Al Sagban *v.* Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 133, 2002 SCC 4

Ahmad Abdulaal Al Sagban *Appellant*

v.

Minister of Citizenship and Immigration *Respondent*

and

Immigration and Refugee Board *Intervener*

Indexed as: Al Sagban *v.* Canada (Minister of Citizenship and Immigration)

Neutral citation: 2002 SCC 4.

File No.: 27111.

2000: October 10; 2002: January 11.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

on appeal from the federal court of appeal

Immigration -- Removal orders -- Appeals by permanent residents -- Scope of discretionary jurisdiction of Immigration Appeal Division of Immigration and Refugee Board under s. 70(1)(b) of Immigration Act -- Whether Immigration Appeal

Division entitled to consider potential foreign hardship when dealing with appeals from removal orders by permanent residents -- Interpretation of phrase "having regard to all the circumstances of the case" in s. 70(1)(b) -- Immigration Act, R.S.C. 1985, c. I-2, s. 70(1)(b).

The appellant was born in Iraq in 1964, the son of a high-ranking economist in the Iraqi government that preceded the presidency of Saddam Hussein. The appellant left Iraq permanently in 1981 in order to avoid the military draft, then lived in the United States, Egypt and England before being landed in Canada in 1986, at which time he became a permanent resident. A removal order was entered against the appellant in 1994, as a result of the application of s. 27(1)(*d*) of the *Immigration Act*, as he had been convicted of three property-related offences for which a term of imprisonment of 12 months was imposed. The Immigration Appeal Division ("I.A.D.") of Canada's Immigration and Refugee Board dismissed the appellant's appeal of the removal order, concluding that it could not consider potential hardship in the country of removal. The Federal Court, Trial Division allowed the appellant's application for judicial review but the Federal Court of Appeal set aside that decision.

Held: The appeal should be allowed.

For the reasons given in *Chieu*, the I.A.D. can take potential foreign hardship into consideration under s. 70(1)(*b*) of the *Immigration Act* whenever a likely country of removal has been established by an individual facing removal. The Minister remains free to determine the country a person will be removed to, pursuant to s. 52 of the Act, provided that the removal order has not been quashed or stayed by the I.A.D. The Minister may make submissions regarding the country of removal at the hearing of a s. 70(1)(*b*) appeal or make a s. 52 decision prior to the hearing.

In this case, the matter should be returned to the I.A.D. for a new hearing. It is clear that the country of removal is Iraq and that the I.A.D., having found that the appellant would suffer extreme hardship if returned to Iraq, might have exercised its discretion to allow the appellant to remain in Canada if it had believed it was able to consider this potential foreign hardship. This is an administrative decision requiring a complex balancing of numerous foreign and domestic factors by the I.A.D. It is the I.A.D., not this Court, which possesses the necessary expertise to make this decision and apply the appropriate remedy.

Cases Cited

Applied: *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3; **referred to:** *Ribic v. Canada (Minister of Employment and Immigration)*, [1985] I.A.B.D. No. 4 (QL); *Canepa v. Canada (Minister of Employment and Immigration)*, [1992] 3 F.C. 270; *Hoang v. Canada (Minister of Employment and Immigration)* (1990), 13 Imm. L.R. (2d) 35; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1; *Ahani v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 72, 2002 SCC 2.

Statutes and Regulations Cited

Immigration Act, R.S.C. 1985, c. I-2, ss. 27(1)(*d*) [am. 1992, c. 47, s. 78; am. 1992, c. 49, s. 16], 32(2), 52, 70(1)(*b*) [am. c. 28 (4th Supp.), s. 18; am. 1995, c. 15, s. 13].

APPEAL from a judgment of the Federal Court of Appeal (1998), 234 N.R. 173, 48 Imm. L.R. (2d) 1, [1998] F.C.J. No. 1775 (QL), reversing a judgment of the

Trial Division, [1998] 1 F.C. 501, 137 F.T.R. 283, [1997] F.C.J. No. 1349 (QL), setting aside a decision of the Immigration Appeal Division, [1996] I.A.D.D. 859 (QL), dismissing the appellant's appeal from a removal order. Appeal allowed.

Rod Holloway and *Christopher Elgin*, for the appellant.

Judith Bowers, Q.C., for the respondent.

Brian A. Crane, Q.C., and *Krista Daley*, for the intervener.

