IMMIGRATION AND REFUGEE BOARD OF CANADA

IMMIGRATION APPEAL DIVISION

COMMISSION DE L'IMMIGRATION ET DU STATUT DE RÉFUGIÉ DU CANADA

SECTION D'APPEL DE L'IMMIGRATION

IAD File No. / N° de dossier de la SAI : VA6-01774
Client ID no. / N° ID client : 4103-0697

Reasons and Decision – Motifs et décision

Removal Order

Appellant(s) **Appelant(s)**

HARJIT SINGH TATLA

Respondent **Intimé**

Minister of Public Safety and Emergency Preparedness
Ministre de la Sécurité publique et de la Protection civile Canada

Date(s) and Place of Hearing **Date(s) et Lieu de l'audience**

November 20, 2006
Vancouver, BC

Date of Decision **Date de la Décision**

November 28, 2006

Panel **Tribunal**

Erwin Nest

Appellant's Counsel **Conseil de l'appelant(s)**

Dill Gosal
Barrister & Solicitor

Minister's Counsel **Conseil de l'intimé**

Rick Brummer

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Reasons for Decision

[1] Harjit Singh TATLA (the "appellant") appeals a deportation order issued against him by a Member of the Immigration Division on August 17, 2006. He was ordered removed from Canada because he is a person described in paragraph 36(1)(a) of the *Immigration and Refugee Protection Act* (the "*Act*"),[1] that is, a permanent resident who is inadmissible for serious criminality, having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least ten years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed.

[2] This is an appeal under subsection 63(3) of the *Act*[2] and Minister's counsel is representing the Minister of Public Safety and Emergency Preparedness.[3]

[3] The appellant was convicted of sexual assault pursuant to subsection 271(1) of the *Criminal Code* in New Westminster, British Columbia on November 25, 2005. This is an indictable offence for which the maximum punishment is a term of imprisonment of ten years. The appellant received a conditional sentence of 15 months and three years probation. He is serving his sentence now.

[4] The appellant does not challenge the legal validity of the deportation order but brings his appeal pursuant to the Division's discretionary jurisdiction to grant special relief. He thus bears the onus to establish that, "taking into account the best interest of a child directly affected by the

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1 *Immigration and Refugee Protection Act* (the "*Act*"), S.C. 2001, c. 27.

2 **63(3)** A permanent resident or a protected person may appeal to the Immigration Appeal Division against a decision at an examination or admissibility hearing to make a removal order against them.

3 In accordance with amendments made to the *Immigration and Refugee Protection Act* (the *"Act*"), the Immigration Appeal Division recognizes that the legally correct party to this appeal is the Minister of Public Safety and Emergency Preparedness. See "Order Setting Out the Respective Responsibilities of the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness Under the *Act*", SI/205-120, which came into effect on December 23, 2005, when the *Canada Border Services Agency Act* came into effect.

decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case."[4]

BACKGROUND

[5] The appellant, 26 years old, was born in India. There is evidence from the appellant's Canadian physician, under whose care he was since July 2003,[5] that the appellant suffers from epilepsy and hepatitis C and he requires medical care and supervision. According to the Pre-Sentence Report and a letter of July 27, 2006 from the appellant's probation officer[6] the appellant suffered a serious head injury at the age of 5 or 6 and consequently experienced significant cognitive deficits and he suffers from a seizure disorder. As a result of his injury he has limited education and employment history.

[6] On February 26, 2002, the appellant landed in Canada with his parents after being sponsored by his sister.[7] On March 9, 2003 the appellant married Kuljit Kaur TATLA in India and he was successful in sponsoring her. She was landed in Canada on April 3, 2004.[8] On November 23, 2003 there was a child, a daughter, born out of this union. According to the appellant's spouse, Ms. TATLA, on October 30, 2006, she, the appellant, their daughter and the appellant's parents and the appellant's brother, age 24, moved to Oliver, B.C from Surrey, where they all currently reside in a two bedroom rented basement suit. Ms. TATLA testified that the appellant has his father's sister and two of her married daughters and his mother's paternal relative and his son reside in B.C. According to her, two and a half years ago, the appellant's married sister, who sponsored him to Canada, moved with her husband to Toronto, Ontario, where they live with their two children. Ms. TATLA testified that they own two trucks and the

4 *Act*, paragraph 67(1) (c).
67(1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,
…
(*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.

