IMMIGRATION AND REFUGEE BOARD
(IMMIGRATION APPEAL DIVISIO N)

COMMISSION DE L'IMMIGRATION
ET DU STATUT DE RÉFUGIÉ
(SECTION D'APPEL DE L'IMMIGRATION)

IAD File No. / N° de dossier de la SAI : TA9-02209
Client ID No. / N° ID client : 2867-9066

Reasons and Decision – Motifs et décision

Removal order

Appellant(s)	**Appelant(s)**
SHAWN DWIGHT COLE	
Respondent	**Intimé**
The Minister of Public Safety and Emergency Preparedness **Le ministre de la Sécurité publique et de la Protection civile**	
Date(s) and Place of Hearing	**Date(s) et Lieu de l'audience**
August 20, 2010 **Toronto, Ontario**	
Date of Decision	**Date de la Décision**
October 24, 2010	
Panel	**Tribunal**
S. J. Morris	
Appellant's Counsel	**Conseil de l'appelant(s)**
Self-Represented	
Minister's Counsel	**Conseil de l'intimé**
Ian Catterall	

Canada

REASONS FOR DECISION

INTRODUCTION

[1] These are the reasons for decision in the appeal of **SHAWN DWIGHT COLE** ("appellant"). The appellant is a permanent resident of Canada, having been granted this status on October 20, 2003. The appellant was ordered deported on January 27, 2009.[1] This deportation was as a result of a referral being made under section 44(2) of the *Immigration and Refugee Protection Act* ("*IRPA"*) which in kind led to an admissibility hearings under section 36(1)(a) of the *Act*.[2] At the admissibility hearing, the Immigration Division ("ID") determined that the appellant was a person described in that latter section, being a permanent resident who having been convicted of an offence for which a term of imprisonment of six months was imposed or ten years or more may have been imposed. The offence in question which resulted in the referral was that on March 3, 2008, the appellant was convicted section 139(2) of the *Criminal Code of Canada ("Criminal Code")*, of one count of obstructing justice, an offence which is punishable by imprisonment for a term not exceeding ten years.

[2] On February 2, 2009, the appellant filed his Notice of Appeal with the Immigration Appeal Division ("IAD"). The IAD hearing was scheduled to take place on February 2, 2010. The appellant failed to appear. The matter was put over to Show Cause court. The appellant sent a letter to the IAD dated February 3, 2010 stating that he was sorry that he did not attend and provided some detail of his circumstances, which presumably included having been released from jail in the recent past. The matter was then scheduled for April 9, 2010, for the appellant to attend in Assignment/Show Cause court. He attended at which time the hearing of this appeal was scheduled for today.

[1] Deportation Order dated January 27, 2009.
[2] Held January 27, 2009 before Member Funston.

ISSUE

[3] The appellant does not challenge the legal validity of the ID's decision. The appellant is asking this tribunal exercise its humanitarian and compassionate jurisdiction and stay the deportation order. Therefore, the issue to be determined is whether there are sufficient humanitarian and compassionate considerations which warrant the granting of this special relief in all of the circumstances of this case.

DECISION

[4] For the reasons to be detailed below, based on all of the evidence presented, I am of the view that the appellant has not met the evidentiary burden under the applicable provisions of the *Act*. Therefore, the within appeal is dismissed.

THE APPLICABLE LEGISLATIVE PROVSIONS AND CASE LAW

[5] The appellant brings this appeal in accordance with section 63(3) of *IRPA*. The appellant relies on sections 67 and 68 of *IRPA*. In this regard, with respect to section 67(1)(a), as I stated above, the appellant did not challenge the legal validity of the removal order. Based on the evidence before me, I am satisfied that that the deportation order is valid in law. Reliance is therefore made by the appellant on subsection 67(1)(c) and 68(1) of *IRPA*.

[6] In assessing whether to exercise the statutory discretion granted in sections 67 and 68 of the *Act*, the evidence presented by the appellant must be assessed in the context of the legal test set out in the *Ribic*[3] case, as endorsed by the Supreme Court of Canada in *Chieu*[4] and *Al Sagban*.[5] Although this is not an exhaustive list, these factors include the following:

[3] *Ribic, Marida* v. *M.E.I.* (I.A.B. 84-9623), D. Davey, Benedetti, Petryshyn, August 20, 1985 (See CLIC, No.86, May 14, 1986). **Reported:** *Ribic* v. *Canada (Minister of Employment and Immigration*), [1985] I.A.D.D. No. 4 (QL).
[4] *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3.
[5] *Al Sagban* v. *Canada* (*Minister of Citizenship and Immigration*), 2002 S.C.C. 4.

