March 20, 2003. The notes represent an accurate and complete account of the interview that was held that day. He confirmed his recommendation was based on statements during the interview.

[25]At paragraph 5 of his affidavit, he states that following the interview "I issued a report against the Applicant for the reason indicated in these notes". In the next paragraph he writes that subsequent to the issuance of the report, the applicant met with Lisa Perreault to determine if the report was well-founded. He was present during this second interview and confirms the "suggested A-44 proceedings script" signed by officer Perreault accurately reflected the conduct of the interview and that she explained the procedure to the applicant step by step.

[26]He then commented briefly on the applicant's affidavit. He states on March 14, 2003, when he called the applicant to reschedule the interview, he recalled informing him the purpose of the interview was to discuss his criminal conviction. He confirms he never informed the applicant he had a right to a lawyer because "he was never arrested under the *Immigration Refugee Protection Act*". Contrary to paragraph 11 of the applicant's affidavit, it was officer Perreault-MacIntyre and not himself who presented him with the deportation order and finally that contrary to paragraph 12 of the applicant's affidavit, the decision to write the report and to issue the deportation order against him was not taken automatically. He states "as indicated in our notes, the Applicant had an opportunity to make representations and explain his situation in Canada".

ANALYSIS

(1) The position of the parties

[27]Counsel for the applicant argues two central points arise in this proceeding: (1) the scope of the discretion the Minister's delegate enjoys under subsection 44(2) of the Act when to issue a deportation order; and (2) breaches of procedural fairness.

[28]The Minister's delegate, he argues, must look beyond the fact of the conviction and the identity of the foreign national who was convicted. The Minister's delegate must examine all of the facts and exercise judgment before issuing a deportation order that could have severe consequences such as, in this case, disrupting a student's study and career plans. Parliamentary intent as to the Minister's delegate's discretion is evidenced by the use of the words "may make a removal order" as found in that subsection. He argues, in this case, the deportation order was made automatically as the result of his conviction and consequently the Minister's delegate fettered her discretion.

[29]In terms of procedural fairness, counsel for the applicant argues he was not warned the interview could result in a deportation order nor was he told he could bring legal counsel to the interview. In the circumstances, he argued the applicant was unfairly denied the opportunity to make his case to stay in Canada.

[30]Counsel for the respondent filed an initial then a supplementary memorandum.

[31]In her initial memorandum filed on July 7, 2003, opposing the grant of leave, counsel for the respondent, after citing certain objectives in the Act, namely those at paragraphs 3(1)(*h*) and (*i*), and after canvassing the statutory and regulatory scheme, stated it was clear from the interview notes the decision to write the report and to issue a deportation order against the applicant "was made after a thorough assessment of the facts relevant to the applicant's case" and it was particularly apparent from the notes of the Minister's delegate the purpose of the interview was explained to the applicant and he fully understood the case against him. The purposes and nature of the report and the consequences of a deportation order were also explained to him. She added the Minister's delegate's notes indicated the applicant failed to submit any evidence and agreed with the facts found in the report. She stated contrary to the applicant's submissions, it was obvious from the evidence provided the deportation order was not issued to the applicant as an automatic result of his criminal conviction but in fact, Marc Yelle considered the particular circumstances of the applicant but concluded there were no mitigating circumstances that would justify not issuing a report against the applicant. She argued these circumstances were later assessed by the Minister's delegate who also concluded they were insufficient to justify the non-issuance of a deportation order.

[32]She argued since the particular circumstances of the applicant were considered, it was not necessary for this Court to answer the question raised by the applicant, namely, whether an immigration officer has the duty to look at all of the facts of the case and exercise some judgment before issuing a deportation order. She argued no such issue arose in the case at bar.

[33]In terms of procedural fairness, the respondent submitted there was no right to counsel at this interview which was an administrative review held with respect to the applicant to simply review his immigration status and the courts had held consistently a person does not have the right to counsel in such a process.

[34]She submitted in her initial memorandum the standard of review was patent unreasonableness.

