Federal Court  Cour fédérale

Date: 20090706

Docket: IMM-5158-08

Citation: 2009 FC 703

Ottawa, Ontario, July 6, 2009

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

GARVEY ANDRE BLACK

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of a decision by the Immigration and Refugee Board, Appeal Division (IAD) dated October 24, 2008 (Decision) which dismissed the Applicant's appeal of his deportation order.

BACKGROUND

[2] The Applicant was born in Jamaica on April 9, 1975. He became a permanent resident of Canada on July 17, 1990 at the age of 15 after being sponsored by his mother, who was already living in Canada with an aunt and a few cousins. The Applicant does not know his father and his mother was never married. The rest of the Applicant's family members reside in Jamaica (including maternal grand-parents, uncles and cousins). The Applicant does not have any siblings and has only travelled to Jamaica once (in 1994 or 1995) since he arrived in Canada. The Applicant's mother and his other relatives in Canada travel to Jamaica quite frequently.

[3] The Applicant is not married and does not have any relationship or children. He lived with his mother for about five years, moved into an apartment with a friend named Sean, and then moved into a rooming house on Kingston Road in Toronto.

[4] Before coming to Canada, the Applicant was in grade 8 at school. He was not able to go beyond grade 10 in Canada. He registered at an adult school but he did not stay long enough and decided to cease his education. His working history in Canada involves several jobs in the restaurant business including assistant chef or chef. At present he is living off social assistance, as he has frequently in the past.

[5] At the time of the IAD hearing, the Applicant's criminal record revealed 15 convictions for offences from 1991 to 2007. The crimes for which he has been sentenced include: possession of narcotics; theft; possession of a credit card obtained by crime; failure to attend court; failure to

comply with a recognizance; failure to comply with probation orders; obstruction of a peace officer; two convictions for assaulting a peace officer; and assault with a weapon.

[6] The Applicant had a previous deportation order made against him on January 13, 1998 on the basis of two counts of break and enter for which he was convicted on October 17, 1995 and sentenced to 35 days in prison and probation of 24 months. The removal order was stayed by the IAD on March 10, 1999, reviewed on February 2, 2000 and renewed on March 16, 2000 for a period of four years. On June 5, 2002 the case was reviewed by the IAD and the stay maintained with amended conditions. On February 18, 2004, following a final review by the IAD, the stay was cancelled and the appeal was allowed and the removal order quashed.

[7] One of the key conditions of the stay required the Applicant to participate in "psychotherapy or counselling with a registered psychologist" and to "engage in psychotherapy or counselling." This was because the Applicant was thought to suffer from some type of mental disability that had not been diagnosed. The Applicant did not abide by his stay conditions but the IAD disposed of the stay on April 8, 2004 because the Applicant provided a letter indicating that he was "an in-patient at the Scarborough Hospital-General Division from October 15, 2002 to October 30, 2002" and he had a "diagnosis of schizophrenia (Paranoid Type)."

[8] The offence that triggered the decision of the IRB was one count of assault with a weapon contrary to section 267(a) of the *Criminal Code*, committed on November 21, 2006, for which the Applicant was convicted on February 13, 2007. The Applicant was sentenced to 1 day in jail and 3

years probation, in light of 84 days of pre-sentence custody. There was also an order of prohibition/seizure for 10 years and the Applicant had to provide a DNA sample for future reference.

[9] The Applicant appealed pursuant to subsection 63(3) of the Act from a deportation order made against him on February 4, 2008 by the Immigration and Refugee Board (IRB). The IRB found the Applicant inadmissible for serious criminality under paragraph 36(1)(*a*) of the Act for having been convicted in Canada of an offence punishable by a maximum term of at least ten years. The Applicant filed a Notice of Appeal that month and included a note advising the IAD that a designated representative had been used in the past.

[10] On July 2, 2008, the hearing was adjourned to September 10, 2008 to give the Applicant an opportunity to retain counsel. The Applicant, who was detained at Central East Correctional Centre, was brought before the IAD on September 10, 2008.