5 Exhibit A-1, tab 9, page1.

6 Exhibit A-1, tab 5, page 1, tab 10, page 3.

7 Record, page 17.

8 Record, pages 1-3.

house they live in. The appellant's older brother and sister, both married, live in India. Ms. TATLA's parents and siblings, two of whom are married, live in India.

[7] Ms. TATLA testified that the appellant used to work as a farm worker with his father for Mainland Farm Labour Supply Limited, picking berries.[9] According to her, in 2004 the appellant did not work all summer picking berries and after start of a seasonal work in June 2004, she claimed that the appellant stayed at home, helping to care for their daughter while she continued to work on the farm. She testified that before the appellant committed the offence in February 2005, he did work irregularly in construction, earning total amount of $500.00 and he stopped working before sentencing as his Recognizance Order prohibited him from leaving home unless accompanied by an adult. Following his sentencing they moved to Oliver, B.C and the appellant and his spouse began working for Vincor International Inc. in Oliver, B.C.[10] as seasonal vineyard labourers. According to Ms. TATLA, since October 30, 2006 until present she and the appellant are working for the K&C Nursery in Oliver, B.C. Ms. TATLA testified that the appellant is using his income to pay monthly rent and provide for his partner and child's needs.

[8] With respect to the circumstances surrounding the appellant's criminal offence in 2005, I note that the appellant pleaded guilty of sexual assault and was given conditional sentence of 15 months to be followed by three-year probation, and in February 2005 he was in jail for one month. The appellant had no criminal convictions prior to his landing and he had no sustained convictions since the offence leading to the removal.

DECISION

[9] Taking into account the best interest of a child directly affected by the decision, I find sufficient humanitarian and compassionate considerations that warrant special relief in light of all the circumstances of the case and I conclude that the removal order against the appellant be stayed for a four-year period on conditions.

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9 Exhibit A-1, tab 10, page 3.

10 Exhibit A-1, tab 6, page 1.

ANALYSIS

[10] I have considered all the testimony adduced at the hearing *de novo*, the contents of the Record, the appellant's disclosure and oral submissions of counsel for the appellant and from the Minister's counsel.[11]

[11] The appellant was present but did not testified in person at the hearing. Ms. TATLA testified as witness at the hearing. The appellant's child, his father and the appellant's mother's relative were present in support of the appellant.

[12] The Division may order a stay of execution of the Removal Order,[12] or allow an appeal from a Removal Order,[13] if the appellant has established that, 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. The factors to be considered by the Appeal Division when exercising its discretionary jurisdiction are those as set out in *Ribic*.[14] These factors include the seriousness of the offence, the possibility of rehabilitation, the likelihood of the appellant re-offending, the length of time he has spent in Canada and the degree to which he is established here, the family and community support available to him, the dislocation to his family in Canada that deportation would cause, and the degree of hardship that would be caused to the appellant by his return to his country of nationality. These factors are not exhaustive, however they do provide a general guideline to the Division in terms of its exercise of discretion.

[13] In the case at hand, there is no question but that the offence is serious, involving sexual assault. While the appellant committed serious offence of sexual assault, there is no evidence that this assault was a part of pattern of offences. In examining the circumstances of the offence I have taken into the account the length of sentence imposed on the appellant and the victim

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11 In accordance with amendments made to the *Immigration and Refugee Protection Act* (the "*Act*"), the Immigration Appeal Division recognizes that he legally correct party to this appeal is the Minister of Public Safety and Emergency Preparedness. See "Order Setting Out the Respective Responsibilities of the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness Under the *Act*", SI/205-120, which came into effect on December 23, 2005, when the *Canada Border Services Agency Act* came into effect.

