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## CITIZENSHIP AND IMMIGRATION

### EXCLUSION AND REMOVAL

#### *Inadmissible Persons*

Application for judicial review of decision by delegate of Minister of Public Safety and Emergency Preparedness referring applicant for admissibility hearing pursuant to *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), s. 44(2) — Applicant citizen of Trinidad and Tobago, permanent resident of Canada for twenty years — Diagnosed with schizophrenia, prescribed medication to help with his symptoms — Began using crystal methamphetamine, stopped taking prescribed medication, became homeless — In 2021, convicted of multiple crimes — Sentenced for arson, assault, committing indecent act — Since 2022, applicant continued to receive treatment for his schizophrenia — Stated that he is motivated to continue his medication, has not used drugs since mid-2022 — Minister began initiating inadmissibility proceedings against applicant — Initiated IRPA, s. 44(1) reports for applicant's arson convictions — Officer concluded that applicant had potential to relapse, reoffend, posed serious risk to general public — Also concluded that humanitarian and compassionate (H&C) factors not outweighing seriousness of applicant's conviction, not justifying warning letter, rather than referral to inadmissibility hearing — Delegate agreed with officer for largely same reasons, referred report to Immigration Division (ID) for admissibility hearing — Applicant submitted that decision unreasonable for failing to account for his submissions, analysis of his personal circumstances — Also submitted that decision ignored his requests that referral be made for his less serious criminal offences or that decision to refer applicant to admissibility hearing be held in abeyance until outcome of criminal appeal — Further maintained that delegate bore discretion to not refer report, that applicant held to incorrect standard for his prospect of rehabilitation in analysis, that establishment, hardship analyses erroneous — Whether delegate's decision reasonable — This matter raising nature of discretion in s. 44 referral process — Question herein: what exactly is form of "discretion" at play in s. 44 referral process? — There are two forms of discretion: first is discretion to refer report to ID or not, second is discretion to consider individual's personal circumstances or not — First form of discretion undoubtedly existing — In *Tran v Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50, [2017] 2 S.C.R. 289, Supreme Court's guidance on discretion to refer report clear — Second form of discretion existing for officers, delegates in s. 44 referral process as well — *Obazughanmwun v. Canada (Public Safety and Emergency Preparedness)*, 2023 FCA 151, *Sidhu v. Canada (Public Safety and Emergency Preparedness)*, 2023 FC 1681 both providing extensive discussions of discretion of immigration officers, ministerial delegates to consider H&C factors in ss. 44(1),(2) referral process — Stating that there is no obligation to consider personal circumstances not meaning that officers, delegates cannot consider personal circumstances, despite Court's holding in *Sidhu* that these circumstances "beyond the reach" of officers, delegates, including H&C considerations — Rather than bearing obligation to consider these circumstances, decision maker bearing discretion to consider them, will not be faulted if they do not — In case at hand, officer, delegate did consider applicant's personal circumstances — However, decision insufficiently responsive to applicant's submissions regarding report being issued for applicant's less serious offences or having matter held in abeyance until determination of criminal appeal — Officer chose not to rely on evidence with

regard to applicant's requests — Delegate similarly acknowledged that applicant convicted of three counts of arson — This reasoning was a failure to address key issues raised by applicant, failure in responsive justification, both of which are fundamental features of reasonableness review — Officer erred by finding that “it would be premature to assume [the Applicant] will be successful at rehabilitation” — Relevant legal constraint here was that threshold for applicant was not that his rehabilitation will be successful, but rather that he was “likely to reoffend or to be rehabilitated” — In considering applicant's rehabilitation, requiring that applicant demonstrate he “will” or “would” be rehabilitated, threshold elevated beyond what was required — These features of decision, as well as lack of responsiveness to applicant's submissions, sufficiently serious to render decision unreasonable as whole — Decision makers for referrals in ss. 44(1),(2) process neither precluded from nor obligated to consider personal circumstances in discretionary decision to report for admissibility hearing or not — Retaining discretion to consider these circumstances, albeit one tempered by their role in process — Further retaining discretion to refer report or not, even if report well founded — However, once decision makers provide reasons regarding individual's personal circumstances, their reasons subject to strictures of reasonableness review — Holding otherwise would see exercise of public power go unchecked — Application allowed.

DASS V. CANADA (PUBLIC SAFETY AND EMERGENCY PREPAREDNESS) (IMM-6584-23, 2024 FC 624, Ahmed J., reasons for judgment dated April 24, 2024, 17 pp.)