Khosa: Extending and Clarifying *Dunsmuir*

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Introduction

The Supreme Court's recent decision in *Khosa* represents its first significant guidance with regard to the implementation of the standard of review analysis post-*Dunsmuir* (*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9). This decision provides some insight into how the standard of review analysis should be conducted after the elimination of the most deferential patent unreasonableness standard.

Dunsmuir was the most significant administrative law decision released last year. It represents a break from past standard of review jurisprudence because it reduced the available standards from three to two. Whereas previously there were two deferential standards of review, these being reasonableness and patent unreasonableness, there is now only reasonableness. The non-deferential standard of review remains the same as before – correctness.

Khosa is significant because it is the first decision in which the Supreme Court conducts a standard of review analysis where the only options for review are either reasonableness or correctness. It is also important because it provides specific guidance with respect to the role that the common law plays in many judicial reviews conducted under the auspices of the *Federal Courts Act*. More generally, the majority reasons in *Khosa* also clarify and explain the role that statutorily mandated standards of review play in the standard of review analysis. It is not the case that a statutory direction with regard to the applicable standard would ever completely oust the common law. At minimum, the common law remains an important interpretive aid.

Justice Binnie wrote the majority decision, with McLachlin C.J. and LeBel, Abella and Charron JJ. concurring. Justice Rothstein wrote a concurring reason based on a different analysis, and Justice Deschamps, in brief reasons, concurred with much of Justice Rothstein's analysis, and concurred in the result with the majority. Justice Fish wrote a dissent in which he largely endorsed the reasons of the majority at the Federal Court of Appeal.

Background

Khosa was convicted by the British Columbia Supreme Court of criminal negligence causing death in connection with a street racing incident that took place in Vancouver in 2000 (*R. v. Khosa*, 2003 BCSC 357). Khosa and another driver were travelling far in excess of the speed limit when Khosa lost control of his vehicle and struck and killed a pedestrian.

Khosa, having been a landed immigrant at the time of his offence, was subject to a removal order as he was found to be a person engaged in "serious criminality" within the meaning of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. After serving a conditional sentence of two years less a day, Khosa appealed his removal order to the Immigration Appeal Division ("IAD") requesting special relief from the order on humanitarian and compassionate grounds. Khosa did not contest the validity of the order per se.

Immigration Appeal Division

The IAD considered the relevant common law test for whether a person who is subject to a valid removal order should be granted special relief on humanitarian and compassionate grounds. In a 2-1 split decision, the IAD decided that Khosa's mitigating factors were not sufficient to prevent the enforcement of the removal order. The majority emphasized that although Khosa had expressed remorse for his actions, he continued to deny that he was involved in a "street race." Khosa admitted during his criminal sentencing and before the IAD that he had been driving dangerously, and that his dangerous driving had caused a death, but he did not go so far as to admit that he had actually been involved in a "street race." The majority of the IAD concluded that Khosa's qualified expression of remorse indicated that he lacked insight into his conduct.

Federal Court
Khosa v. Canada (Minister of Citizenship and Immigration), 2005 FC 1218

Khosa applied to the Federal Court to have the IAD's decision judicially reviewed. The Federal Court denied Khosa's Application for judicial review in reasons that were released prior to the Supreme Court's decision in *Dunsmuir v. New Brunswick*.

Lutfy C.J. found that the standard of review applicable to the IAD's decision was patent unreasonableness based in part on an application of the factors from *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, but also based on the Supreme Court's analysis in *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100, which was based on an interpretation of s. 18.1(4)(d) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. In Lutfy C.J.'s view, patent unreasonableness was the applicable standard because Parliament intended the IAD to have wide discretion in immigration removal matters, because the question was one of mixed fact and law, and because the IAD had greater expertise than the Court in making the factual determinations necessary to exercise its humanitarian and compassionate discretion within this regime.

Federal Court of Appeal
Khosa v. Canada (Minister of Citizenship and Immigration), 2007 FCA 24

The Federal Court of Appeal, like the Federal Court before it, did not have the benefit of the Supreme Court's reasons in *Dunsmuir* at the time it rendered its decision in this case. The majority at the Federal Court of Appeal, in reasons drafted by Décary J.A., found that the applicable standard of review was reasonableness, and that the IAD's decision had been unreasonable. The majority disagreed with Lutfy C.J.'s standard of review analysis for a number of reasons. In Décary J.A.'s view the Federal Court had given short shrift to the fact that decisions of the IAD are not protected by a privative clause, are related to humanitarian and compassionate factors, and that the issue in this case related to criminal law sentencing principles with which the IAD had no expertise or qualification. The majority found that the Federal Court had not properly considered the parallels between the matter before the IAD in this case, and the standard of review analysis in *Baker v. Canada*, [1999] 2 S.C.R. 817. In *Baker* the Court had considered a matter that similarly dealt with a discretionary immigration decision made on humanitarian and compassionate grounds, and had concluded that the applicable standard was reasonableness simpliciter.