The judgment of the Court was delivered by

IACOBUCCI J. –

I. Introduction

1 This appeal was heard with *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, reasons in which are being released concurrently herewith. For the reasons given in *Chieu*, the Immigration Appeal Division ("I.A.D.") of Canada's Immigration and Refugee Board is able to consider the foreign hardship potentially faced by a permanent resident being removed from Canada when deciding whether to quash or stay a removal order under its "equitable jurisdiction" conferred by s. 70(1)(*b*) of the *Immigration Act*, R.S.C. 1985, c. I-2 (the "Act"). The I.A.D. can take potential foreign hardship into consideration whenever a likely country of removal has been established by an individual facing removal.

2 The respondent Minister of Citizenship and Immigration remains free to determine, pursuant to s. 52 of the Act, where a permanent resident will be removed to. The Minister's jurisdiction to make a decision under s. 52 only exists while an individual has a removal order entered against them. If the I.A.D. quashes or stays a removal order, the Minister no longer has anyone to remove and so no longer has the jurisdiction to make a decision under s. 52. But it is open to the Minister to make submissions at the hearing of a s. 70(1)(*b*) appeal with regard to the country the Minister intends to remove a permanent resident to, or to make the s. 52 decision prior to the hearing. Submissions regarding the country of removal are only necessary where the country of removal is in dispute, which will generally be the case only when the intended country of removal is one other than the individual's country of nationality or citizenship. The appellant Ahmad Abdulaal Al Sagban's appeal can be disposed of by applying these holdings to the facts of this case.

II. Relevant Statutory Provisions

3 The provisions of the Act relevant to this appeal are largely set out in *Chieu*, *supra*. For ease of reference, the primary provision in dispute -- s. 70(1)(*b*) -- is repeated here (although not law, I have once again included the marginal notes of the Act in these reasons as an explanatory aid):

> **70.** (1) [Appeals by permanent residents and persons in possession of returning resident permits] Subject to subsections (4) and (5), where a removal order or conditional removal order is made against a permanent resident or against a person lawfully in possession of a valid returning resident permit issued to that person pursuant to the regulations, that person may appeal to the Appeal Division on either or both of the following grounds, namely,
>
> . . .

> (*b*) on the ground that, having regard to all the circumstances of the case, the person should not be removed from Canada.

4 An additional provision relevant to the particular facts of this appeal is s. 27(1)(*d*):

> **27.** (1) [Reports on permanent residents] An immigration officer or a peace officer shall forward a written report to the Deputy Minister setting out the details of any information in the possession of the immigration officer or peace officer indicating that a permanent resident is a person who
>
> . . .
>
> (*d*) has been convicted of an offence under any Act of Parliament, other than an offence designated as a contravention under the *Contraventions Act*, for which a term of imprisonment of more than six months has been, or five years or more may be, imposed . . . .

III. Facts

5 The appellant was born in Iraq on August 27, 1964. His father was a high-ranking economist in the Iraqi government in power prior to the presidency of Saddam Hussein. The appellant lived with his family in Egypt from 1972-78, while his father was secretary general of the Council of Arab Economic Unity in Cairo. He and his family then returned to Iraq, but the appellant left permanently in 1981 in order to avoid military service. He lived in the United States, Egypt and England before being landed in Canada with his parents and brother on August 3, 1986. He became a permanent resident at that time. The appellant entered Canada as an independent immigrant and has not applied for refugee status.

6 A removal order was entered against the appellant on September 22, 1994 at Prince Albert, Saskatchewan, pursuant to s. 32(2) of the Act. The basis for the

removal order was that the appellant was a person described in s. 27(1)(*d*) of the Act, having been convicted in November 1993 of three property-related offences for which a term of imprisonment of 12 months was imposed. As was the case in *Chieu*, the appellant appealed the removal order to the I.A.D. solely on equitable grounds pursuant to s. 70(1)(*b*).

IV. Decisions Below

A. *Immigration Appeal Division*, [1996] I.A.D.D. No. 859 (QL) (Board Members Clark, Dossa and Singh)

7 The I.A.D. dismissed the appellant's appeal of the removal order made against him. Applying *Ribic v. Canada (Minister of Employment and Immigration)*, [1985] I.A.B.D. No. 4 (QL), the I.A.D. held that the relevant domestic factors did not favour allowing the appellant to remain in Canada. The I.A.D. did refer at para. 16 to the hardship the appellant would face if returned to Iraq:

> . . . the most positive factor in his favour is the hardship that he would suffer if returned to Iraq. . . . Iraq is not a safe place to be. As a person considered to be a deserter, and as the eldest son of a prominent Iraqi family which was opposed to the government of Sadam Hussein, he would be in a very difficult position. His stepmother said that the only thing that would happen would be that they would hang him. . . . The Appeal Division finds that it would be an extreme hardship for the appellant to be returned to Iraq.