(i) The length of time the appellant has been in Canada and the degree to which he is established here;

(ii) The seriousness of the appellant's criminal convictions;

(iii) The possibility of rehabilitation of the appellant;

(iv) The impact the appellant's removal from Canada would have on members of the appellant's family;

(v) The family and community support available to the appellant; and,

(vi) The hardship the appellant would face in the country to which he would likely be removed.

[7] The appellant must discharge the onus provided under sections 67 and 68 of the *Act* in order for me to exercise the statutory discretion provided and grant the relief sought.

ANALYSIS

Background Facts

[8] The appellant testified as did his sister, Youlet Cole. The appellant did not file any documentary evidence is support of this appeal, although he had ample time to do so.[6] The summary of the facts as detailed herein is from the oral testimony of the appellant and witness and the documentary evidence, filed, in the form of ID Record and Exhibit R-1.

[9] The appellant was born January 23, 1978 in Jamaica. He entered Canada on December 25, 1992 and was granted permanent resident status, as indicated above, on October 20, 1993. At the time of his landing he was 15 years of age. At the time of the hearing of this appeal the appellant is 32 years of age. He, along with his siblings, was sponsored by their mother who had arrived in Canada years earlier. The appellant attended high school although he did not obtain his leaving certificate. In his oral testimony, the appellant was unable to say what grade he completed or in what year he dropped out. Since that time, the appellant has not pursued any

[6] The Notice of Appeal was filed with the AID on January 29, 2009. The appellant therefore had slightly more that 1. 6 years to file any materials with this tribunal.

form of further education. In the Case Review Notes, the appellant indicated that he was going to take a course in real estate as he wanted to sell real estate.[7] In his oral testimony at the hearing of this appeal, the appellant indicated other plans. Specifically, he indicated that he was looking into going to Centennial College. He indicated that in this regard he had made some calls. The appellant was unable to say what he wanted to study or in fact how he would attend college without first having obtained a high school diploma. No concrete plan was put forward. When his sister gave her evidence she testified that she had gotten the college telephone number for him, but that it was up to him to then take the steps to make the call(s) to the college, inquire about the courses and so on. It was clear, however, that the plan which the appellant had in August of 2008 when he spoke with the Immigration officer had not been acted upon in the ensuing years, nor had the appellant taken any active steps to implement his present educational aspirations. In terms of the latter, when asked by Minister's counsel why he had not taken any active steps, the appellant indicated that he intends to go back to school once *"...we figure out what causes the seizures".*

[10] The appellant testified that he has seizures with some regularity, although he could not provide a sampling of a chronology. In the case review summary, it was noted by the Immigration officer that the appellant advised that he had seizures; that per the appellant, the doctors have been unsuccessful in finding the root cause of them. The Immigration officer then notes *"...Mr. Cole promised to fax the discharge papers to confirm his frequent admission and discharge to hospital, but to date the officer has not receive any additional submissions from Mr. Cole."* This was noted in the report dated September 29, 2008 which resulted from at least one meeting with the appellant held on August 7, 2008. The appellant again stated at this hearing that he could get his medical records; that he had tried, but he did not realize how difficult it would be. I questioned him as to what that meant, and he indicated that he had asked his family doctor, not specifically able to recall when, and he repeated that it was hard as a number of hospitals were involved. I refer to this issue at this time, and in some detail, as I do not view it as insignificant. I have no reason to doubt that the appellant has some form of health issue. He has described that there is an issue with seizures. No medical evidence has been presented to

[7] ID Record, page 8; interview held on September 29, 2008.

provide confirmation of this description and/or diagnosis; what is its cause, if know, what are the options in terms of treatment, if any; what physical limitations does this place on the appellant, if any; does, for example, the appellant's continued drug use contribute or exacerbate in any way to the condition. The appellant has apparently held the view at least since August of 2008 that his health situation is something that is germane to his ongoing deportation process. In the two years since his initial meeting with the Immigration officer wherein he advised that the relevant medical materials would be forwarded, no steps have been taken by the appellant in this regard. My difficulty is that I have none of the necessary medical evidence which would in any way assist me in assessing such evidence in the context of the issues, the legislative provisions and the jurisprudence which I must apply. Given the seriousness of this proceeding and the possible resulting outcome, namely, deportation from Canada, I would have thought that the appellant would have ensured that this evidence would be before this tribunal if he intended to rely on a medical condition in this proceeding in any manner whatsoever. In my view, the lack of action on the appellant's part on this seemingly very important issue is germane to several of the *Ribic* factors, which I will discuss further below. Further, and significantly, as there is simply no medical evidence upon which I can rely, I cannot factor into my analysis in any meaningful way any condition which the appellant may have.