[11] The Applicant did not challenge the legal validity of the removal order, but asked the IAD to allow the appeal based on paragraph 67(1)(*c*) of the Act, or to stay the removal order under subsection 68(1) of the Act. The Minister asked for a dismissal of the appeal. The Applicant's appeal was dismissed on October 24, 2008.

DECISION UNDER REVIEW

[12] The issue before the IAD was whether, pursuant to paragraph 67(1)(*c*) of the Act, it should allow the appeal or, pursuant to subsection 68(1) of the Act, stay the removal order.

[13] At the outset of the hearing, the IAD noted that the Applicant was lucid and understood the nature of the proceedings. The Applicant's mother was asked to act as a designated representative for the whole proceeding and she accepted this role.

[14] The IAD looked at the factors in *Ribic v. Canada (Minister of Employment and Immigration)*, [1985] I.A.B.D. No. 4 (*Ribic)* as a guideline for exercising its discretion regarding subsections 67(1)(*c*) and 68(1) of the Act. See also: *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84 and *Al Sagban v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 133. These factors, which are not exhaustive, include:

1) Seriousness of rehabilitation;
2) Possibility of rehabilitation;
3) Length of time spent in Canada and degree to which the appellant is established;
4) Presence of family in Canada and impact that the removal of the appellant would cause;
5) Support available for the appellant not only within the family but also within the community; and
6) Degree of hardship that the appellant will face by his return to his country of nationality.

[15] The weight to be given to each of these factors varies according to the particular circumstances of the case: *Olaso v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1265 (F.C.T.D.). The IAD noted that the objectives of the Act include protecting the safety of Canadians and maintaining the security of Canadian society: paragraph 3(1)(*h*) of the Act. The IAD also commented that it was "alive, alert and sensitive" to the best interests of any child directly affected by the outcome of this appeal": *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Hawthorne v. Canada (Minister of Citizenship and Immigration)* 2002 FCA 475 and *Kolosovs v. Canada (Minister of Citizenship and Immigration)* 2008 FC 165.

Seriousness of the Criminal Offences

[16] The IAD observed that the Applicant has a lengthy and serious criminal record that began at the age of 16, just after his arrival in Canada as a permanent resident. These crimes continued into the Applicant's adulthood. Due to his mental health challenges, his initial removal order was quashed because he was allegedly receiving some treatment at that time. However, the Applicant did not, in fact, undergo any treatment or programs and committed two more serious crimes on November 21, 2006 and September 11, 2007. His conviction on February 13, 1007 (assault with a weapon) triggered a Report under subsection 44(1) of the Act and resulted in the second removal order made against him.

[17] After the Applicant had completed his prison sentence, and before he was detained on immigration hold, the police record shows that the other residents in the rooming house where the Applicant was living were afraid of him and had called the police to accompany them into the house in order to get their belongings. The Applicant was bullying some of them.

[18] The IAD found that the Applicant's record established a pattern of criminal conduct that weighed heavily against him. The IAD considered the seriousness and length of the criminal offences and the objectives of the Act in paragraph 3(1)(*h*). It concluded that the serious offences were not isolated incidents; nor had they arisen in extenuating circumstances. The offences were indicative of the Applicant's normal character and conduct and revealed a criminal disposition. The Applicant did not care about the "numerous chances granted to him in order to change his criminal behaviour and seek help when necessary." The IAD concluded that the "Applicant presents an unacceptable risk to Canadian society and Canadian citizens."

Possibility of Rehabilitation

[19] The IAD pointed out that the onus was on the Applicant to establish the possibility of rehabilitation, but no evidence was presented. There had been no significant measures undertaken by the Applicant to rehabilitate, even after the first removal order was quashed in 2004. The IAD held that the Applicant "did not learn from his criminal convictions and [was] not deterred from criminal behaviour." The Applicant was in "total denial" and "had a different version of the facts, particularly concerning the two recent assault convictions." The IAD did not hear from the

Applicant any “expression of sincere and profound remorse for his actions, except that his mother admitted that her son needs help.”