However, relying on *Hoang v. Canada (Minister of Employment and Immigration)* (1990), 13 Imm. L.R. (2d) 35 (F.C.A.), the I.A.D. concluded that it could not consider this factor, noting that "control over the location to which the appellant is removed is a matter solely for the Minister's decision" (para. 16). It therefore concluded that "the

negative factors weigh more heavily against the appellant than the positive ones weigh in his favour" (para. 17), and upheld his removal.

B. *Federal Court, Trial Division*, [1998] 1 F.C. 501

8 On an application for judicial review before the Federal Court, Trial Division, Reed J. set aside the I.A.D.'s decision and referred the appeal back to a differently constituted panel of the I.A.D. for reconsideration. She held that *Hoang* does not prevent the I.A.D. from considering potential foreign hardship under the *Ribic* test when dealing with appeals by permanent residents, and that the I.A.D. therefore erred in not fully considering the hardship the appellant would face if returned to Iraq. Reed J. relied in part on the Federal Court of Appeal's decision in *Canepa v. Canada (Minister of Employment and Immigration)*, [1992] 3 F.C. 270, at p. 286, where it was stated that "every extenuating circumstance that can be adduced in favour of the deportee" should be considered by the I.A.D. when hearing an appeal pursuant to s. 70(1)(*b*). She held that it was not premature for the I.A.D. to consider potential foreign hardship prior to the Minister making the decision as to the country of removal under s. 52, as the likely country of removal will usually be the individual's country of nationality or citizenship. Reed J. was aware that a question of general importance had already been certified on this matter by Muldoon J. in *Chieu*, and she certified an almost identical question in this case.

C. *Federal Court of Appeal* (1998), 234 N.R. 173

9 The Minister successfully appealed this decision to the Federal Court of Appeal. For the reasons given in *Chieu, supra*, which was released on the same day,

Linden J.A., for the court, allowed the appeal, set aside Reed J.'s decision and dismissed the application for judicial review.

V. Analysis and Disposition

10 For the reasons set out in *Chieu*, the appropriate standard of review in this case is correctness. Turning to the substantive issues, and also applying the approach set out in *Chieu*, it must first be asked whether the appellant has established a likely country of removal. At the hearing of the s. 70(1)(*b*) appeal, the appellant presented evidence regarding the conditions he would face in Iraq, his country of nationality. And in fact, after the s. 70(1)(*b*) appeal was dismissed, the government acted to remove the appellant to Iraq. As Reed J. stated at p. 506:

> . . . Mr. Justice McKeown, on April 28, 1997 . . ., granted a stay of the deportation order that had been issued against this applicant, to prevent the applicant's deportation until this application for judicial review was heard. The travel plans that were in place at that time would have seen the applicant deported to Iraq.

The booking of travel arrangements is the administrative process by which the Minister makes the s. 52 decision as to the country of removal. In this case it is therefore clear that the likely country of removal is Iraq.

11 As a result, the second issue to be addressed is whether the I.A.D. would have exercised its discretion under s. 70(1)(*b*) to allow the appellant to remain in Canada, and if so, what remedy it would have provided. The I.A.D. found that "it would be an extreme hardship for the appellant to be returned to Iraq" (para. 16). It therefore appears that the I.A.D. would have exercised its discretion to allow the appellant to remain in Canada if it had believed it was able to consider this potential

foreign hardship. However, this is an administrative decision which requires a complex balancing of numerous factors. It is the I.A.D., not this Court, that has the expertise to balance domestic and foreign concerns properly. More importantly, it is the I.A.D. that should make the decision regarding the appropriate remedy if the appeal is allowed. The I.A.D. has the expertise to decide whether the removal order should be quashed or whether a stay would be preferable, as well as to determine what the terms and conditions of a stay would be.

12 The appeal is therefore allowed. The judgment of the Federal Court of Appeal is set aside and the appeal under s. 70(1)(*b*) is returned to the I.A.D. for a new hearing, taking into account the reasons set out herein and in *Chieu*. At the new hearing, the likely country of removal will be Iraq, unless the Minister can establish otherwise.

VI. Addendum

13 Both this appeal and *Chieu* were heard prior to the hearings before this Court in *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, and *Ahani v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 72, 2002 SCC 2. Pursuant to the reasoning of the Court in those cases, if the appellant in this case can establish that there are substantial grounds to believe that he will face a risk of torture upon return to Iraq, he cannot be removed to that country.

Appeal allowed.

Solicitors for the appellant: McPherson, Elgin & Cannon, Vancouver.

Solicitor for the respondent: The Attorney General of Canada, Vancouver.

Solicitors for the intervener: Gowling Lafleur Henderson, Ottawa.