CITATION: MONGE MONGE *v.* CANADA (MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS), 2009 FC 809, [2010] 3 F.C.R. 291 IMM-138-09

Arthur Monge Monge (*Applicant*)

v.

The Minister of Public Safety and Emergency Preparedness (*Respondent*)

INDEXED AS: MONGE MONGE v. CANADA (MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS) (F.C.)

Federal Court, Harrington J.—Vancouver, July 14; Ottawa, August 10, 2009.

Citizenship and Immigration — Exclusion and Removal — Inadmissible Persons — Judicial review of decision by Minister's delegate under Immigration and Refugee Protection Act (IRPA), s. 44(2) that immigration officer's report under IRPA, s. 44(1) finding applicant to be inadmissible well founded, referring report to Immigration Division of Immigration and Refugee Board for admissibility hearing — Case dealing with removal of inadmissible persons, extent to which immigration officers, Minister's delegates having discretion to allow permanent residents to remain in Canada — Applicant seeking judicial review on ground delegate refusing to carry out pre-removal risk assessment, failing to assess applicant's addiction to alcohol, drugs as disability — Word "may" in s. 44 connoting certain amount of discretion — Scope of that discretion at issue — Case law diverging on matter — Here, not necessary to determine whether delegate having discretion to consider Ribic v. Canada (Minister of Citizenship and Immigration) factors, whether having discretion to refer well-founded report for admissibility hearing — If having discretion, that discretion exercised reasonably — Argument treating addiction as disability attempt to invoke Canadian Charter of Rights and Freedoms equality rights — Serious criminals subject to removal without discrimination, removal not engaging Charter, ss. 7, 15 — Application dismissed.

This was an application for judicial review of the decision by the Minister's delegate that the report in which the applicant was found to be inadmissible was well-founded, and her decision to refer that report to the Immigration Division of the Immigration and Refugee Board for an admissibility hearing.

This case dealt with the mechanics of removing from Canada an inadmissible person and the extent to which those charged with the administration of the *Immigration and Refugee Protection Act* (IRPA) may, in their discretion, allow a permanent resident inadmissible on grounds of serious criminality to remain here. The applicant, a citizen of Poland and a long time permanent resident of Canada, was convicted of armed robbery, dangerous operation of a motor vehicle and possession of a weapon for dangerous purposes, and was sentenced to 30 months' imprisonment. According to paragraph 36(1)(*a*) of the IRPA, a permanent resident is inadmissible on grounds of serious criminality for having been convicted in Canada of an offence punishable by a maximum term of imprisonment of at least 10 years for an offence for which a term of imprisonment of more than six months has been imposed. Here, in accordance with section 44, the officer reported to the Minister that in his opinion the applicant was inadmissible. The Minister's delegate found that the report was well-founded and referred it to the Immigration Division for an admissibility hearing.

The grounds of review raised by the applicant were that the Minister's delegate refused to carry out a pre-removal risk assessment (PRRA) and failed to assess his addiction to alcohol and drugs as a disability.

Held, the application should be dismissed.

Subsection 44(1) provides that an immigration 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, and subsection 44(2) provides that if the Minister is of the opinion that the report is well-founded, he may refer the report for an admissibility hearing. The word "may" usually connotes a certain amount of discretion. The first issue was to determine the scope, if any, of the Minister's delegate's discretion not to refer the report for an admissibility hearing. There were five cases of particular note. In *Hernandez v. Canada (Minister of Citizenship and Immigration)*, subsection 44(1) was interpreted as giving a broad discretion requiring the officer to form an opinion as to admissibility and then decide whether to prepare a report. It was said that the practical effect of a decision not to prepare a report is that, in spite of being inadmissible, there are compelling reasons to allow the person to stay in Canada. The same reasoning was held with respect to the Minister's decision as to whether a report is well-founded. In *Cha v. Canada (Minister of Citizenship and Immigration)* the Federal Court of Appeal noted that, in section 36(3) of the IRPA, 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. It concluded that, in making findings of inadmissibility under subsections 44(1) and 44(2), the IRPA did not allow immigration officers and Minister's delegates any room to manoeuvre apart from that expressly carved out in the IRPA and Regulations. In *Spencer v. Canada (Minister of Citizenship and Immigration)*, it was said that officers may but are under no duty to take *Enforcement Manual (ENF)* factors into consideration when making a decision. In *Awed v. Canada (Minister of Citizenship and Immigration)* and *Richter v. Canada (Minister of Citizenship and Immigration)*, it was held that, where facts of serious criminality are found to exist, the officer has a responsibility pursuant to subsection 44(1) to prepare a report and is not empowered to exercise discretion.