[11] The offence which underlies the deportation order is a conviction for obstruction of justice on March 3, 2008 and that is what is central in this appeal. However, the balance of the appellant's criminal history is also relevant in overall analysis. His criminal activity dates back to 1993, shortly after his arrival in Canada, as a young offender. Based on the materials contained in Exhibit R-1, it appears that the appellant has been convicted of well over two dozen offences between 1994 and 2008. Minister's counsel has represented that the appellant has 28 convictions in all. At least three of those convictions relate to firearm-related offences.[8] At least four of the convictions are drug-related, primary possession of crack cocaine. There is one assault conviction with resulted from an assault on his former common law spouse, the mother of his then 3-year old son.[9] Very concerning for the purposes of today are the numerous failures to

[8] Exhibit R-1, pages 1 through 7.
[9] *Ibid*.

comply with bail condition convictions, failures to comply with conditions of probation and obstruction of justice and obstructing a peace officer.[10] I also note that in one particular situation, when the appellant was incarcerated, he managed to be released by coming forward when a person with the last name "Cole" was called, albeit it was not with the appellant's first name. He nevertheless proceeded to knowingly misrepresent himself as this other person in order to secure his release. He did turn himself in a number of days later, and at that time was found to be in possession of marijuana in his anal cavity. In his oral testimony the appellant indicated that he attempted to smuggle the substance into jail so that he would have something to smoke while in jail.

[12] The appellant is the father of two children, a boy and a girl, who at the time of this hearing were 12 and 5 respectfully. In his testimony, the appellant indicated that there was no court order with respect to the custody of or access to the children. Rather, the children resided primarily with their mother. In the school year 2009 to 2010, his now 12-year old daughter lived with the appellant's mother and sister in their home in Pickering and attended school in that area. For most of this time period, the appellant was in custody. There is also no court order which provides that the appellant is required to provide any form of child support for his children. The appellant indicated both in his testimony and in the section 44(1) narrative that he does not provide much financial support for his children, but he does babysit. He does this as his former common law spouse, who is the mother of these children's, works two jobs in order to support herself and the children.

[13] The appellant's employment history is rather limited. He indicated that at present, he is not working. He testified that his last job was in a barber shop but that as a result of his seizures, he felt that it was not safe to work with scissors and the like. His testimony led me to believe that he was cutting hair. When his sister testified, she indicated that his last job was helping out in a barber shop, sweeping floors, cleaning up the shop and the like. Quite a different presentation of the job description. I asked the appellant if he had been fired from this employ and he said no. The only conclusion I can therefore draw is that the appellant quit his job. He

[10] Exhibit R-1, pages 1 through 7..

was not able to provide any form of job history, stating that for a period of years, although he could not say when, he had was in receipt of welfare, but he has not been "for the last couple of years". He indicated that his mother and sister financially support him. Since his last release from jail he has been living with his mother in Pickering, a term of his release. The appellant testified that he has no assets in Canada, is not involved in any community activities and attends church "every so often."

[14] His younger sister was called to testify on the appellant's behalf. Ms. Cole is employed in a hair salon. She has two children of her own and for the past four years, she has resided in her mother's home in Pickering with her children. Ms. Cole indicated that the appellant was asked by their mother to leave her home when he was quite young as they did not get on. She believed that for a period of time thereafter the appellant was living on the streets. At the time, Ms. Cole, the younger sister, was in her early years of high school. In sum, Ms. Cole described the manner in which her brother has lived as "not the right way". She stated that either he opens his eyes or he will end up nowhere. She said that as he was older sibling, he should guide her, but instead she will now guide him. She indicated quite clearly that in order for her brother to get on track she was of the view that he had to get help with his drug addiction problem, he had to get a job, even if was part-time, that he had to go back to school and, that he had to be a better role model for his children by staying out of trouble and spending more time with them.

