

Federal Court



Cour fédérale

Date: 20170111

Docket: IMM-1886-16

Citation: 2017 FC 33

Ottawa, Ontario, January 11, 2017

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

**SHAVIQUE DILANO MONTANO
BY HIS LITIGATION GUARDIAN,
SHANTELLE ADAMS**

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant has applied for judicial review of a decision of a Minister's Delegate [the Officer] to issue an exclusion order against him dated April 21, 2016 [the Decision]. The Applicant is a minor and is represented by his mother, Shantelle Adams [the Mother]. She is his litigation guardian. Both the Applicant and his Mother are citizens of St. Vincent. This

application is brought pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA].

[2] The Applicant and his Mother entered Canada as temporary residents. Six months after their arrivals in 2010 and 2006 respectively, their temporary resident status lapsed, but neither applied for an extension. On September 10, 2011, the Applicant's mother married a Canadian citizen.

[3] The Canada Border Services Agency [CBSA] became aware of the mother's address and issued an inadmissibility report against her under Section 44(1) of the IRPA. On August 11, 2015, she failed to appear for her Minister's Delegate's Review, and an exclusion order was subsequently made against her *in absentia*.

[4] On August 31, 2015, the Mother's husband filed a Spousal Sponsorship application listing the Applicant as a dependent.

[5] On April 11, 2016, the CBSA contacted the Mother and she confirmed that she would attend an appointment concerning the Applicant.

[6] On April 21, 2016, the Mother met with the Officer. The Officer conducted a Minister's Delegate's Review [the Review] of the subsection 44(1) inadmissibility report [the Report], which had been issued against the Applicant.

[7] The Officer's affidavit, dated October 21, 2016, shows that she used a set of standardized questions and recorded the Mother's responses on a form called "Minister's Delegate Review".

This form will be described as the Notes. The Notes showed that:

- i. the Mother spoke English and presented herself without counsel;
- ii. the Mother advised that the allegations in the Applicant's Report were accurate; and
- iii. the Mother, when given an opportunity to make additional comments and communicate whether she feared a return to St. Vincent, said it was in the Applicant's best interests to continue his ongoing medical testing in Canada, but also said that she recognized that they might have to return to St. Vincent pending the outcome of the spousal application.

[8] The Officer deposes that, given the above, she was satisfied that the Report was well founded and she issued an Exclusion Order [the Order] against the Applicant. The Officer swears that she explained the implications of the Order to the Mother, who signed both the Order and a form advising her of the option to seek judicial review.

[9] The Mother swore two affidavits, which provide a different account of the Review. She stated as follows:

I was told by a nice lady that she had to issue an Order against my son because we overstayed. That was it. I was never questioned about the stage of my inland spousal sponsorship or whether there was fear or whether I wish to get Counsel or anything of that sort.

[10] The Mother swore that, following the Review, she met with counsel. He showed her a Minister's Delegate Review form, and asked her whether she had been taken through the

questions on the form with the Officer noting her responses. She swears that she was not asked those questions.

I. The Issues

[11] There is preliminary issue of procedural fairness which, in my view, is dispositive.

II. Discussion

[12] The Applicant applied for leave and judicial review on May 6, 2016, and a request was made under Rule 9 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules* [Rule 9 Request] asking CBSA to forward a copy of the Decision and related written reasons.

There is no issue that the Order is the Decision and the Notes are the reasons.

[13] In response, on June 9, 2016, the Applicant was sent the Order, but not the Notes. The Notes and other material were not produced until October 4, 2016. However, in the meantime, on July 18, 2016, the Applicant's counsel filed his Memorandum of Argument [the Memorandum].

[14] The Respondent has provided no explanation for CBSA's failure to produce the Notes in response to the Rule 9 Request.

[15] Accordingly, the Applicant submits that it is possible, notwithstanding that they are dated April 21, 2016, that the Notes were actually written after he filed his Memorandum, and were tailored to dispel the criticisms of the Review included in his Memorandum. He therefore

submits that to produce the Notes late and without an explanation, raises a question of procedural fairness.

[16] The Respondent submits that counsel for the Applicant was obliged to cross-examine the Officer on the affidavit sworn on October 21, 2016 before making this submission. However, in my view, there was no such condition precedent, particularly as the Officer gave no indication in her affidavit that she had been involved in responding to the Rule 9 Request.

[17] In my view, there is no reason to believe that the Notes were fabricated to respond to the Memorandum. Nevertheless, the absence of any explanation for their late production leaves a submission about the possibility of wrongdoing open to the Applicant. Accordingly, this application will be granted.

[18] No questions were posed for certification for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Applicant's mother, Shantelle Adams, is to be interviewed by a different Minister's Delegate with regard to the well foundedness of the Report under subsection 44(1) of the IRPA, dated April 21, 2016 naming her son, Shavique Dilano Montano;
2. If the Applicant has become an adult by the time of the interview, he shall be interviewed instead of his mother; and
3. No question is posed for certification.

"Sandra J. Simpson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1886-16

STYLE OF CAUSE: SHAVIQUE DILANO MONTANO BY HIS
LITIGATION GUARDIAN, SHANTELE ADAMS v
THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: DECEMBER 12, 2016

JUDGMENT AND REASONS: SIMPSON J.

DATED: JANUARY 11, 2017

APPEARANCES:

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