[20] The IAD considered the Applicant’s mental health challenges and the relationship between his diagnosis of schizophrenia in 1999 and his criminality. The Applicant testified that he was willing to see a psychiatrist. The IAD concluded, however, that “he was never serious or willing to pursue [counselling programs and medication on a voluntary basis] in a satisfying manner.” The IAD gained the impression that the Applicant thought nobody could touch him because his lawyer told him so and that he has a “penchant to do what he wishes to do, when he wishes to do it, and to refrain from doing what he is supposed to do or what he does not want to do regardless of whom he harms or hurts as a result of his conduct.”

[21] The IAD also noted that there was no evidence on file to suggest that the Applicant was unfit or incompetent to stand trial, or considered to be not guilty by reason of insanity. There was no evidence that the Applicant did not have a guilty mind in respect to the crimes he was convicted for. The IAD concluded that the Applicant had not discharged his burden of proof on the possibility of rehabilitation.

Time Spent and Degree of Establishment of the Applicant in Canada

[22] The IAD acknowledged that the Applicant had been in Canada a long time (since July 17, 1990) and that this counted in his favour. However, the IAD also noted that the Applicant had spent

half of his life in Jamaica. The Applicant had not been successful in establishing himself in Canada and he could not keep steady employment or a lucrative job. He does not own any property, assets or bank accounts or file income tax returns.

[23] The IAD concluded that the Applicant's degree of establishment in Canada is marginal and he had not provided any plans for the future, prospects of employment, or special programs to show that he intended to change his lifestyle. He relies on social assistance and is a burden on the public purse. The IAD concluded that his removal from Canada would "not cause him to be uprooted or to lose any solid establishment whatsoever."

Presence and Support of Family in Canada and Impact that the Removal of the Appellant Would Cause to Them or to the Community

[24] The Applicant's mother, one aunt and a few cousins live in Canada. The Applicant's maternal grand-parents, a few maternal uncles and two cousins still reside in Jamaica. Except for the Applicant's mother, there was no one else in the hearing room and no other letters of support were provided. The Applicant is not involved in his community and does not rely on anybody for financial support. Nor do his family members living in Canada rely on him for financial support.

[25] The Applicant's mother declared that she was ready to help him in the future by letting him stay with her again, but she stated that she is afraid of him sometimes. The Board drew a negative inference from the absence of family members, relatives or friends. There was also no explanation presented by the mother as to how she could help him or prevent or stop his criminal behaviour. The

IAD concluded that the removal of the Applicant from Canada would cause his family or the community very little dislocation.

Hardship Caused to the Applicant by his Removal to Jamaica

[26] The IAD found that the Applicant was not well established in Canada and would not be uprooted by his removal to Jamaica. The IAD acknowledged that the economic and social situation in Jamaica may not be perfect or offer the same employment opportunities or medical care as Canada. The Applicant did not provide any proof of hardship and he is in good physical health and does not take any medication. His prospects of employment in Jamaica were no less than in Canada. In relation to the Applicant's mental health, the IAD found that he had not demonstrated the existence of any special care or need that would be necessary in the future and which would not be available to him in Jamaica.

Best Interests of Any Child Directly Affected by the Decision

[27] The IAD considered the best interests of any child in Canada who would be affected by the removal of the Applicant to Jamaica and found that the Applicant does not have any children or a relationship with any children. No children rely on his closeness or support.

Conclusion

[28] The IAD concluded that the Applicant had not discharged the onus that was upon him, and there were no H&C considerations that warranted special relief in light of all of the circumstances of the case. The IAD gave weight to the length of the Applicant's presence in Canada and the presence of family members, as well as their and the Applicant's potential hardship. The factors that outweighed these considerations were the Applicant's poor prospects for rehabilitation, risk to the safety of the public and weak establishment in Canada. The Applicant was "not a good candidate for a stay of the removal order." The appeal was dismissed.