[35]After leave was granted, counsel for the respondent filed a supplementary memorandum dated June 9, 2004. The respondent quoted extensively from Justice Phelan's recent decision in *Correia v. Canada (Minister of Citizenship and Immigration)* (2004), 253 F.T.R. 153 (F.C.), particularly from paragraphs 22, 23, 25, 27, 28, 29 and 30, which read:

For purposes of the subsection 44(1) report, that report is restricted to the "relevant facts". In the case of serious criminality those facts relate to the fact of the conviction.

The nature of the inquiry does not involve issues of humanitarian and compassionate matters, rehabilitation or other such factors. It is a very limited inquiry being essentially a confirmation that the conviction was in fact handed down. After that, the process for removal is engaged.

. . .

While the Federal Court of Appeal's decision in *Kindler v. MacDonald*, reflex, [1987] 3 F.C. 34 is of somewhat less relevance given the new provision of the Act, the basic analysis of the process remains relevant in the context of serious criminality. As the Federal Court of Appeal observed, the inquiry is purely factual and administrative in nature.

. . .

Since inadmissibility for serious criminality under subsection 44(1) is based on the conviction and sentence itself, the Officer's opinion is likewise limited to securing knowledge that the conviction and sentence were rendered. The "relevant facts" for purposes of the report to the Minister or the Delegate is the fact of the conviction and the length of the sentence.

Therefore the Officer had no jurisdiction to consider humanitarian and compassionate issues in issuing his report.

Similarly the Delegate, in determining whether the report is "well-founded" is restricted in his consideration to the

relevant fact of the conviction and of the sentence.

There are no grounds advanced which would justify the Minister or the Delegate not referring the report to the Immigration Division. The exercise of the Minister's discretion does not engage a review of humanitarian and compassionate grounds, as confirmed by the Federal Court of Appeal.

[36]She then argued, in the case at bar, it was clear from both the immigration officer and the Minister's delegate's notes they considered the relevant facts of this case namely the applicant, a foreign national, was convicted of operating a motor vehicle while impaired for which he was convicted in Canada of an offence under an Act of Parliament punishable by way of indictment.

[37]As to the applicant's allegation the immigration officer had a duty to look at all of the facts of the case and exercise some judgment before issuing a deportation order, the respondent submitted it was clear from Justice Phelan's decision in *Correia*, the assessment of the relevant facts does not include an assessment of the humanitarian and compassionate grounds relating to the applicant but rather consists only of the facts of the conviction and the length of the sentence and states, since these facts are admitted by the applicant, the decisions of the immigration officer and the Minister's delegate are clearly well-founded.

[38]In terms of procedural fairness, counsel for the respondent reiterates the position taken in her initial memorandum and emphasizes the applicant had failed to highlight any facts which would have been allegedly ignored by the immigration officer and the Minister's delegate nor any relevant facts which could have been presented to them in order to convince them not to issue the report and the deportation order concluding the prejudice alleged by the applicant was purely speculative in nature. She closed arguing if there was a breach of procedural fairness, the remedy should not be the quashing of the decision because the applicant was unable to suggest any relevant facts that could have been put to the delegate which could have in any way altered the decision to refer the matter to adjudication.

(2) Principles of statutory interpretation

[39]I cite what Justice Iacobucci stated about the proper approach to statutory interpretation in *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (S.C.C.), [1998] 1 S.C.R. 27 [at paragraphs 20-22]:

At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.

Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

. . .

I also rely upon s. 10 of the *Interpretation Act*, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and

spirit".

[40]These principles were recently reiterated by Justice Deschamps in the Supreme Court of Canada's decision of *Glykis v. Hydro-Québec*, 2004 SCC 60 (CanLII), [2004] 3 S.C.R. 285, at paragraph 5:

The approach to statutory interpretation is well-known (*Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 (CanLII), [2002] 2 S.C.R. 559, 2002 SCC 42). 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. This approach to statutory interpretation must also be followed, with necessary adaptations, in interpreting regulations.

(3) The content of the duty of fairness

[41]A large part of this case turns on the content of the duty of fairness which is reviewed by this Court on the standard of correctness.

[42]I refer to the Supreme Court of Canada's decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (S.C.C.), [1999] 2 S.C.R. 817, and that of *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 (CanLII), [2002] 1 S.C.R. 3, for an outline of the principles governing the content of the duty of fairness which applies in this case because the deportation order made is a decision after administrative review that affects "the rights, privileges or interests of an individual" (see *Cardinal et al. v. Director of Kent Institution*, 1985 CanLII 23 (S.C.C.), [1985] 2 S.C.R. 643, at page 653).