12 *Act*, subsection 68(1).

13 *Act*, subsection 67(1)(c).

14 *Ribic, Marida* v. *M.E.I.* (I.A.B. 84-9623), D. Davey, Benedetti, Petryshyn, August 20, 1985.

information evidence,[15] which asked for protective conditions in place for any community supervision. I am mindful that upon expiration of the Conditional Sentence Order in February 2007 a Probation Order will come into effect and the appellant will be able to leave the residence unaccompanied.

[14] In assessing the risk the appellant poses to Canadian society, the IAD takes into account evidence such as comments by judges on sentencing and by members of the National Parole Board in their reasons for decision, as well as reports by parole officers, psychologists and psychiatrists. In making the assessment the IAD has regard to societal interests set out paragraph 3(1)(h) of the *Immigration and Refugee Protection Act*.[16]

[15] I note that while condition 11 of the Conditional Sentence Order stipulates that the appellant "must take such psychiatric/psychological counseling as directed by your Probation Officer" there was no evidence that the appellant has undergone sexual offender counseling. According to his probation officer, the appellant is not a candidate for the Sex Offender Treatment Program because of his cognitive deficits, combined with a language barrier.

[16] There were no risk assessments reports of the appellant from psychologists and psychiatrists and the only evidence of the appellant's compliance with the conditions of his sentence is a letter from the appellant's Probation Officer of July 27, 2006.

[17] There is evidence that since the appellant's move to Oliver, B.C. he has been reporting regularly to the probation officer.[17] Ms. TATLA testified that 3-4 months before moving to Oliver, B.C she and the appellant attended meeting with the medical doctor, who questioned the appellant extensively about the sexual assault. He asked the appellant questions about his life with his family after the offence. Ms. TATLA testified that the meeting lasted for half an hour and the doctor sent a report to the appellant's probation officer. Ms. TATLA, who is familiar with the conditions of the Conditional Sentence Order, testified that the appellant is scheduled to

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15 Exhibit A-1, tab10, page 4.

16 **3.** (1) The objectives of this Act with respect to immigration are
(*h*) to protect the health and safety of Canadians and to maintain the security of Canadian society;

17 Exhibit A-1, tab 5, page 1.

have meeting with a nurse who will conduct mental assessment of the appellant. However, this report was never a part of the evidence before me.

[18] Given that the appellant did not testify at the hearing the Panel could not assess if the appellant has personally accepted what he has done is wrong and if he undertook to make personal commitment to correct his offending behaviour and to make meaningful steps at making reparations to either the victim and/ or society. The onus is on the appellant to prove his rehabilitation on a balance of probabilities. I find that by not testifying the appellant prevented the Panel from directly assessing credibility of the appellant's expression of remorse and a degree to which he achieved rehabilitation and his commitment to refrain from criminal activities in the future. I consider this to be a detrimental factor in this appeal.

[19] While I share the respondent's concern with respect to the seriousness of the appellant's offence, at the same time, it is significant to the panel that this is a first time offence and there is no record of further convictions.

[20] In assessing the risk assessment and the likelihood of the appellant re-offending I accept Ms. Tatla's testimony that the appellant is very concerned about the event in 2005 and he keeps thinking about it often. According to her, he takes full responsibility for his actions at that time; he is remorseful for the offence committed and regrets the pain he caused to the victim. According to the probation officer in the Pre-Sentence Report[18] the appellant appreciates the possible impact this offence has had on the victim and her daughter and is genuinely remorseful. He is aware of the shame and disgrace he has brought onto himself and he indicated that he would like to apologize to the victim if appropriate.

[21] I find the appellant's demeanour, such as paying close attention when his wife testified, and his emotional reaction to her description of hardship if the appellant was removed, to show that he is remorseful.

[22] The probation officer stated that the appellant's family has taken very seriously their role as a supervisor of the appellant's activities and they have arranged for approved supervisors to accompany the appellant whenever he is outside his residence. In addition, the appellant's

[18] Exhibit A-1, tab10, page5.

probation officer described the appellant as being cooperative with supervision and compliant with the Conditional Sentence Order to date with the assistance of his family. In his opinion, the appellant has strong family support from Ms. TATLA as well as his parents and siblings.