ISSUES

[29] The Applicant submits the following issue on this application:

1) Whether the IAD breached the Applicant's right to procedural fairness by not meaningfully appointing a designated representative.

STATUTORY PROVISIONS

[30] The following provisions of the Act are applicable in these proceedings:

3. (1) The objectives of this Act with respect to immigration are (*h*) to protect the health and safety of Canadians and to maintain the security of Canadian society;	3. (1) En matière d'immigration, la présente loi a pour objet : *h*) de protéger la santé des Canadiens et de garantir leur sécurité;
36. (1) A permanent resident	36. (1) Emportent interdiction

or a foreign national is inadmissible on grounds of serious criminality for

(*a*) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

de territoire pour grande criminalité les faits suivants :

a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;

44. (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.

44. (1) S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.

63(3) A permanent resident or a protected person may appeal to the Immigration Appeal Division against a decision at an examination or admissibility hearing to make a removal order against them.

63(3) Le résident permanent ou la personne protégée peut interjeter appel de la mesure de renvoi prise au contrôle ou à l'enquête.

67. (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,

67. (1) Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :

(*c*) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and

c) sauf dans le cas de l'appel du ministre, il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres

compassionate considerations warrant special relief in light of all the circumstances of the case.	circonstances de l'affaire, la prise de mesures spéciales.
68. (1) To stay a removal order, the Immigration Appeal Division must be satisfied, taking into account the best interests of a child directly affected by the decision, that sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.	68. (1) Il est sursis à la mesure de renvoi sur preuve qu'il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.
167 (2) If a person who is the subject of proceedings is under 18 years of age or unable, in the opinion of the applicable Division, to appreciate the nature of the proceedings, the Division shall designate a person to represent the person.	167 (2) Est commis d'office un représentant à l'intéressé qui n'a pas dix-huit ans ou n'est pas, selon la section, en mesure de comprendre la nature de la procédure.

STANDARD OF REVIEW

[31] The issue raised by the Applicant involves a question of procedural fairness: I find the appropriate standard of review is correctness: *Suresh v. Canada (Minister of Citizenship and Immigration)* 2002 SCC 1.

ARGUMENTS

The Applicant

[32] The Applicant submits that the IAD has the authority to appoint a designated representative under subsection 167(2) of the Act. The Applicant cites *Duale v. Canada (Minister of Citizenship and Immigration)* 2004 FC 150 at paragraphs 3 and 17 (*Duale)* for the proposition that "the obligation to designate a representative…arises at the earliest point in time at which the RPD becomes aware of the facts which reveal the need for a designated representative" and "the need for the designation of a representative applie[s] to the entirety of the proceedings" and not just to the hearing itself. The Court in *Duale* also confirmed that the duties of a designated representative include the obligation to retain and instruct counsel and to assist in obtaining evidence in support of the claim.

[33] The Applicant submits that while *Duale* involved a minor refugee claimant before the RPD, subsection 167(2) applies to all Divisions and all persons incapable of appreciating the nature of proceedings for reasons other than age. He says that the principles in *Duale* apply to mentally ill persons who appear before the IAD.

[34] The Applicant notes that he filed his Notice of Appeal on February 22, 2008 and placed a note on it advising the IAD that the Immigration Division had appointed a designated representative for the Admissibility Hearing. The Applicant asserts that the IAD was alerted to the potential need for a designated representative from the outset of the appeal but no representative was appointed. There was also no appointment of a designated representative at the time of the initial hearing on July 2, 2008, which was postponed to permit the Applicant to find counsel.

[35] At the September 10, 2008 hearing, the Applicant was without counsel and did not provide any documents in support of his claim. His mother was asked to act as a designated representative for the proceeding. The Applicant's mother insists in an affidavit filed in these proceedings that she was not informed of the duties of a designated representative. She also did not know that part of a designated representative's responsibility is to arrange for counsel. Nothing was explained to her at the hearing.