[43]It is clear the concept of procedural fairness "`is eminently variable and its content is to be decided in the specific context of each case'. All of the circumstances must be considered in order to determine the content of the duty of procedural fairness" (see paragraph 21 of Justice L'Heureux-Dubé's reasons in *Baker*).

[44]Before she enumerated certain factors affecting the content of the duty of fairness, she emphasized at paragraph 22 of her reasons "that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker".

[45]The Supreme Court of Canada in *Suresh*, summarized the factors affecting the content of the duty of fairness at paragraph 115 of its decision which I cite:

What is required by the duty of fairness--and therefore the principles of fundamental justice--is that the issue at hand be decided in the context of the statute involved and the rights affected: *Baker, supra*, at para. 21; *Knight v. Indian Head School Division No. 19*, 1990 CanLII 138 (S.C.C.), [1990] 1 S.C.R. 653, at p. 682; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, 1990 CanLII 31 (S.C.C.), [1990] 3 S.C.R. 1170, *per* Sopinka J. More specifically, deciding what procedural protections must be provided involves consideration of the following factors: (1) the nature of the decision made and the procedures followed in making it, that is, "the closeness of the administrative process to the judicial process"; (2) the role of the particular decision within the statutory scheme; (3) the importance of the decision to the individual affected; (4) the legitimate expectations of the person challenging the decision where undertakings were made concerning the procedure to be followed; and (5) the choice of procedure made by the agency itself: *Baker*, *supra*, at paras. 23-27. This is not to say that other factors or considerations may not be involved. This list of factors is non-exhaustive in determining the common law duty of fairness: *Baker, supra*, at para. 28. It must necessarily be so in determining the procedures demanded by the principles of fundamental justice.

[46]In *Suresh*, the Court was dealing with the required procedure under the former *Immigration Act* [R.S.C., 1985, c. I-2] which would enable the Minister to deport Mr. Suresh, who had been recognized a Convention refugee, to Sri Lanka, a place he had established a real possibility he might be tortured if returned there. As such, the *Suresh*, case is not applicable to deportations in general.

[47]However, in that specific context, it is interesting how the Supreme Court of Canada analysed required

participatory rights [*Suresh*, at paragraphs 116-118, and 121-123]:

The nature of the decision to deport bears some resemblance to judicial proceedings. While the decision is of a serious nature and made by an individual on the basis of evaluating and weighing risks, it is also a decision to which discretion must attach. The Minister must evaluate not only the past actions of and present dangers to an individual under her consideration pursuant to s. 53, but also the future behaviour of that individual. We conclude that the nature of the decision militates neither in favour of particularly strong, nor particularly weak, procedural safeguards.

The nature of the statutory scheme suggests the need for strong procedural safeguards. While the procedures set up under s. 40.1 of the *Immigration Act* are extensive and aim to ensure that certificates under that section are issued fairly and allow for meaningful participation by the person involved, there is a disturbing lack of parity between these protections and the lack of protections under s. 53(1)(*b*). In the latter case, there is no provision for a hearing, no requirement of written or oral reasons, no right of appeal--no procedures at all, in fact. As L'Heureux-Dubé J. stated in *Baker*, *supra*, "[g]reater procedural protections . . . will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted" (para. 24). This is particularly so where, as here, Parliament elsewhere in the Act has constructed fair and systematic procedures for similar measures.

The third factor requires us to consider the importance of the right affected. As discussed above, the appellant's interest in remaining in Canada is highly significant, not only because of his status as a Convention refugee, but also because of the risk of torture he may face on return to Sri Lanka as a member of the LTTE. The greater the effect on the life of the individual by the decision, the greater the need for procedural protections to meet the common law duty of fairness and the requirements of fundamental justice under s. 7 of the *Charter*. Deportation from Canada engages serious personal, financial and emotional consequences. It follows that this factor militates in favour of heightened procedural protections under s. 53(1)(*b*). Where, as here, a person subject to a s. 53(1)(*b*) opinion may be subjected to torture, this factor requires even more substantial protections.

. . .