[23] As a general principle the IAD tends to weigh in the appellant's favor if the appellant resided for a significant period of time, and become firmly established in Canada. Given that the appellant was 22 years old at the time of his landing, and his length of time in Canada is less than five years as compared to India where he was born and raised I find the appellant's establishment in Canada is minimal. The appellant has no property, car, savings or any other assets in Canada. He and Ms. TATLA have a joined bank account and they work as farm labourers earning minimum wages. The appellant has some community support as evidenced from the letters to the court in his criminal trial from the appellant's co-workers who knew him and his family during a brief period between 2003[19] and 2005.

[24] While the appellant's length of time in Canada does not support a degree of establishment I find the appellant's record of employment is satisfactory in light of his low cognitive ability. With the help of his family members, in particular his parents and his spouse, the appellant has generally been able to seek and maintain employment over the years since his landing and after his marriage. The appellant and his wife are currently earning $8.90 per hour and they earned $13,000.00 from their previous employment in the Vincor International Inc. in Oliver, B.C. I am satisfied with Ms. TATLA's explanation of the appellant's inability to work during pre-sentencing period which had a negative impact on the family finances. I find the fact the appellant's immediate family relocation to Oliver indicative of strong ties among the appellant's family members and I find that the appellant derives support and assistance from his stable and supportive family. Although his sister lives in Toronto and has not visited her family since they moved to Oliver I am satisfied that she cares about what happened to the appellant and her family as a result of his offence as evidenced by her staying with her family in Surrey for two months in Surrey after the appellant was charged and based on the evidence before me I find that she maintains ongoing contact with her parents and the appellant and his wife.

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[19] Exhibit A-1, tab 7, page 1, tab 8, page 1.

[25] Ms. TATLA testified about her close relationship with the appellant and she described the appellant as a caring and loving father to their daughter. According to her she did not hesitate to leave her in his care.

[26] When asked by the Minister's counsel about the contact with the appellant's eldest brother in India Ms. TATLA claimed that there is no contact between him and his family in Canada. While she claimed that she is close to her father-in-law she could not provide any details of his recent visit in India which lasted for five and a half months and she was evasive when asked if her father-in-law visited his eldest son. I find that Ms. TATLA's testimony with respect to the lack of contact with the appellant's siblings in India was designed to support a claim that if the appellant is to be removed to India there will be no family support for him there. I find not truthful Ms. TATLA's testimony regarding the nature and extent of contact and relationship between the appellant's family in Canada and his family in India detracts from her credibility.

[27] With respect to issues of hardship, I conclude that there would be hardship to his family were the appellant required to leave Canada at this time. He is married and has young daughter. He and his wife appear to have solid and loving relationship and they both care deeply for their child. Given that the appellant, his parents and his younger brother have only been in Canada a short time and his wife has been in Canada only since April 2004, they have been making efforts to settle in Canada. I note that the appellant's partner's income is a limited one and she is relying on financial support from the appellant. Were the appellant to leave Canada, there would, no doubt, be difficulty with respect to her continued management of the home in the absence of the appellant's financial contribution. I note his close ties to his family in Canada, including his residency with his wife in Canada. I accept there would be a degree of hardship to the appellant if removed from Canada presently.

[28] With respect to hardship to the appellant, I note that he has relatives living in India, including his wife's relatives and there does appear to be a support network available to this appellant in India. The appellant's father owns an ancestral home which is being rented. I find the appellant has family in India, which would mitigate the hardship of his removal. While the appellant certainly retains Punjabi language, given his cognitive deficit and inability to clearly

articulate himself[20] his limited employability and his need for ongoing medical care and supervision I find that there will be a degree of hardship to the appellant if removed to India.

[29] I accept that the appellant has limited establishment in Canada and this is a negative factor in my consideration of discretionary jurisdiction.