[36] The Applicant submits that the IAD's decision to appoint his mother as a designated representative at the hearing without any instructions about her duties and obligations rendered the appointment meaningless. The IAD's failure to meaningfully appoint a designated representative who could assist the Applicant to pursue his appeal constitutes a breach of his right to procedural fairness.

[37] The Applicant has submitted the affidavit of Carole Simone Dahan, an experienced immigration and refugee lawyer, which speaks to the information that could have been presented on behalf of someone who is represented by counsel and who is schizophrenic and faces a return to Jamaica. The Applicant submits that the documentary evidence indicates that there is inadequate care for schizophrenic persons in Jamaica and that they face increased risks of homelessness, incarceration, grave violence and human rights violations, including severe physical, sexual and psychological abuse. This is abuse in which the authorities (police, prison guards) are often implicated.

[38] The *Ribic* factors require a consideration of any hardship an applicant may face by returning to their country of nationality. There was no information presented to the IAD on the risks to mentally ill persons in Jamaica. The appointment of a meaningful designated representative at the earliest possible opportunity would have allowed the Applicant to properly present his appeal.

[39] The Applicant also submits that while a judicial review record may only consist of materials before the administrative decision-maker, there are important exceptions to this rule, as outlined in *C.D. v. Canada (Minister of Citizenship and Immigration)* 2008 FC 501 at paragraph 41:

> **41** If an applicant believes that the evidence not submitted to the original decision-maker nevertheless needs to be considered by the Court, he has to demonstrate that the evidence is needed to resolve issues of procedural fairness or jurisdiction or that there are very exceptional circumstances to justify an exception to the general principle: see *Omar v. Canada (Solicitor General)*, [2004] F.C.J. No. 2136, 2004 FC 1740 [*Omar*]…

[40] The Applicant submits that the materials (the affidavits from the Applicant's mother and Ms. Dahan) included in this application demonstrate the significant material impact of the breach of procedural fairness that has occurred in this case. Had the designated representative been properly apprised of her obligation to retain counsel, and had the Applicant been represented by counsel, this type of evidence could have been presented to the IAD.

[41] Without this additional evidence, the Applicant argues that the Court would not be able to determine whether the breach of procedural fairness was material to the outcome. The evidence demonstrates that the issue of risks to schizophrenic persons in Jamaica should have been properly presented for consideration by the IAD and that there was a breach of the Applicant's right to a meaningfully appointed designated representative.

[42] The Applicant also submits that the IAD had an obligation to explain the role of the designated representative to the Applicant's mother. The fact that the Applicant's mother did not ask for clarification about her role is not proof that she understood her duties; nor was it a waiver of the Applicant's right to the meaningful appointment of a designated representative.

[43] The Applicant submits that, while his mother had the best of intentions, she did not understand her role and the IAD should have ensured that she understood her duties. She was also appointed at the last minute and not at the earliest opportunity.

[44] In addition, the fact that the Applicant said he wanted to proceed without counsel had no bearing on the IAD's decision to appoint a designated representative. It was for the designated representative, with full knowledge and understanding of her duty, to obtain and instruct counsel and to consider whether to request more time to obtain counsel.

The Respondent

Material Not before the IAD

[45] The Respondent submits that, on judicial review, a reviewing court is bound by the record that was before the IAD. The Respondent cites *Nejad v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1810 at paragraphs 15-16:

> 15. …Judicial review proceedings are narrow in scope. Their essential purpose is the review of decisions for the purpose of