As evidenced above, there is divergence in the case law on the matter. Nonetheless, to dispose of this particular case, it was not necessary to determine whether the Minister's delegate had discretion to take into account the *Ribic v. Canada (Minister of Employment and Immigration)* factors, and whether she had the discretion to refer the subject of a well-founded report for an admissibility hearing. However, if she had that discretion, she exercised it reasonably. Like the immigration officer's report, the Minister's delegate reasons for referring the applicant for an admissibility hearing were well thought-out and took into account the factors listed by Citizenship and Immigration Canada in guideline ENF 6. After balancing the applicant's difficult circumstances to the harm that he has done to Canadian society, she concluded that there weren't sufficient humanitarian and compassionate grounds to outweigh the applicant's very extensive criminal record. Her decision dealt with the *Ribic* factors and was within the range of defensible outcomes. She was under no obligation to carry out what in effect would be a PRRA as the applicant was entitled to such an assessment in any event.

The argument treating addiction as a disability was an attempt to invoke the equality rights set out in section 15 of the *Canadian Charter of Rights and Freedoms*. Serious criminals are subject to removal without discrimination. Removal of those convicted of serious criminality does not engage section 7 of the Charter; the same holds true with respect to section 15.

STATUTES AND REGULATIONS CITED

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], ss. 7, 15.

Immigration Act, R.S.C., 1985, c. I-2.

Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 3(1), 25 (as am. by S.C. 2008, c. 28, s. 117), 36 (as am. by S.C. 2008, c. 3, s. 3), 44, 45, 64, 65, 67.

Interpretation Act, R.S.C., 1985, c. I-21.

TREATIES AND OTHER INSTRUMENTS CITED

United Nations Convention Relating to the Status of Refugees, July 28, 1951, [1969] Can. T.S. No. 6.

CASES CITED

CONSIDERED:

Medovarski v. Canada (Minister of Citizenship and Immigration), 2005 SCC 51, [2005] 2 S.C.R. 539; *Cha v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126, [2007] 1 F.C.R. 409, 267 D.L.R. (4th) 324, 42 Admin. L.R. (4th) 204, revg 2004 FC 1507, [2005] 1 F.C.R. 503, 25 Admin. L.R. (4th) 198, 258 F.T.R. 54; *Hernandez v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 429, [2006] 1 F.C.R. 3, 271 F.T.R. 257, 45 Imm. L.R. (3d) 249; *Awed v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 469, 46 Admin. L.R. (4th) 233; *Spencer v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 990, 298 F.T.R. 267; *Richter v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 806, [2009] 1 F.C.R. 675, 73 Imm. L.R. (3d) 131, affd 2009 FCA 73.

REFERRED TO:

Ribic v. Canada (Minister of Employment and Immigration), [1985] I.A.B.D. No. 4 (QL); *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84, 208 D.L.R. (4th) 107, 37 Admin. L.R. (3d) 252; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, 329 N.B.R. (2d) 1, 291 D.L.R. (4th) 577.

AUTHORS CITED

Citizenship and Immigration Canada. *Enforcement Manual (ENF)*. Chapter 6 : Review of Reports under A44(1), online: <http://www.cic.gc.ca/english/resources/manuals/enf/enf06-eng.pdf>.

APPLICATION for judicial review of the Minister's delegate decision that the report in which the applicant was found to be inadmissible was well-founded and her decision to refer that report to the Immigration Division of the Immigration and Refugee Board for an admissibility hearing in accordance with section 44 of the *Immigration and Refugee Protection Act*. Application dismissed.