[30] I consider the offences committed by the appellant against a woman to be very serious. While there was no evidence that in his relationship with his wife, he has shown violent behavior toward her, I am mindful that the appellant was unable at the time of the sentence to explain his motivation behind his offence and his wife could not provide plausible explanation for his motive or intent. Ms. TATLA advised the Probation officer that the couple have an active, consensual sex life and she indicated that the appellant has been sexually appropriate to her since their marriage.

[31] I have considered the best interest of a child. I find the relationship between the appellant and his wife, which resulted in a child to be strong, tightly knit and should not be severed. I find that in the best interest of this child that the appellant be allowed to stay in Canada. However given that the appellant was found guilty of a serious offence, I am not prepared to allow the appellant to remain in Canada unconditionally. I also note that any further convictions or the appellant's failure to make serious efforts to rehabilitate himself may give rise to an oral review.

[32] Although the Division finds the Removal Order made August 17, 2006 is in accordance with the law, the Division orders the execution of the Removal Order by stayed for a four-year period on the following conditions.

NOTICE OF DECISION

The removal order in this appeal is stayed. This stay is made on the following conditions (note that conditions 1 to 6 are mandatory conditions under s. 251 of the *Immigration and Refugee Protection Regulations*) – the appellant must:

1. Inform the Department (see condition "7" herein) and the Immigration Appeal Division (see condition "8" herein) in writing in advance of any change in your address;

[20] Exhibit A-1, tab 10, page 5.

2. Provide a copy of your passport or travel document to the Department or, if you do not have a passport or travel document, complete an application for a passport or a travel document and provide the application to the Department;

3. Apply for an extension of the validity period of any passport or travel document before it expires, and provide a copy of the extended passport or document to the Department;

4. Not commit any criminal offences;

5. If charged with a criminal offence, immediately report that fact in writing to the Department;

6. If convicted of a criminal offence, immediately report that fact in writing to the Department and the Division;

7. Provide all information, notices and documents (the "documents") required by the conditions of the stay by regular mail to the Department at **Canada Border Services Agency at Suite 700, 300 West Georgia St., Vancouver, B.C., V6B 6C8, phone number 604-666-8769 and fax number 604-666-3102.** It is the responsibility of the appellant that the documents are received by the Department within any time period required by a condition of the stay;

8. Provide all information, notices and documents (the "documents") required by the conditions of the stay by regular mail to the Immigration Appeal Division, **at Library Square, 1600 - 300 West Georgia St., Vancouver, B.C., V6B 6C9, phone number 604-666-5946, and fax number 604-666-3043.** It is the responsibility of the appellant that the documents are received by the Division within any time period required by a condition of the stay;

9. Report to the Department on the first week of January 2007 and every four (4) month(s) after that date on the following dates: the first week of May 2007, the first week of September 2007, the first week of January 2008, the first week of May 2008, the first week of May 2009, and the first week of May 2010.

The Appellant shall report in person. The reports are to contain details of the Appellant's: employment or efforts to obtain employment if unemployed; current living arrangements; marital status including common-law relationships; participation in psychotherapy or counselling treatment for sex offenders, and if not attending such, to provide reasons to the Division; meetings with parole officer, including details of any violations

of the conditions of parole; and other relevant changes of personal circumstances;

10. Make reasonable efforts to maintain yourself in such condition that it is not likely you will commit further offences;

11. Respect all parole conditions and any court orders.

12. Keep the peace and be of good behaviour.

Final Reconsideration

Take notice that the Immigration Appeal Division will reconsider the case on or about the 1st day of December, 2010, or at such other date as it determines, at which time it may change or cancel any non-prescribed conditions imposed, or it may cancel the stay and then allow or dismiss the appeal.

"Erwin Nest"
Erwin Nest

28 November 2006
Date (day/month/year)

Judicial review – Under section 72 of the *Immigration and Refugee Protection Act*, you may make an application to the Federal Court for judicial review of this decision, with leave of that Court. You may wish to get advice from counsel as soon as possible, since there are time limits for this application.