Federal Court  Cour fédérale

Date: 20180719

Dockets: IMM-4017-17
IMM-3914-17

Citation: 2018 FC 753

Ottawa, Ontario, July 19, 2018

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

WARDLEY WALTON BURTON

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Before the Court are two applications for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The first, IMM-4017-17, involves a decision of a delegate of the Minister of Public Safety and Emergency Preparedness (the "Delegate") to refer the Applicant to an admissibility hearing pursuant to subsection 44(2) of

the *IRPA*. The second, IMM-3914-17, involves a decision of the Immigration Division of the Immigration and Refugee Board (the "Immigration Division"), to issue a removal order pursuant to paragraph 45(d) of the *IRPA*.

II. Background

[2] The Applicant is a 50-year-old Jamaican citizen who has been a permanent resident of Canada since 1987. Most of his family lives in Canada including his mother, two siblings, son and grandchildren.

[3] The Applicant alleges that he has a history of cognitive and mental health difficulties. He struggled in school in Jamaica and dropped out after grade nine. Beginning in 1991, he began experiencing mental health issues, including auditory hallucinations, as a result of stress. He was briefly in the care of a psychiatrist in the mid-1990s and also spent 20 days at the Centre for Addiction and Mental Health in Toronto. He has not received care for his symptoms since he stopped taking medication in 1990s.

[4] In May 2015, he was convicted of assault with a weapon and sentenced to six months' imprisonment. According to the Applicant, he saw someone riding what he believed to be his bike. He tried to get the bike back and a fight ensued. His phone fell and the individual grabbed it and ran into a grocery store. He went to his truck, got a hatchet for protection and then entered the grocery store. He tried to get the phone back but the individual would not return it. He swung the hatchet at him and the individual left the store. He was arrested and eventually sentenced to

six months imprisonment. The police report contains a similar narrative, but excludes the Applicant's explanations for his actions.

[5] In February 2017, the Canada Border Services Agency ("CBSA") notified the Applicant that there were reasonable grounds to believe he was inadmissible for serious criminality under paragraph 36(1)(a) of the *IRPA.* It asked him to provide written submissions as to why a removal order should not be sought. The Applicant asked his cousin to write a reply letter for him because he found the situation stressful and difficult to understand. The letter explained that all his family resided in Canada, he had nothing to go back to in Jamaica, he regretted his actions and he had taken an anger management course. The Applicant now alleges that he did not understand the seriousness of the situation and if he had, he would have asked a lawyer instead of his cousin to help him.

[6] Upon receipt of the Applicant's submissions, a CBSA officer prepared a subsection 44(1) inadmissibility report. The Delegate then reviewed that report and referred the Applicant to an admissibility hearing pursuant to subsection 44(2) of the *IRPA.* The inadmissibility hearing took place on August 28, 2017. The Immigration Division found that the Applicant was inadmissible under paragraph 36(1)(a) of the *IRPA* and issued a removal order pursuant to paragraph 45(d) of the *IRPA.* Due to the fact he had been sentenced to six months imprisonment for his crime, subsection 64(2) of the *IRPA* barred the Applicant from appealing the inadmissibility finding to the Immigration Appeal Division.

[7] On September 5, 2017, the Applicant retained counsel. Shortly afterwards, he applied for judicial review of the Delegate's decision to refer him to an inadmissibility hearing, as well as the Immigration Division's issuance of the removal order.

[8] On October 14, 2017, the Applicant met with a psychologist for a psychological assessment. The psychologist found that the Applicant's academic abilities were at a primary school level and that he was cognitively outperformed by 99% of people in his age group. The psychologist also found that the Applicant's ability to understand, process and respond effectively to the immigration proceedings he was involved in was impaired by his level of cognitive functioning.

III. Issues

[9] The issues are:

A. Was the Delegate's decision to refer the Applicant to an admissibility hearing unreasonable because:
    i. the Delegate's reasons are silent as to the merits of the case and do not permit the Court to understand why the decision was made; and
    ii. the Delegate fettered his or her discretion by failing to consider the Applicant's circumstances.
B. With respect to both the referral to an admissibility hearing and the issuance of the removal order, was the Applicant's right to procedural fairness breached because he has a low level of cognitive functioning and was unable to understand the significance of the proceedings.

IV. Standard of Review

[10] Procedural fairness is reviewed on a standard of correctness, whereas the alleged errors in the Delegate's decision are reviewed on a standard of reasonableness (*Sharma v Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 FCA 319 [*Sharma*] at para 15).

V. Analysis

A. *Was the Delegate's decision to refer the Applicant to an admissibility hearing unreasonable.*

[11] The Applicant submits that the Delegate's reasons for submitting the Applicant to an admissibility hearing, pursuant to subsection 44(2) of the *IRPA*, are devoid of any analysis of the Applicant's particular circumstances. This renders the decision unreasonable because the reasons do not allow the Court to understand why the decision was made. Furthermore, it shows that the Delegate fettered his or her discretion by not considering the Applicant's particular circumstances.