APPEARANCES

Lobat Sadrehashemi for applicant.

Helen C. H. Park for respondent.

SOLICITORS OF RECORD

Pivot Legal LLP, Vancouver, for applicant.

Deputy Attorney General of Canada for respondent.

The following are the reasons for order rendered in English by

[1] HARRINGTON J.: Mr. Monge Monge is in jail because, according to the police reports as quoted in the decision which is the subject of this judicial review: "[He] approached the victim and got into an altercation with her as she refused to give him money. He grabbed her by the throat and threatened to cut her. She hit the panic button on her key pad. She was pushed into another car and he fled with her vehicle. The police traced the car the next day and tried to apprehend him but he hit three police cars and two civilian vehicles. He drove out of a parking lot and rammed into a marked police vehicle injuring a police officer. He was eventually apprehended by the police and arrested".

[2] He was convicted of armed robbery, dangerous operation of a motor vehicle and possession of a weapon for dangerous purposes. He was sentenced to 30 months' imprisonment. Although only 29 years of age, this was his 27th conviction.

[3] Mr. Monge Monge is a citizen of Poland and a long time permanent resident of Canada: 16 years. According to paragraph 36(1)(*a*) of the *Immigration and Refugee Protection Act*, S.C. 2001 c. 27 (IRPA) a permanent resident or foreign national is inadmissible on grounds of serious criminality for having been convicted in Canada of an offence punishable by a maximum term of imprisonment of at least 10 years for an offense for which a term of imprisonment of more than six months has been imposed. Without doubt Mr. Monge Monge is inadmissible.

[4] This case deals with the mechanics of removing from Canada a person who is inadmissible and the extent to which those charged with the administration of the IRPA may, in their discretion, allow a permanent resident who is inadmissible on grounds of serious criminality to remain here.

[5] In this case, and in accordance with section 44 of the IRPA, an immigration officer reported to the Minister that in his opinion Mr. Monge Monge was inadmissible. The Minister in turn appointed a delegate to consider whether that report was well-founded. The Minister's delegate so found and referred the report to the Immigration Division of the Immigration and Refugee Board [the Board] for an admissibility hearing. This is a judicial review of that decision.

[6] This report does not in and of itself render Mr. Monge Monge inadmissible. A decision of the Immigration Division is required. Nevertheless, the Minister does not take the position that this application for judicial review is premature. It has been held many times that both the decision of an officer to report and the decision of the Minister's delegate under section 44 of the IRPA may be the subject of judicial review. Indeed, the result of an inadmissibility hearing is a foregone conclusion as section 45 of the IRPA provides that the Board "shall" make the applicable removal order against a Canadian resident "if it is satisfied that the . . . permanent resident is inadmissible" (my emphasis).

[7] In fact, I was informed at the hearing that since no stay was ordered, the admissibility hearing has taken place and Mr. Monge Monge has been ordered removed to Poland once he has served his sentence. There is no appeal of that decision as section 64 of the IRPA denies an appeal to the Immigration Appeal Division by a permanent resident if found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality. Serious criminality for the purposes of section 64 must be with respect to a crime that was punished in Canada by a term of imprisonment of at least two years.

[8] However, should judicial review of the decision of the Minister's delegate be granted, the underpinning of the admissibility hearing is set aside and the decision must fall. The grounds of this judicial review are that the Minister's delegate refused to carry out a pre-removal risk assessment [PRRA] and failed to assess Mr. Monge Monge's addiction to alcohol and drugs as a disability.

DISCUSSION

[9] Section 44 of the IRPA has drawn a great deal of attention. It was discussed before Parliament, is the subject of a departmental manual and has been the subject of many judicial reviews. It should be read together with subsection 3(1), sections 36 [as am. by S.C. 2008, c. 3, s. 3], 64, 65 and 67, all of which are appended hereto. The IRPA pays more attention to the security of Canadians than did the former *Immigration Act* [R.S.C., 1985, c. I-2]. In *Medovarski v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 S.C.R. 539, which dealt with transitional sections, the Supreme Court noted that the IRPA contains several provisions which facilitate the removal of permanent residents who have been engaged in serious criminality. The IRPA is even more stringent as regards non-residents. One such step is section 64 which restricts the right of appeal to the Immigration Appeal Division.