Weighing these factors together with all the circumstances, we are of the opinion that the procedural protections required by s. 7 in this case do not extend to the level of requiring the Minister to conduct a full oral hearing or a complete judicial process. However, they require more than the procedure required by the Act under s. 53(1)(*b*)--that is, none--and they require more than Suresh received.

We find that a person facing deportation to torture under s. 53(1)(*b*) must be informed of the case to be met. Subject to privilege or similar valid reasons for reduced disclosure, such as safeguarding confidential public security documents, this means that the material on which the Minister is basing her decision must be provided to the individual, including memoranda such as Mr. Gautier's recommendation to the Minister. Furthermore, fundamental justice requires that an opportunity be provided to respond to the case presented to the Minister. While the Minister accepted written submissions from the appellant in this case, in the absence of access to the material she was receiving from her staff and on which she based much of her decision, Suresh and his counsel had no knowledge of which factors they specifically needed to address, nor any chance to correct any factual inaccuracies or mischaracterizations. Fundamental justice requires that written submissions be accepted from the subject of the order after the subject has been provided with an opportunity to examine the material being used against him or her. The Minister must then consider these submissions along with the submissions made by the Minister's staff.

Not only must the refugee be informed of the case to be met, the refugee must also be given an opportunity to challenge the information of the Minister where issues as to its validity arise. Thus the refugee should be permitted to present evidence pursuant to s. 19 of the Act showing that his or her continued presence in Canada will not be detrimental to Canada, notwithstanding evidence of association with a terrorist organization. The same applies to the risk of torture on return. Where the Minister is relying on written assurances from a foreign government that a person would not be tortured, the refugee must be given an opportunity to present evidence and make submissions as to the value of such assurances. [Emphasis mine.]

(4) Discussion

(a) The circumstances

[48]For both the purpose of the scope of discretion analysis and the participatory rights analysis, I enumerate the personal and statutory scheme circumstances or factors in this case:

(1) The applicant had been lawfully in Canada for seven years holding a student visa which had been renewed annually.

(2) At the time of the Minister's delegate's decision to issue a deportation order, the applicant was to receive his diploma in August 2003;

(3) While convicted of an indictable offence, he was prosecuted summarily receiving only a fine and a licence suspension;

(4) The incident he was convicted for did not cause any personal or property damage to anyone;

(5) During his lengthy stay in Canada, he only had one conviction;

(6) The Minister's delegate's decision to issue a deportation order against him was a final determination for which he had no right of appeal to the Immigration Appeal Division where, on such appeal, there is the possibility of staying the removal order through a consideration of humanitarian and compassionate circumstances. He could, and did, with leave, seek judicial review of the Minister's delegate's decision;

(7) The only removal order which the Minister's delegate could make in the circumstances was a deportation order;

(8) A deportation order is the most severe of the three removal orders specified under the Act, the two others being an exclusion order and a departure order;

(9) Subsection 226(1) of the Regulations states if a person such as in the case of the applicant where a deportation order was enforced, wishes to enter Canada for a visit or otherwise during his lifetime, he must obtain authorization or consent to return.

(b) The scope of discretion under subsection 44(2)

[49]Under the Act, after finding a subsection 44(1) report well-founded, the Minister's delegate "may" refer the report to the Immigration Division for an admissibility hearing except where a foreign national is involved and in prescribed circumstances; it is the Minister's delegate and not the Immigration Division which "may" issue exclusively a deportation order.

[50]It is a well-known rule of statutory interpretation, backed by section 11 of the *Interpretation Act* [R.S.C., 1985, c. I-21], that in the use of the word "may" where it is used to confer a power or authority, Parliament intends to empower the decision maker with a discretion whether to exercise that power or not (see, *Sullivan and Driedger on the Construction of Statutes,* 4th ed. (Toronto: Butterworths, 2002)).

[51]However, the interpretative exercise does not end at that point. The interpreter must determine whether anything else in the statute or in the circumstances expressly or implicitly obligates the exercise of the power--in this case the making of the deportation order. To find the answer, Ruth Sullivan tells us one must examine the context of the legislative provision and the scope and object of the Act as well as take into account legislative history.

[52]In my view, the scrutiny of the context, the object and purpose of the Act, does not serve to transform the permissive "may" into an obligatory "shall".