[12] The Respondent submits that the Delegate had very little discretion to not refer the Applicant to an admissibility hearing. A decision made under subsection 44(2) of the *IRPA* is not an in-depth review of humanitarian and compassionate ("H&C") considerations, but is focused on the facts underlying the alleged inadmissibility. Regardless, the Delegate considered the fact that the Applicant had no right of appeal, as well as the H&C and rehabilitation factors, and found that they did not outweigh the seriousness of his conviction.

[13] The record shows that the Delegate considered the Applicant's particular circumstances before referring him to an admissibility hearing, and the Delegate's written reasons combined with the CBSA officer's subsection 44(1) report are sufficient for the Applicant and the Court to understand why the decision to refer him was made.

[14] Both the CBSA officer who prepared the inadmissibility report, and the Delegate who referred it to the Immigration Division, considered the Applicant's particular circumstances (*Sharma* at paras 47-48; *Abdi v Canada (Minister of Public Safety and Emergency Preparedness)*, 2017 FC 950 at para 16).

[15] The Delegate's written reasons show that he was aware of the Applicant's mitigating circumstances, but found them to be outweighed by the seriousness of the crime:

> I have reviewed the case and concur with the officer's assessment and recommendation to refer the case to an admissibility hearing. Taking into account that [the Applicant] has no right of appeal, H&C factors and rehabilitation factors, I find that they do not outweigh the seriousness of [the Applicant's] conviction. Not only did he steal the victim's bike, he went to his vehicle to pick up an axe and proceeded to find the victim to assault him with the weapon, unprovoked.

[16] Furthermore, the CBSA officer's analysis underlying the subsection 44(1) report is considered to be part of the Delegate's reasoning (*Huang v Canada (Minister of Public Safety and Emergency Preparedness*), 2015 FC 28 at para 88). The CBSA officer provided a detailed analysis of the Applicant's circumstances. He noted that the Applicant had no right of appeal, regretted his actions, received counselling on anger management, had nothing to return to in Jamaica and that most of his family resided in Canada, depended on each other and would be

affected by his removal. However, he also found that the Applicant was a repeat offender with a history of non-compliance, put the general public safety at risk, did not accept culpability for his actions, only completed the anger management course as part of his probation conditions, did not provide evidence of rehabilitation or any supporting submissions from family showing how they would be impacted, and had familiarity with his home country. The CBSA officer concluded that the H&C factors did not outweigh the serious of the conviction.

[17] Accordingly, both the Delegate and the CBSA officer were aware of the mitigating factors but found them to be outweighed by the seriousness of the crime. Taken together, the CBSA officer's reasons for recommending a referral to an admissibility hearing, and the Delegate's acceptance of the reasons and decision to refer the Applicant to an admissibility hearing, are sufficient to allow the Applicant and the Court to understand why the decision to refer him was made.

B. *With respect to both the referral to an admissibility hearing and the issuance of the removal order, was the Applicant's right to procedural fairness breached because he has a low level of cognitive functioning and was unable to understand the significance of the proceedings.*

[18] The Applicant argues that his right to procedural fairness was breached in both proceedings, that is, the Delegate's decision to refer him to an admissibility hearing as well as the Immigration Division's decision to issue him a removal order, because he was unable to understand the nature of the proceedings. He states in his affidavit that he was confused, stressed out and did not fully understand what was happening throughout those proceedings.

Furthermore, the psychologist's report states that the Applicant's poor cognitive skills would be expected to impair his ability to effectively understand and respond to the proceedings.

[19] The Respondent replies that the Applicant demonstrated the requisite knowledge and appreciation of the proceedings. In his response to the CBSA letter, he provided detailed responses to the questions about his removal and who would be affected. Furthermore, at the hearing before the Immigration Division, the Applicant was asked throughout the proceedings whether he understood, and he answered that he did. He also indicated that he did not need a lawyer. Regardless, the purpose of the Immigration Division hearing was to confirm the Applicant's conviction, which required a simple "yes" or "no" answer.

[20] The Federal Court of Appeal in *Sharma* dealt with procedural fairness requirements in the context of inadmissibility proceedings. It stated that "the duty of fairness is clearly not at the high end of the spectrum" and "a relatively low degree of participatory rights is warranted" (*Sharma* at paras 29 and 34). It concluded at paragraph 34:

> To the extent that the person is informed of the facts that have triggered the process, is given the opportunity to present evidence and to make submissions, is interviewed after having been told of the purpose of that interview and of the possible consequences, is offered the possibility to seek assistance from counsel, and is given a copy of the report before the admissibility hearing, the duty of fairness will have been met.

[21] The Applicant was provided with a letter from the CBSA on February 28, 2017, advising him that there were reasonable grounds to believe he was inadmissible for serious criminality under paragraph 36(1)(a) of the *IRPA* due to his conviction for assault with a weapon. It explained that a decision to allow him to remain in Canada or issue a removal order against him

would be made in the near future, that the next step in the process was to conduct a complete review of the circumstances surrounding his case, and that he may or may not have a right to appeal a removal order based on subsections 64(1) and (2) of the *IRPA*. It also provided a list of H&C factors that would be considered and asked for submissions relevant to those factors or any other circumstances of his case.