[10] In *Medovarski*, Chief Justice McLachlin noted, at paragraph 12:

> In introducing the *IRPA*, the Minister emphasized that the purpose of provisions such as s. 64 was to remove the right to appeal by serious criminals. She voiced the concern that "those who pose a security risk to Canada be removed from our country as quickly as possible" (Standing Committee on Citizenship and Immigration, *Evidence*, May 8, 2001).

[11] It must be kept in mind that there are a wide range of reasons why a foreign national or a permanent resident may be inadmissible. At one end of the spectrum are offences such as serious criminality and crimes against humanity. At the other end of the spectrum a person may not have maintained residency requirements or technically may not be a member of the "family class" eligible to be sponsored, failed a medical examination or overstayed a visa.

[12] The cases which deal with inadmissibility due to criminality touch upon a number of issues including:

(a) Procedural fairness;

(b) The discretion, if any, of an officer who is of the opinion that a permanent resident is inadmissible for serious criminality not to prepare and transmit a report to the Minister in accordance with subsection 44(1);

(c) The meaning of the term "relevant facts" in the report;

(d) What factors, if any, is the Minister to take into account in forming an opinion whether the report is well-founded or not;

(e) The discretion, if any, of the Minister (usually the Minister's delegate) not to refer a well-founded report to the Immigration Division for an admissibility hearing.

[13] In this case, the officer's report under subsection 44(1) is very detailed. Mr. Monge Monge's criminal history in Canada is set out in detail "as to his" difficult background. He had been put into an orphanage by state authorities in Poland where he says he suffered extreme sexual and physical abuse. He was later adopted by one of the volunteers at the orphanage in Canada. The family moved to Costa Rica and then immigrated to Canada. After he threatened to kill his adoptive parents he was put into the care of the British Columbia's Ministry of Children and Family Development. He lived in foster and group homes. His addiction to drugs and alcohol and both his prospects in Canada and Poland were considered. Having taken into account factors including Mr. Monge Monge's age at the time of landing, his family inside and outside Canada, support in Canada, criminal record, seriousness of the indexed offence, the length of the sentence imposed, his remorsefulness and potential for rehabilitation, he recommended that he be referred to an admissibility hearing.

[14] The Minister's delegate followed guideline ENF 6 prepared by Citizenship and Immigration Canada [*Enforcement Manual (ENF)*, Chapter ENF 6: Review of Reports under A44(1)] which deals with the review of reports under subsection 44(1). It lists factors [at pages 24–25] which "may be considered in both criminal and non-criminal cases". These factors include age at time of landing, length of residence, location of family support and responsibilities, conditions in home country, degree of establishment, criminality and history of non-compliance and current attitude.

[15] Like the officer's report, the Minister's delegate's reasons for referring Mr. Monge Monge to an admissibility hearing were well thought-out and take into account the factors mentioned in the manual.

[16] She concluded that she was not satisfied that sufficient humanitarian and compassionate grounds existed to outweigh Mr. Monge Monge very extensive criminal record. She reached this conclusion after balancing his difficult circumstances against the harm that he has done to Canadian society. "He failed to learn from his previous errors and has been unable to overcome his drug and alcohol habits even after several attempts at different institutions".

[17] The paragraph of the reasons which has led to this judicial review is the following:

> Counsel submitted reports on alcoholism as a disease and of drug use in Poland and how it can lead to HIV/AIDS infection due to dirty needles and drugs that are contaminated. Counsel also submitted articles on the risk of returning to Poland. I have not assessed this risk as Mr. Monge Monge will have an opportunity to submit a Pre-Removal Risk Assessment before removal from Canada if a deportation order is issued against him.