The Ribic Factors Applied to the Facts

[15] In appellant's submissions, he stated very clearly that he did not wish to be deported. He stated that Canada was his home; that he loved his kids; that at a certain point you get tired of stuff- the smoking, going to jail; that he wanted to get a job; that he wanted to "do better". There is no question in my mind that at the moment the appellant provides this testimony, and taken in its widest sense, he actually believes it. The issue is his ability to take any concrete steps to even begin to implement such a life change, let alone to achieve it. He has said this to this tribunal and he said essentially the same thing to the immigration official who prepared the section 44(1) narrative back in September of 2008. My function is to look at this in the context of the totality of the evidence and the applicable law, which I will do in some detail below.

The length of time the appellant has been in Canada and the degree to which he is established in Canada

[16] The appellant has been in Canada with status since 1993. He has now spent 17 years in this country, longer than he lived in Jamaica. This is a factor which is in the appellant's favour. The degree of establishment is a far more difficult issue. He dropped out of school at an early age and has not continued with any form of education which would enable him to have a better chance at obtaining meaningful employment. While he "talks the talk" of upgrading he education, to use a colloquial expression, he has failed over an extended period of time to "walk the walk". He is unemployed, has no assets of any variety and has little, if any, community involvement or attachments. In the ordinary course, given the duration of his residency in this country, one would expect a far greater degree of establishment. Given the choices made by the appellant, he has largely failed to establish any meaningful roots in Canada. In these circumstances, I place less weight on this conjunctive *Ribic* factor.

The seriousness of the appellant's criminal convictions

[17] In a comparative sense, one could argue that obstruction of justice is not on the higher end of serious criminality. But this is not a comparative process. This is an individual analysis or assessment which therefore has a strictly individual context. When looking at the possibility of imposing a stay of any variety, which is in essence my only other available option, this has to be considered in the context of this indicia, a central question is whether the conditions imposed in relation to that stay will be respected and as a result, will actually assist in achieving the underlying purpose of granting the appellant in essence, a second chance to remain in Canada. Given that as an adjudicator, I do not have a crystal ball which can provide me with this answer, and given that I cannot speculate, I can only base my assessment on the history of the appellant to date. Here, his regular disregard for court imposed terms does not bode well for him. He has not only obstructed justice, he has breached the terms imposed as a consequence of his various convictions. I am not sure if that is because he simply does not care, or, he simply does not have the capacity to stay on a different path or, because he knows that the consequences, unfortunately, in our criminal justice system for such breaches are seemingly not that sever in

cases where there are multiple breaches over periods of years. But, in this forum, that is not, in my view the case. There are only two options available to me. Deportation is an all or nothing proposition. It is very serious in my view, and has certainty and finality. The granting of a stay is something that, while discretionary, must to have its foundation in the facts of the case as applied to our law. The applicable law, as I understand it, is grounded in serving a greater purpose. Part of that is balancing our immigration objectives one the one hand, which are appropriately large in spirit, and, on the other hand, respecting expectation or perhaps even the right of our existing citizens to be safe while at the same time recognizing the obligations on citizens and permanent residents to be law abiding. In my view, therefore, the conviction of obstructing justice viewed in the matrix of the appellant's overall history makes this conviction quite serious.

The possibility of rehabilitation of the appellant

[18] It is apparent that the appellant has, in large measure, disregarded many of the legally imposed sanctions, as described above. The appellant has not over the many years reached out to take any active steps to help himself. He has not taken any significant steps toward the road of rehabilitation. It is trite to say that there can be no real or meaningful prospect of rehabilitation unless and until there is an acknowledgment that there is a problem. Even when there is acknowledgment, the ability to act on it and to maintain that action is required. Based on the appellant's history as I have detailed herein; based on the fact that he has not put forward any concrete plan which would demonstrate that he is moving in a different direction, that a process or rehabilitation had begun or, is at least in place and will be launched shortly, I cannot say that there is any objective evidence which would demonstrate that rehabilitation is a possibility. The appellant's subjective statement that he has "*had enough*" with his present lifestyle simply does not meet the legal standard which I must apply.