> assessing their legality. The reviewing court (absent exceptional circumstances not applicable here) is bound by the record that was before the board. Fairness to the parties and the tribunal under review dictates such a limitation: *Bekker v. Canada* (2004), 323 N.R. 195 (F.C.A.). The reviewing court must proceed on the record as it exists, confining itself to the criteria for judicial review: *Canada (Attorney General) v. McKenna*, [1999] 1 F.C. 401 (C.A.).
>
> 16 Although it is evident that the noted principles apply to preclude the court, on judicial review, from receiving evidence that was not before the decision-maker, Mr. Justice MacKay's comments in *Wood v. Canada (Attorney General)* (2001), 199 F.T.R. 133 also provide insight. At paragraph 34, he stated:
>
> > 34 [...] On judicial review, a Court can consider only evidence that was before the administrative decision-maker whose decision is being reviewed and not new evidence (see *Brychka v. Canada (Attorney General)*, [1998] F.C.J. No. 124, supra; *Franz v. Canada (Minister of Employment and Immigration)* (1994), 80 F.T.R. 79; *Via Rail Canada Inc. v. Canada (Canadian Human Rights Commission)* (re *Mills*) (August 19, 1997), Court file T-1399-96, [1997] F.C.J. No. 1089; *Lemiecha v. Canada (Minister of Employment & Immigration)* (1993), 72 F.T.R. 49, 24 Imm. L.R. (2d) 95; *Ismaili v. Canada (Minister of Citizenship and Immigration)*, (1995) 100 F.T.R. 139, 29 Imm.L.R. (2d) 1). [...]

[46] The Respondent objects to the inclusion of the affidavits and their appended material from the Applicant's mother and immigration lawyer, Carole Simone Dahan.

Procedural Fairness

[47] The Respondent submits that the IAD did not err by not informing the Applicant's mother of the duties of a designated representative upon her designation at the IAD hearing. The Applicant's mother was explicitly asked if she was ready to act as a designated representative and

she answered that she was. At no time did she ask for clarification of the role of a designated representative.

[48] The Respondent argues that the IAD rules do not support the argument that the role of the designated representative is to arrange counsel. Rule 19 of the *Immigration Appeal Division Rules*, S.O.R./2002-230 (Rules) reads as follows:

Duty of counsel to notify	Obligation du conseil d'aviser la Section19.
19. (1) If counsel for either party believes that the Division should designate a representative for the person who is the subject of the appeal because they are under 18 years of age or unable to appreciate the nature of the proceedings, counsel must without delay notify the Division in writing. If counsel is aware of a person in Canada who meets the requirements to be designated as a representative, counsel must provide the person's contact information in the notice.	(1) Si le conseil d'une partie croit que la Section devrait commettre un représentant à la personne en cause parce qu'elle est âgée de moins de dix-huit ans ou n'est pas en mesure de comprendre la nature de la procédure, il en avise sans délai la Section par écrit. S'il sait qu'il se trouve au Canada une personne ayant les qualités requises pour être représentant, il fournit les coordonnées de cette personne dans l'avis.
Requirements for being designated	Qualités requises du représentant
(2) To be designated as a representative, a person must	(2) Pour être désignée comme représentant, la personne doit :
(*a*) be 18 years of age or older;	*a*) être âgée de dix-huit ans ou plus;

(*b*) understand the nature of the proceedings;	*b*) comprendre la nature de la procédure;
(*c*) be willing and able to act in the best interests of the person to be represented; and	*c*) être disposée et apte à agir dans l'intérêt de la personne en cause;
(*d*) not have interests that conflict with those of the person to be represented.	*d*) ne pas avoir d'intérêts conflictuels par rapport à ceux de la personne en cause.

[49] The Respondent notes that the Rules do not state that it is the role of the designated representative to retain counsel.

[50] The Respondent also submits that the Applicant made it clear that he wanted to proceed with the hearing without counsel and that his mother, his designated representative, made no objection. If the Applicant's mother did not understand the role of the designated representative, "it behooved her to raise her concerns with the IAD at the time. The Applicant's mother made submissions on his behalf throughout the hearing and was an active participant before the IAD."

ANALYSIS

[51] Section 167(2) of the Act mandates the appointment of a designated representative "if a person who is the subject of proceedings is under 18 years of age or unable, in the opinion of the applicable Division, to appreciate the nature of the proceedings …."