The majority's view was that the IAD had placed excessive emphasis on the question of whether Khosa was street racing, and on the issue of Khosa's refusal to characterize his actions as street racing. The IAD appeared to have concluded, based on Khosa's qualified expression of remorse, that he was not a candidate for rehabilitation and therefore should not be granted relief from his removal order on humanitarian and compassionate grounds. The IAD's fixation on this issue, to the detriment of Khosa's other mitigating factors, was seen by the Court of Appeal as unreasonable, particularly in light of the fact that the IAD had no expertise or qualification with regard to criminal law sentencing or rehabilitation issues.

This lack of expertise was highlighted, in the majority's view, by the fact that Khosa's expression of remorse was sufficient to persuade the British Columbia Court of Appeal to uphold the trial judge's imposition of a conditional sentence of two years less a day (*R. v. Bhalru, R. v. Khosa*, 2003 BCCA 645). The British Columbia Supreme Court and the British Columbia Court of Appeal felt that Khosa *was* a candidate for rehabilitation and not likely to re-offend and as such they did not hand down a custodial sentence. Given the severity of the offence for which Khosa was convicted, a lengthy custodial sentence would not have been out of the question in his case. The IAD acknowledged these findings of the criminal courts, but did not distinguish them in its reasons.

Supreme Court of Canada
Canada (Citizenship and Immigration) v. Khosa, 2009 SCC 12

The Minister of Citizenship and Immigration appealed the Federal Court of Appeal's decision to the Supreme Court. By the time this appeal was heard the Supreme Court had released its decision in *Dunsmuir*. The lower courts did not have the benefit of this

decision when drafting their reasons and the decision in *Khosa* represents the Supreme Court's first significant application of its own reasons from *Dunsmuir*.

The majority, led by Binnie J., overturned the decision of the Federal Court of Appeal, finding that although the standard of review was properly found to be reasonableness, the Court of Appeal did not afford the IAD the appropriate level of deference commensurate with that standard of review, having regard to the nature of the question and the statutory regime that was implicated.

Justices Rothstein and Deschamps concurred in the result, but held that a standard of review analysis based on common law principles was unnecessary and misplaced in this case. In their view the standard of review was statutorily directed by the *Federal Courts Act* and that the statutory direction displaced any role that *Dunsmuir* may have otherwise played in determining the standard of review.

Fish J. dissented, largely agreeing with the reasons of the majority at the Federal Court of Appeal, in his view, the IAD gave short shrift to the findings of the British Columbia Court of Appeal and British Columbia Supreme Court with regard to Khosa's prospects for rehabilitation, re-offending, and with regard to the level of remorse that he had expressed. Justice Fish acknowledged that the findings of the criminal courts were not binding on the IAD, but that it was unreasonable for the IAD to simply ignore these findings without at least distinguishing them.

How *Khosa* Clarifies *Dunsmuir*

The reasons of the majority in *Khosa* offer a number of significant clarifications with respect to how the standard of review analysis should be implemented post-*Dunsmuir*. Many of these points were present in *Dunsmuir* itself, but it was not clear on the strength of that decision alone how significant each point would be in future standard of review analyses.

Justice Binnie writes the majority decision in *Khosa* whereas he wrote separate concurring reasons in *Dunsmuir*. *Khosa* closes some of the analytical gap between the majority reasons and Binnie J.'s concurring reasons in *Dunsmuir*. Justice Binnie's reasons in *Dunsmuir* were supportive of the elimination of the patent unreasonableness standard of review, but were critical of a standard of review exercise that he viewed as being prone to over-abstraction (*Dunsmuir* at para. 122). In his view, reviewing courts should not approach the standard of review analysis mechanically by checking items off a list or by attempting to mathematically calibrate the degree of deference that should be afforded to a particular tribunal. Similarly, he takes the position that the analysis should not be excessively general and should be specifically linked to the merits of the applicant's case.

Justice Binnie emphasized that the substance of the administrative decision-maker's reasons should not take a back seat to the form of those reasons, or to the constitution of

the decision-making body itself. He suggests that although the "nature of the question" before the decision-maker has long been one of a number of elements to be considered in the standard of review analysis, it ought to play a more important role in terms of substantive review and the application of the standard. In *Dunsmuir*, Binnie J. seemed to reserve a special role for the "nature of the question" in determining the range of reasonable outcomes (*Dunsmuir* at para. 138).