[22] The Applicant responded to this letter with lengthy written submissions. He accepted responsibility for his actions and explained that he was disappointed in himself and was taking steps to prevent something similar from occurring in the future. He noted that his mother, two siblings, son and grandchildren lived in Canada. He cared for his mother and it would be hard for her if he was not around – his whole family would suffer as a result of his removal. Moreover, if he was removed from Canada, it is possible he would end up living on the streets with no education or job. There was nothing for him to go home to. He needed to be in Canada to continue his treatment, develop and be a productive member of society.

[23] What is apparent is that there is no evidence, in those submissions, that the Applicant did not appreciate the nature of the proceedings.

[24] However, the evidence is not clear in the transcript that the Applicant agreed to proceed without representation. Moreover, while references made to discussions that took place beforehand, it is unclear what was said in those discussions. Furthermore, the Applicant was mistakenly advised that he could appeal this decision. He was then under the impression that this

was not the end of the process. He then stated, “I’d like to speak to someone else in regards to this situation.” It is unclear whether he is referring to filing an appeal, hiring counsel, or both.

[25] An individual’s lack of understanding at an inadmissibility hearing was recently addressed by this Court in *Bisla v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1059, in which Justice Diner wrote at paragraphs 16, 17, 19 and 21:

> **16** As for the lack of counsel, the purpose of this ID proceeding was to confirm Mr. Bisla’s prior conviction. This required a simple “yes” or “no” answer; one which I find Mr. Bisla was capable of both understanding and providing with or without counsel. Then, having confirmed that the Applicant had been convicted of an indictable offence and receiving a sentence of over six months, the ID Member had no choice but to issue a deportation order in the circumstances (by operation of subsection 45(d) of the Act and para 229(1)(c) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227). As Justice de Montigny held in *Canada (Citizenship and Immigration) v Fox*, 2009 FC 987 at para 39:
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> > The Tribunal’s function at the admissibility hearing is exclusively to find facts. If the member finds the person described in section 36(1)(a) of the *IRPA*, then pursuant to section 45(d) of the *IRPA* and section 229(1)(c) of the *Immigration and Refugee Protection Regulations*, the Tribunal must issue a Deportation Order against the person.
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> **17** Furthermore, no medical or psychological evidence pertaining to Mr. Bisla's alleged cognitive disability was placed before the ID Member. I agree with Mr. Bisla's counsel in this judicial review that any disability of Mr. Bisla, as a permanent resident, should be considered at the start of the ID hearing: *Cha v Canada (Minister of Citizenship and Immigration)*, at para 41. That said, I do not find that the Board erred in proceeding with the inadmissibility hearing based on the background documentation, and/or its interaction with the Applicant during the hearing, both before and after the interpreter was present. In short, the Applicant's duty of fairness was respected.
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> **19** There was no obligation in this instance for the Member to have made available a designated representative on the basis of Rules 50

> and 18. To hold otherwise would be to impose a positive obligation on opposing counsel and the ID Member to assess an applicant's mental capacity where the Applicant confirmed that he understood the nature of the proceedings, and the Board believed the Applicant appreciated the nature of the proceedings. In other words, the Member met his obligation to satisfy himself of the Applicant's capacity to understand the proceedings, based on the input of the Applicant, his exchanges with the Applicant and the documentation placed before the Board.
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> **21** Ultimately, Parliament drew a harsh line when it drafted subsection 45(d) and paragraph 129(1)(c) of the Act and its Regulations respectively. These provisions provide that once the ID receives a s. 44 referral for serious criminality, its sole function is to conduct a factual inquiry. If the facts underlying the inadmissibility based on serious criminality are correct, the ID has no choice but to issue the removal order. Here, the facts before the ID were that the Applicant received an 18 month prison sentence for having committed the offence.

[26] I find that reasoning to be applicable in this case. The sole function of the Immigration Division was to confirm that the facts underlying the inadmissibility based on serious criminality were met. He clearly acknowledged that he had been convicted of assault with a weapon and had not appealed that conviction or the imposed sentence of six months; therefore, the requirements of paragraph 36(1)(a) of the *IRPA* were met and the Applicant was inadmissible for serious criminality.

[27] Accordingly, the Applicant’s apparent difficulty with understanding the proceedings did not render this hearing to be procedurally unfair. Even if he had legal representation, or the Immigration Division was aware of his cognitive impairments, the result would have been the same. Moreover, at the time the subsection 44(1) report was prepared by the CBSA officer and then considered by the Delegate, the Applicant had made significant submissions regarding the

H&C factors relevant to his case. That was the correct time to make those submissions, and they were properly considered by the CBSA officer and the Delegate.

[28] I find that the Applicant was afforded procedural fairness.

JUDGMENT in IMM-3914-17 and IMM-4017-17

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;

2. There is no question for certification.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	IMM-3914-17 AND IMM-4017-17
STYLE OF CAUSE:	WARDLEY WALTON BURTON v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JULY 18, 2018
JUDGMENT AND REASONS:	MANSON J.
DATED:	JULY 19, 2018

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