[18] Although in this case Mr. Monge Monge's inadmissibility is a matter of fact, and not of opinion, subsection 44(1) provides that an officer may prepare a report and subsection 44(2) provides that if the Minister is of the opinion that the report is well-founded he may refer the report for an admissibility hearing. The word "may" usually connotes a certain amount of discretion, as indeed reflected in the *Interpretation Act* [R.S.C., 1985, c. I-21]. The first issue is to determine the scope, if any, of the Minister delegate's discretion not to send on a report to an admissibility hearing. As noted by Mr. Justice Décary in *Cha v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126, [2007] 1 F.C.R. 409, at paragraph 19:

> In *Ruby v. Canada (Solicitor General)*, [2000] 3 F.C. 589 (C.A.), at pages 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.

[19] *Cha* also confirms that the determination of this scope of discretion is a matter of law and that the standard of judicial review is correctness. No deference is owed to the Minister's delegate.

[20] There are five cases of particular note. In addition to the decision of the Federal Court of Appeal in *Cha*, above, there is the decision of Madam Justice Snider in *Hernandez v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 429, [2006] 1 F.C.R. 3; the decision of Mr. Justice Mosley in *Awed v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 469, 46 Admin. L.R. (4th) 233; the decision of Mr. Justice Blais, as he then was, in *Spencer v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 990, 298 F.T.R. 267; and the decision of Mr. Justice Mosley in *Richter v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 806, [2009] 1 F.C.R. 675, upheld by the Federal Court of Appeal at 2009 FCA 73.

[21] Mr. Hernandez, a permanent resident, was convicted and sentenced to 30 months' imprisonment for possession of cocaine for the purposes of trafficking. The maximum sentence was life imprisonment. An officer reported him under subsection 44(1), the Minister's delegate referred the matter for an admissibility hearing pursuant to subsection 44(2) and a member of the Immigration Division ordered that he be deported on the basis that he fell within paragraph 36(1)(*a*) of the IRPA.

[22] Under the former Act, Mr. Hernandez would have had a right of appeal to the Immigration Appeal Division which would have to take into account a wide range of factors (the *Ribic* factors [*Ribic v. Canada (Minister of Employment and Immigration)*, [1985] I.A.B.D. No. 4 (QL)]) which included the seriousness of the offence, potential for hardship, rehabilitation possibilities, the length

of time spent in Canada and the degree of establishment here, his family's circumstances and support available here. These factors have been affirmed by the Supreme Court in *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84.

[23] Citizenship and Immigration officials are of the view that these factors are still to be considered in cases of serious criminality. Madam Justice Snider referred to comments made to the Standing Committee of Citizenship and Immigration by an Assistant Deputy Minister and the Department procedures manual. She interpreted subsection 44(1) to first require the officer to form an opinion as to admissibility and second, if of the view the person is inadmissible, he or she must then decide whether to prepare a report. While accepting that Hansard only plays a limited role in the interpretation of legislation, and although manuals and guidelines are not binding, she concluded at paragraphs 38 and 39:

> The result, when an officer determines that he or she is not going to prepare a report, does not change the fact that the person is inadmissible, as defined by the IRPA; it does not mean the person is "admissible". The practical effect of a decision by the officer not to prepare a report is that in spite of being "inadmissible", as defined in IRPA, there are compelling reasons to allow that person to remain in Canada.
>
> My reasoning is the same with respect to the decision to be made by the Minister's delegate as to whether a report is well-founded, pursuant to subsection 44(2).

[24] This decision was in contrast to earlier decisions which had taken a more narrow approach. Although questions were certified, the appeal was abandoned before it was heard on the merits.

[25] The cornerstone of any analysis by this Court is the decision of Mr. Justice Décary speaking for the Federal Court of Appeal in *Cha*, above. That case is important not only for what it says, but also for what it deliberately refrains from saying. In considering such discretion as the Minister's delegate may have under subsection 44(2) he noted that the IRPA differentiates between permanent residents and foreign nationals and between those who enjoy protected status as United Nations Convention refugees [*United Nations Convention relating to the Status of Refugees*, July 28, 1951, [1969] Can. T.S. No. 6] and those who do not. Mr. Cha, a foreign national studying in Canada on a student visa, had been convicted for drunk driving, a criminal offence which carries a maximum sentence of five years. He had been prosecuted summarily and received a fine and licence suspension. He was not jailed. A report was made pursuant to subsection 44(1) of the IRPA. Since Mr. Cha was a foreign national, and not a permanent resident, the Minister's delegate made a removal order directly, rather than referring the case to an admissibility hearing. In judicial review, Mr. Justice Lemieux set aside the order on the basis that the Minister's delegate had fettered her discretion and had not observed principles of procedural fairness [2004 FC 1507, [2005] 2 F.C.R. 503]. The case went to appeal on a certified question. The Federal Court of Appeal reversed. Much of the case deals with procedural fairness, which is not in issue before me.

