Federal Court  Cour fédérale

Date: 20150630

Docket: IMM-6354-14

Citation: 2015 FC 808

Ottawa, Ontario, June 30, 2015

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

MARTIN LUTHER THOMPSON

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review by Martin Luther Thompson [the Applicant] under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 of a decision by the Immigration and Refugee Board of Canada, Immigration Appeal Division [IAD], dated July 23, 2014, wherein the IAD dismissed the Applicant's removal order appeal.

[2] The Applicant was born on October 29, 1985. He is a citizen of Jamaica. The Applicant came to Canada in August 1996, while he was 10 years old, and has never returned to Jamaica since. He became a permanent resident on March 20, 2003. The Applicant has his mother, step-father, younger brother, grandmother and two aunts in Canada. He has no remaining family in Jamaica. The Applicant has a daughter who is a Canadian citizen. He is engaged to a Canadian citizen who also has a daughter. Together, they were expecting a son in January 2015 when the Applicant swore his affidavit in support of this application.

[3] As a result of a criminal conviction, the Applicant lost his permanent resident status and a deportation order was issued against him on October 14, 2011 by a member of the Immigration Division of the Immigration and Refugee Board of Canada. The Applicant appealed the issuance of the deportation order to the IAD.

[4] The Applicant was unrepresented before the IAD. Present at the hearing was the counsel for the Minister of Public Safety and Emergency Preparedness [the Respondent]. The Applicant who had not previously advised the IAD who would be giving evidence on his behalf told the IAD that in addition to his own testimony, he wanted his mother and his girlfriend to give evidence on his behalf. However, when his mother finished her evidence, the IAD advised him that he had ten minutes left to present his evidence and asked if he wished to call another witness. He decided to call his step-father, not the girlfriend. When his step-father finished, the Applicant did not ask to call his girlfriend, nor did he ask to have the hearing continue into the afternoon or on another day to hear from her. He then summarized his case and the Respondent

made submissions. After the hearing and without previously asking for permission to do so, the Applicant filed a letter from his girlfriend which supported his claim.

[5] On July 23, 2014, the IAD dismissed the Applicant's appeal of his deportation order. The Applicant filed an application for leave and for judicial review of the IAD's decision, which was granted on March 18, 2015.

[6] The Applicant has a very extensive criminal record in Canada involving convictions for offences committed not only before but also after the offence for which he was ordered removed. The conviction in question arose out of a serious incident of domestic violence perpetrated on his then girlfriend in 2008. He was charged with sexual assault, forcible confinement, assault causing bodily harm, and two counts of failure to comply with terms of recognizance (arising out of earlier convictions). Amongst other violence perpetrated on the victim, the Applicant kicked her knee resulting in displacement of her kneecap and tearing the ligaments and tendons around the knee cap. An x-ray of her neck showed internal trauma from being choked. At the time of arrest for the above-noted offences, the police noted that the Applicant had a criminal record dating back to 2002 for 19 convictions including robbery, forcible confinement, five assault convictions, one uttering threats, together with firearms offences and numerous convictions for failure to attend court, failure to comply with recognizance, failure to comply with terms of probation. The only convictions shown as having occurred when he was under 18 were convictions for failure to attend court (2002-2007). His record also shows two robbery convictions and a forcible confinement conviction in 2004, when he was 19 years old. His mother, who testified on his behalf, was unaware of the full extent of his criminal history.

[7] As noted, the Applicant continued to commit and be convicted for crimes after having been found inadmissible, and while still under probation for the 2010 conviction. These offences were the same type of vicious domestic violence but perpetrated against different women who were in relationships with him. He was charged with assault causing bodily harm against another girlfriend in 2012. The girlfriend was "badly beaten. She suffered bruising about her body, and it appears that her ribs have been broken. She is in severe discomfort and it pains her to breathe deeply. She has had a laptop broken over her head." He was also convicted on charges arising out of a domestic violence incident that occurred later in 2010 (after the subject conviction) in Nova Scotia. The victim was yet another girlfriend. He was under probation relating to the 2010 Ontario convictions at the time. This attack on his then girlfriend, a mother of twins, occurred while the victim was holding a 5 month old child. He assaulted his victim numerous times between August 10 and August 31, 2010; one of the assaults included punching her in the face with sufficient force to cause her to fall down stairs. The Applicant did not appear in court to contest charges and was convicted for failure to appear. Supporting the IAD's explicit findings that the Applicant failed to take responsibility for his criminal actions, when questioned about the assault on his then girlfriend in 2010 (leading to the inadmissibility proceedings), is the following exchange:

> Appellant: In my mind, it was a physical altercation that went (sic) because I take full responsibility but it takes two and…
>
> Appellant: Well that's what I mean like it takes two, like we were both fighting. …
>
> Appellant: She always has long nails, okay? This girl stuck her fingers into my face and almost poked my eyes out with about six scratches. By the time I could get to her she was running away. So that's how when I kicked for her legs that's what happened…

However, the police report describes the severe injuries suffered by the girlfriend (dislocated knee cap and torn ligaments and tendons) and that the Applicant had kicked her, unprovoked, while she was seated.