[52] Paragraph 13 of the Decision makes it clear that the IAD, "[a]t the outset of the hearing," decided that the Applicant required a designated representative. The IAD even noted that "the ID had previously appointed a designated representative during the admissibility hearing procedure" and that "the appellant is a vulnerable person."

[53] So the IAD was aware of the Applicant's vulnerability and that he needed a designated representative.

[54] In order to fulfill its obligations under section 167(2) of the Act, the IAD asked the Applicant's mother to act as a designated representative. Even though she had no appreciation of the significance of this role or how to best represent the interests of the Applicant, she willingly stepped into the breach to help her son.

[55] In my view, this was not a meaningful compliance by the IAD with section 167(2) of the Act and the jurisprudence dealing with the appointment of a designated representative.

[56] The Respondent's own rules on designated representatives (Rule 19 of the IAD Rules) require that the person appointed must understand the nature of the proceedings and that they be "willing and able to act in the best interests of the person to be represented."

[57] The Applicant's mother was obviously appointed as an expedient. She just happened to be in the room to support her son and, being a mother, she naturally stepped forward. But it is clear that

she did not fully appreciate the implications of her role as designated representative and that she was not “able” to act in his best interests. It is difficult to see how a mother, appointed as a designated representative at the hearing itself, could be in a position to act in the best interests of the Applicant. The Respondent argues that the Applicant appeared lucid to the IAD and made it clear that he wished to proceed without legal counsel and that he agreed that his mother should be his designated representative for the purposes of the meeting. In my view, however, this does not satisfy the obligations of the IAD to ensure that the Applicant had a designated representative for the entirety of the proceedings who understood her role and what needed to be done to protect the best interests of the Applicant.

[58] The *Duale* decision cited by the Applicant teaches that the need for a designated representative applies to the entirety of the proceedings and not just the hearing itself. *Duale* also discusses in some detail what is required of a designated representative. The record in the present case reveals that the Applicant’s mother had no idea what was required of her. She knew nothing about obtaining counsel, what evidence needed to be called and, of particular importance for the Applicant, the risks that confront the mentally ill in Jamaica. The transcript of the hearing shows that even the IAD acknowledged that the mother did not even have an understanding of what questions she should ask the Applicant. She was not in a position to ask for clarification because she did not understand her role. It is also clear from Rule 19 that any person so appointed must “understand the nature of the proceedings” and be “willing and able to act in the best interests” of the Applicant. In my view, the ability to act in the Applicant’s best interests requires more than a sympathetic and supportive relative, and the IAD and counsel will need to satisfy themselves that

anyone who does assume the role is appointed in a timely manner and has the necessary understanding to act in the Applicant's best interests.

[59] I agree with the Applicant that the IAD's approach to the issue on the facts of this case has resulted in procedural unfairness and that the matter must be returned and the problem rectified. The breach of procedural fairness was highly material to the Applicant's position and impacted his rights on appeal to the IAD. The evidence is clear that there are all kinds of problems that the Applicant will face in Jamaica as a result of his mental illness which were not before the IAD when it made its Decision. There are problems of care, homelessness and incarceration, and human rights abuses in which the Jamaican authorities are often implicated, that would have been placed before the IAD by a designated representative who understood the nature of her role. These matters could well have led the IAD to a different conclusion. The breach of procedural fairness was highly material to outcome in this case.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. This application is allowed and the matter is remitted to a different Board member for reconsideration.
2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT FILE NO.:	IMM-5158-08
STYLE OF CAUSE:	GARVEY ANDRE BLACK v. THE MINISTER OF CITIZENSHIP AND MMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	May 21, 2009
REASONS FOR JUDGMENT:	RUSSELL J.
DATED:	July 6, 2009

WRITTEN REPRESENTATIONS BY:

Ms. Aviva Basman	FOR THE APPLICANT
Mr. David Knapp	FOR THE RESPONDENT

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