The family and community support available to the appellant

[19] There is no question that the appellant's sister has stepped up, as it were. Her testimony resonated with me. Although the younger sister, she has taken on assisting to support the

appellant financially and emotionally. She has taken over a big part of his child care responsibilities. She testified that while her brother was in jail on the last occasion, for example, and her niece was living with them, she prepared the child for school, took her to school and attended to all of the child's day-to-day needs. She testified that if the appellant was deported, she would continue in this regard, although she did say that it would not be the same, for the child, as having her father physically present. Based on the appellant's own testimony and his record of incarceration, he has not been all that physically available in any event. The relationship with his mother has been, over the years, strained, based on the testimony of both the appellant and his sister. The sister has now seemingly rallied the mother. And so, there is some family support here but it is largely singular. I do however place some weight on this.

[20] The appellant does not seem to have any ties to a community based on his own evidence.

The hardship the appellant would face in the country to which he would likely be removed

[21] I have no doubt that the appellant will face some hardship in returning to his country of citizenship. While no evidence was lead on country conditions, the appellant has lived in Canada most of his life, and so, in essence moving to another geographical location may well be difficult. Whether by deportation or a voluntary move, relocation or, as in this case, return, is always transitional and not without some form of difficulty. But, the appellant has no real degree of establishment here, as detailed above. I therefore do not place significant weight on this factor.

BEST INTEREST OF THE CHILDREN – SEPARATE ANALYSIS

[22] The law requires that I provide a separate analysis with the respect to the appellant's children. Some of the *Ribic* factors do touch on the needs of the children and the effect that a deportation order may have on the children, but they are, in the main, more appellant-focused. The law appropriately recognizes that and therefore mandates that a child-centric analysis be undertaken separately.

[23] There are two children here to consider. A best interest analysis is based on many factors as the there are various types of needs which children have. The best interest basket therefore can be comprised of many things. There are always certain more generic type-factors which must be looked at and, there can additionally be case-specific factors. In terms of the latter, and by way of example, in an individual case, there can be a special needs child. In that case presumably, there would be additional factors to look at in that "basket". In this case, no special needs have been identified or presented. Therefore, the best interest of the child can be looked at a more fundamental level, exploring such things as the need to have a parent physically present; to have financial support from that parent to meet their day-to-day needs; to have the emotional support of a parent; to have the parent to provide guidance in the wider sense as having the parent as a role-model or, in the narrower sense, of having the parent around to assist with homework and perhaps even involving the child in extracurricular or religious activities which may benefit the child's overall development. There is no closed class of factors. The assessment is case-specific and based on the evidence led and garnered.

[24] It is trite to say that the conventional wisdom is that it is best for children to have their parents involved in their lives which, in some respects, may best or most easily be achieved by a parent's physical presence. But again, each case rests on its own facts. Here, on the evidence, the appellant had spent much time physically apart from his children due to his own lifestyle choices. He has not, based on the evidence, contributed to meeting their day-to-day needs, at least in a regularized or consistent way as a result of his unemployment or absences due to incarceration or otherwise. The mother of the children has had to, on the appellant's own evidence, take a second job as a result of his inability to financially contribute to their support. The children's mother's has had to seek the assistance of the appellant's family to assist with the schooling and day-to-day care of the daughter in the result. These children are fortunate that their family has been willing and able to do so. The appellant's sister's testimony evidences the fact that the appellant needs to change in order to be a better role-model for his children and in this regard, to actually spend more time with them. The corollary to that, of course, is that presently, he is not the best role model and that he does not spend enough or sufficient time with them.

[25] When these components are looked at individually and taken together, the conclusion that I have reached is that the appellant's physical presence is not a mainstay in the best interest analysis in this case. I fully appreciate that this is not ideal. However, these children, like other children of separated or divorced spouses or parent's who live in different jurisdictions, can still maintain contact and a relationship with their father through whatever means which the parents themselves determine is best for their children. This of course can include financial support as well.

[26] In the result of the above analysis of all of the applicable factors, I am unable to reach the conclusion that a factual and evidentiary basis exists to support the determination that there are sufficient humanitarian and compassionate considerations which warrant the granting of this special relief in all of the circumstances of this case. The appeal is therefore dismissed on this ground as well.

[27] For all of the reasons outlined above, this appeal is dismissed.

NOTICE OF DECISION

The appeal is dismissed.

"S. J. Morris"
S. J. Morris

October 24, 2010
Date

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	Contrôle judiciaire – Aux termes de l'article 72 de la Loi sur l'immigration et la protection des réfugiés, vous pouvez, avec l'autorisation de la Cour fédérale, présenter une demande de contrôle judiciaire de la décision rendue. Veuillez consulter un conseil sans tarder car cette demande doit être faite dans un délai précis.