In his concurring reasons in *Dunsmuir*, Binnie J. also emphasized that a factor-driven standard of review analysis distracted reviewing courts from examining the merits of the applicant's argument. He stated that, "[t]he problem is that courts have lately felt obliged to devote too much time to multi-part threshold tests instead of focussing on the who, what, why and wherefor of the litigant's complaint on its merits (*Dunsmuir* at para. 154)." In Binnie J.'s view the default position of reviewing courts should be deference, and the standard of review should be presumed to be reasonableness unless demonstrated otherwise.

Partly because the majority in *Dunsmuir* did not extensively comment on Binnie J.'s reasons on these points, it was not clear how or if the standard of review analysis would change given the elimination of the patent unreasonableness standard. We were left with the same *Pushpanathan* factors that had always been examined under the "pragmatic and functional" test, and we were left with the same admonition to apply the factors globally and contextually, and to not treat the factors as checklist items (*Dunsmuir* at paras. 52-64).

In *Khosa*, however, we get some confirmation that the substance of the application for judicial review is to be emphasized over formal considerations such as the structure of the reasons or the nature of the decision maker, the context of the regime overall, etc. *Khosa* adopts certain aspects of Binnie J.'s concurring reasons in *Dunsmuir*, with the notable exception of his suggestion that there would inevitably be a "sliding scale" or inconsistent application, of deference within the reasonableness standard.

At the outset of the majority's reasons in *Khosa*, Binnie J. writes that, "*Dunsmuir* teaches that judicial review should be less concerned with the formulation of different standards of review and more focussed on substance, particularly on the nature of the issue that was before the administrative tribunal under review (*Khosa* at para. 4)."

Determining the Standard

It is significant that the actual standard of review analysis conducted in *Khosa* consists of a bare seven paragraphs briefly addressing each of the four factors (privative clause, purpose of the decision-maker, nature of the question, and the expertise of the tribunal) (*Khosa* at paras. 52-58). The privative clause factor appeared not to be particularly significant since the majority's only conclusion on this point was that there was no statutory right of appeal. As to the purpose, the majority did not offer a great deal of analysis on this point either, but noted that the IAD had been established as a specialized body designed to adjudicate a variety of immigration issues. Although the majority did

not rank the significance of the applicable factors in this case, the nature of the question, combined with the expertise of the tribunal appeared to be significant. Justice Binnie noted that the IAD was charged with the task of determining not only what constituted humanitarian and compassionate considerations in a given case, but was also empowered to determine the sufficiency of those considerations. Further, he noted that an appeal from a valid removal order is properly characterized as a claim for a discretionary privilege (*Khosa* at para. 57). Having regard to these factors, the majority concluded that the reasonableness standard should apply.

Applying the Standard – Two-Stage Approach

In applying the reasonableness standard, the majority followed *Dunsmuir* in examining the reasons of the IAD to determine first, whether there existed justification, transparency and intelligibility within the reasons of the IAD. On this point the IAD's consideration of the relevant common law factors in determining whether to exercise humanitarian discretion was noted. The majority then considered whether the result fell within the range of possible acceptable outcomes.

The one potential flaw in the justification and intelligibility of the IAD's reasons, as emphasized by the Federal Court of Appeal and by Fish J. in his dissent, was that the IAD did not make any effort to distinguish the findings of the criminal sentencing courts that had already favourably considered Khosa's prospects for rehabilitation and his degree of remorse. Justice Binnie obliquely addresses this concern by noting that, "the appropriate degree of deference requires of the courts not submission but a respectful attention to the reasons offered or which could be offered in support of a decision [emphasis Binnie J.'s]" (*Khosa* at para. 63). Justice Binnie then proceeds to effectively 'connect the dots' in the IAD's reasons by explaining that the criminal courts' sentencing considerations are distinct from the considerations of the IAD. In the majority's view these reasons were sufficiently justified, transparent, and intelligible.

With regard to the final outcome, the majority found that the IAD's decision fell within the range of acceptable outcomes given the highly discretionary nature of the question before it, and given its consideration of the relevant common law test. Assessing whether there are sufficient humanitarian and compassionate grounds to exercise discretion is a fact-driven exercise that requires findings of credibility, and it is one to which the IAD is well-suited.

How *Khosa* Extends *Dunsmuir* – Clarifying the Role of Statutory Direction

The Supreme Court's decision in *Khosa* also extended the application of *Dunsmuir*. Although there was some reference in *Dunsmuir* to statutorily-directed standards of review, there was no guidance given as to how or when a statutory direction might displace the common law standard of review analysis. Between the majority decision and the concurring reasons of Rothstein J. and Deschamps J., *Khosa* goes some length in establishing a new front of administrative law analysis in this area.

The statutory direction issue arises in *Dunsmuir* due to the wording of s. 18.1 of the *Federal Courts Act*. This *Act* provides the legal basis for judicial review for a wide range of federal boards and tribunals, including the IAD. It provides some guidance to reviewing courts, listing circumstances in which judicial review may be sought, and establishing some of the outlines of the judicial review exercise in the federal administrative sphere.