[26] Mr. Justice Décary made it perfectly clear that *Hernandez*, which held that section 44 gave a broad discretion, and the earlier cases which were narrower in scope, all involved permanent residents inadmissible on grounds of serious criminality in Canada. He said at paragraph 13: "I do not wish to be taken as approving or disapproving the final determination that was made in these cases." After reminding us that immigration is a privilege and not a right, he turned to section 36 of the IRPA and said (at paragraphs 27–30):

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 10 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).

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

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.

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 36(3)(*a*)). Convictions are not to be taken into consideration where pardon has been granted or where they have been reversed (paragraph 36(3)(*b*)). Rehabilitation may only be considered in defined circumstances (paragraph 36(3)(*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 36(3)(*e*)).

[27] He concluded that sections 36 and 44 of the Act, as well as the applicable Regulations, did not allow immigration officers and Minister's delegates in making findings of inadmissibility under subsections 44(1) and 44(2) due to their being convicted of serious or simple offences "any room to manoeuvre apart from that expressly carved out in the Act and Regulations." He also made mention of the fact that, although questions had been certified in *Hernandez*, the case did not proceed to appeal.

[28] On the heels of that decision came the decision of Mr. Justice Mosley in *Awed*. Mr. Awed was a foreign national who had been determined to be a Convention refugee. He was not a permanent resident. He had been convicted of a number of criminal offences for which he had been sentenced to nine months in jail. Mr. Justice Mosley applied *Cha* noting that refugees received greater protection than other foreign nationals, including a right of appeal, and the right not to be refouled to a place where they would be persecuted. He concluded at paragraph 20 of his reasons, however, that "[t]he officer is on a fact-finding mission and if serious or simple criminality is found, has the responsibility to prepare a report and transmit it to the Minister."

[29] In *Spencer*, Mr. Justice Blais, was dealing with a permanent resident who was not a refugee. She was reported pursuant to subsection 44(1) as being inadmissible for serious criminality. That report was referred to an admissibility hearing. After considering *Cha*, *Hernandez* and *Awed*, he

concluded that officers may take policy manual factors in consideration when making a decision pursuant to section 44 of the Act but are under no duty to do so. In any event, he was of the view that the officer had taken humanitarian and compassionate factors into account.

[30] Ms. Richter was a permanent resident convicted of serious criminality. Mr. Justice Mosley repeated what he had said in *Awed* that where the facts of serious criminality are found to exist the officer has a responsibility pursuant to subsection 44(1) to prepare a report and is not empowered to exercise discretion. As to the Minister's delegate decision to refer the report on pursuant to subsection 44(2), he noted that *Cha* left the question open whether some minimal amount of discretion was available to the Minister's delegate in deciding whether or not to refer the report to the Immigration Appeal Division in cases where the individual involved is a permanent resident. Mr. Justice Mosley did not answer the question as in any event he was satisfied that humanitarian and compassionate factors had been taken into account.

[31] The Federal Court of Appeal upheld him and stated it was in substantial agreement with what he had said. However, since the question in appeal was on procedural fairness, I do not take the case as definitive authority that the Federal Court of Appeal prefers Mr. Justice Mosley's interpretation of section 44 over that of Madam Justice Snider.

[32] Given the divergence in the jurisprudence, it would be inappropriate for me to say anything more than is necessary to dispose of this particular case. Either the Minister's delegate had discretion to take into account the *Ribic* factors or she did not. Either she had the discretion to refer the subject of a well-founded report to an admissibility hearing or she did not. It is not necessary for me to say.