[53]An examination of the legislative history from the *Immigration Act, 1976* [S.C. 1976-77, c. 52], as amended to date, and particularly the provisions relating to removals leads me to conclude Parliament, generally and

consistently with some exceptions however, used the word "may" to connote choice and the word "shall" to signify obligation.

[54]Lastly, under the former Act, the Deputy Minister had a key role to play in referring any report received from an immigration officer in cases dealing with removal of permanent residents or visitors after entry had been granted as opposed to at point-of-entry exclusions.

[55]Under subsection 27(3) [as am. by S.C. 1992, c. 49, s. 16] of the former Act, subject to any direction received from the Minister, the Deputy Minister, "if [he] consider[ed] it appropriate to do so in the circumstances" could refer a report to inquiry or to a senior immigration officer for determination (see subsection 27(3) of the former Act).

[56]In summary, I conclude the Minister's delegate, after finding a subsection 44(1) report well-founded, has a discretion whether to refer that report to the Immigration Division for an admissibility hearing except in prescribed circumstances and, in such cases, has the discretion to make a deportation order.

[57]Counsel for the Minister cited much jurisprudence which I find not on point because those cases dealt with inquiry stages prior to the making of a deportation order or they were cases dealing with port of entry exclusion and not removal after admission. Such were the cases of *Dehghani v. Canada (Minister of Employment and Immigration)*, 1993 CanLII 128 (S.C.C.), [1993] 1 S.C.R. 1053, and *Kindler v. MacDonald*, reflex, [1987] 3 F.C. 34 (C.A.).

[58]Cases cited under the new Act also did not engage the removal process at its final stage, that is the making of the deportation order. Such were the cases of *Poonawalla v. Canada (Minister of Citizenship and Immigration)* (2004), 248 F.T.R. 206 (F.C.) and *Correia*.

[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 qualifies as an 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 subsection 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.

(c) Participatory rights

[63]The problem with deportation orders made by the Minister's delegate pursuant to subsection 44(2) of the Act, is that Parliament has not spelled out any procedures governing the process leading to the making of that deportation order. This is to be contrasted with the elaborate procedures spelled out in the Act when deportation orders are to be issued by the quasi-judicial body which is the Immigration Division.

[64]As the Supreme Court of Canada, the Federal Court of Appeal and this Court have noted for several years now, the content of the duty of procedural fairness is flexible and variable and must be tailored to the particular circumstances of each case.

[65]As indicated above, *Baker* and *Suresh* enunciate the factors which come into play when determining the content of the duty of procedural fairness.

[66]Taking into account, in the particular circumstances of this case, which do 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 only to the Federal Court leave and judicial review process;

(2) The severe consequences of deportation on an 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 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.

[69]This view on participatory rights is in accordance with Justice Reed's decision in *Qi v. Canada (Minister of Citizenship and Immigration)* (1995), 33 Imm. L.R. (2d) 57 (F.C.T.D.) and that of Justice Simon Noël in *Babcock v. Canada (Minister of Citizenship and Immigration)*, IMM-4504-02, September 8, 2003.

[70]Counsel for the Minister urged there was little purpose for granting judicial review if I felt procedural fairness was lacking in this case. She referred to *Correia* where Justice Phelan stated [at paragraph 36] the case before him was one of those rare cases where "there was a breach of procedural fairness but where the remedy should not be the quashing of the decision. The Applicant was unable to suggest what relevant facts could have been put to the Delegate which could have in any way altered the decision to refer".

[71]As noted, *Correia*, is not on point because it was a case where the Minister's delegate's decision attacked was a decision to refer the matter to the Immigration Appeal Division. Here, the decision attacked is the Minister's delegate's decision to issue the deportation order. I am of the view several factors could influence the Minister's delegate not to engage in the final stage of the deportation process, namely, the fact his studies were a couple of months short of completion and he would likely return to Korea and the fact his one conviction was for a minor offence.

[72]For all of these reasons, this judicial review application is allowed, the Minister's delegate's decision to issue the deportation order is quashed, and the matter is remitted back to a different Minister's delegate for review and reconsideration. The parties will have until November 9, 2004, to propose one or more certified questions with comments from the other party submitted by November 16, 2004.