In his concurring reasons, Rothstein J. interprets this section as establishing an appellate-type regime whose default reviewing standard should be correctness. Analyzing each of the various subsections under s. 18.1, Rothstein J. finds that the legislature has specified different standards of review depending on the type of question that is being reviewed, and having regard to the legislature's estimation of the expertise of the IAD with regard to that question. In Rothstein's view, s. 18.1 represents a clear indication of legislative intent with regard to the expertise of the tribunal *vis a vis* particular questions or issues, and this intent should not be by-passed on judicial review (*Khosa* at para. 96).

He therefore agrees with the majority to some extent that the focus of the analysis should be on the nature of the question under review, but does so solely based on his reading of the statute. According to Rothstein J., *Dunsmuir* has no role to play here. The common law of judicial review is displaced by the clear intent of the legislature.

The majority, on the other hand, sees s. 18.1 as not establishing any standard of review at all, but instead as establishing *grounds* on which judicial review may be sought. On this analysis, the *Federal Courts Act* establishes a basis for applying for judicial review, it does not establish a basis for determining what the standard of review should be – the standards remain to be determined by the common law, within the context of the grounds (*Khosa* at paras. 41-48).

The majority, led by Binnie J., states that even had there been a clear statement with regard to the standard of review in s. 18.1, the factors in the standard of review analysis from *Dunsmuir* would still be relevant:

> [51] As stated at the outset, a legislature has the power to specify a standard of review, as held in *Owen*, if it manifests a clear intention to do so. However, where the legislative language permits, the courts (a) will *not* interpret grounds of review as standards of review, (b) will apply *Dunsmuir* principles to determine the appropriate approach to judicial review in a particular situation, and (c) will presume the existence of a discretion to grant or withhold relief based on the *Dunsmuir* teaching of restraint in judicial intervention in administrative matters (as well as other factors such as an applicant's delay, failure to exhaust adequate alternate remedies, mootness, prematurity, bad faith and so forth).

In the majority's assessment, no matter how clear the expression of the legislated standard of review, the common law still plays a role in interpretation (*Khosa* at para. 19). At the same time the majority states that effect must still be given to the clear legislated intent – patent unreasonableness will live on in British Columbia due to the provisions of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45.

Picking up on Binnie J.'s concurring reasons in *Dunsmuir*, the *Khosa* Court states that where the statutory regime does not refer to a specific standard of review or provide guidance in that regard, the default position is to afford the administrative decision-maker deference – the default position is not to evaluate on the correctness standard (*Khosa* at para. 26). In the majority's view, s. 18.2 of the *Federal Courts Act* cannot be read as giving any instruction with regard to the standard of review to be applied – it covers such a wide variety of tribunals, boards, and other decision makers that flexibility is the key to interpreting that section. The *Federal Courts Act* enables, but does not require, judicial intervention in these particular circumstances (*Khosa* at paras. 40-43).

Conclusion

Khosa is a significant decision, not only because it brings Binnie J. in from the cold so-to-speak on the standard of review issue post-*Dunsmuir*, but also because it provides additional guidance with respect to the application of the standard of review analysis that should help in making the outcomes of such analyses more predictable. It is now relatively apparent that the default standard of review is reasonableness (without putting it as high as suggesting that the applicant bears any onus of demonstrating that the standard of review on a given question should not be reasonableness).

The decision in *Khosa* is also significant because it provide some clear directions with regard to how the standard of review analysis interacts with legislative directions on the standard of review. The majority essentially tells us that legislative directions with regard to the applicable standards of review must be quite explicit in order to be effective – the Court seems reluctant to relinquish its supervisory function to lukewarm expressions of legislative intent. If the intent to displace the common law standard of review analysis is not very clearly stated, the Court will not search for implied intent. In any event, the Court also states that the common law will always play an interpretive role with regard to the standard of review, even where there is a clear expression of legislative intent.

Ultimately, it appears that the post-*Dunsmuir* process by which the applicable standard of review is to be determined is largely in line with the "pragmatic and functional" approach that was developed in previous jurisprudence. However, what is interesting about *Khosa* is that the question of which standard of review was to be applied was something of a collateral issue. In that regard *Khosa* has arguably opened a new front in judicial review applications. Given that the majority of judicial review applications will be reviewed on the reasonableness standard in the future (or at least the correctness standard will become more exceptional), it seems likely that counsel will begin concentrating their arguments on the two-step *application* of the reasonableness standard. In our view the important question now is not, "Which standard should apply?" but is rather, "How does the reasonableness standard apply to the facts of a given case?" In this regard the "nature of the question" has a special role to play in determining the range of possible acceptable outcomes.