[33] However, if she had that discretion, she exercised it reasonably. Her decision dealt with the *Ribic* factors and was within the range of defensible outcomes (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190).

[34] Certainly she was under no obligation to carry out what in effect would be a pre-removal risk assessment, as Mr. Monge Monge is entitled to such an assessment in any event.

[35] The argument with respect to treating addiction as a disability is an attempt to invoke the equality rights set out in section 15 of the Charter [*Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendice II, No. 44]] which provides that every individual is entitled to equal protection and equal benefit of the law without discrimination, including discrimination based on "mental or physical disability."

[36] There is no discrimination here. Serious criminals are subject to removal without discrimination no matter their race, national or ethnic origin, colour, religion, sex, age or mental physical disability. It was held in *Medovarksi*, above, that the removal of those convicted of serious criminality did not engage section 7 of the Charter (security of the person). The same holds true with respect to section 15.

[37] Apart from a PRRA, Mr. Monge Monge may ask, pursuant to section 25 [as am. by S.C. 2008, c. 28, s. 117] of the IRPA, for temporary or permanent resident status from within Canada on

humanitarian and compassionate grounds.

[38] The style of cause is amended by removing the Minister of Citizenship and Immigration as a party respondent and replacing him with the Minister of Public Safety and Emergency Preparedness.

[39] Mr. Monge Monge shall have until August 24, 2009 to serve and file a proposed question for certification, which would support an appeal. The Minister shall have seven days from service to respond.

Appendix

Immigration and Refugee Protection Act, S.C. 2001, c. 27

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

(*a*) to permit Canada to pursue the maximum social, cultural and economic benefits of immigration;

(*b*) to enrich and strengthen the social and cultural fabric of Canadian society, while respecting the federal, bilingual and multicultural character of Canada;

(*b.1*) to support and assist the development of minority official languages communities in Canada;

(*c*) to support the development of a strong and prosperous Canadian economy, in which the benefits of immigration are shared across all regions of Canada;

(*d*) to see that families are reunited in Canada;

(*e*) to promote the successful integration of permanent residents into Canada, while recognizing that integration involves mutual obligations for new immigrants and Canadian society;

(*f*) to support, by means of consistent standards and prompt processing, the attainment of immigration goals established by the Government of Canada in consultation with the provinces;

(*g*) to facilitate the entry of visitors, students and temporary workers for purposes such as trade, commerce, tourism, international understanding and cultural, educational and scientific activities;

(*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

(*j*) to work in cooperation with the provinces to secure better recognition of the foreign credentials of permanent residents and their more rapid integration into society.

. . .

36. (1) **A permanent resident or a foreign national is inadmissible on grounds of serious criminality for**

(*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;

(*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

(*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.

(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.

(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 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;

(*d*) a determination of whether a permanent resident has committed an act described in paragraph (1)(*c*) must be based on a balance of probabilities; and

(*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 for which the permanent resident or foreign national is found guilty under the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985 or the *Youth Criminal Justice Act*.

. . .

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 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.

. . .

64. (1) No appeal may be made to the Immigration Appeal Division by a foreign national or their sponsor or by a permanent resident if the foreign national or permanent resident has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality.

(2) For the purpose of subsection (1), serious criminality must be with respect to a crime that was punished in Canada by a term of imprisonment of at least two years.

(3) No appeal may be made under subsection 63(1) in respect of a decision that was based on a finding of inadmissibility on the ground of misrepresentation, unless the foreign national in question is the sponsor's spouse, common-law partner or child.

65. In an appeal under subsection 63(1) or (2) respecting an application based on membership in the family class, the Immigration Appeal Division may not consider humanitarian and compassionate considerations unless it has decided that the foreign national is a member of the family class and that their sponsor is a sponsor within the meaning of the regulations.

. . .

67. (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,

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

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

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

(2) If the Immigration Appeal Division allows the appeal, it shall set aside the original decision and substitute a determination that, in its opinion, should have been made, including the making of a removal order, or refer the matter to the appropriate decision-maker for reconsideration.