[8] Other relevant factors were that the Applicant was referred for counselling in domestic violence programs on numerous occasions, but failed to attend. He completed one partner abuse response program offered by the Catholic Family Services, but failed to attend a scheduled anger management program and other programs. Despite his length of time in Canada, the Applicant held hardly any employment. He had no assets.

[9] After considering the Applicant's evidence, the seriousness of his criminal record, his behavior in dealing with the justice system, the possibility of rehabilitation, his lengthy stay in Canada and his establishment here, his family in Canada and dislocation that the removal may cause, as well as the hardship caused to him by the removal, the IAD found, taking into consideration the best interests of the child, that there were insufficient humanitarian and compassionate grounds to allow the appeal. The IAD found that there were more significant negative factors which, taken together, outweighed the factors which the IAD found to be at best neutral factors. The IAD also found the Applicant would likely re-offend.

[10] The primary issues on judicial review were whether the Applicant was denied procedural fairness by the IAD because his girlfriend was not called, and because the IAD rejected the subsequent filing of a letter from her.

[11] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is unnecessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question." The present case raises an issue of procedural fairness, reviewable under the correctness standard of review: *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Sketchley v Canada (AG)*, 2005 FCA 404 at paras 53-55. In *Dunsmuir* at para 50, the Supreme Court of Canada explained what is required of a court reviewing on the correctness standard of review:

> When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[12] Self-represented claimants are not always or necessarily entitled to a higher degree of procedural fairness: *Martinez Samayoa v Canada (Minister of Citizenship and Immigration)*, 2012 FC 441 at para 6 [*Martinez*]; *Turton v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1244; *Adams v Minister of Citizenship and Immigration*, 2007 FC 529 at paras 24-25; *Agri v Canada (Citizenship and Immigration)*, 2007 FC 349 at paras 11-12. However, while the IAD is to be shown much deference in its choice of procedure, and while it is not obligated to act as counsel for unrepresented parties, it nevertheless has a duty to ensure a fair hearing, and the content of such procedural rights is context-dependent and is to be determined on a case-by-case basis: *Singh Dhaliwal v Canada (Minister of Citizenship and Immigration)*, 2011 FC 201 at paras 13-14; *Martinez* at para 7; *Kamtasingh v Canada (Minister of Citizenship and Immigration)*, 2010 FC 45 at paras 9-10, 13; *Law v Canada (Minister of Citizenship and*

Immigration), 2007 FC 1006 at para 14-19; *Nemeth v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 590 at para 13.

[13] The content of the Applicant's right to a fair hearing includes the opportunity to present his views and evidence fully and have them considered by the IAD: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 22; *Wang v Canada (Minister of Citizenship and Immigration)*, 2007 FC 531 at paras 13-15, 19.

[14] As to calling the girlfriend, I am unable to find this constituted a denial of procedural fairness. The fact is that the Applicant stated at the outset that he had two witnesses to call, his mother and his girlfriend. After his mother finished giving evidence, the IAD asked if he wished to call anyone else, and for reasons of his own choosing, he called his step-father instead of his girlfriend. The IAD, correctly in my view given the Applicant's earlier representation regarding his witnesses, then called for submissions. The Applicant did not ask to call the girlfriend, nor did he ask the IAD to sit additional time to hear his girlfriend. This does not constitute procedural unfairness. The Applicant wishes now that he had called his girlfriend, but he did not make any such request before the IAD. He was under no pressure as to who to call or who not to call.

[15] I accept the jurisprudence cited above that a tribunal is not obliged to act as an attorney for a party who has chosen to appear without counsel. The IAD did not need to point out all possible rights the Applicant may have had. As stated by the Federal Court of Appeal, a party who chooses to represent himself must accept the consequences: see *Wagg v R*, [2004] FC 206

(FCA) per Pelletier J.A., at para 25, 31, adopting dicta from the Ontario Court of Appeal which states:

> … Fairness does not demand that the unrepresented litigant be able to present his case as effectively as a competent lawyer. Rather, it demands that he have a fair opportunity to present his case to the best of his ability. Nor does fairness dictate that the unrepresented litigant have a lawyer's familiarity with procedures and forensic tactics.

[16] Nor does the IAD's refusal to accept the girlfriend's letter amount to procedural unfairness. The Applicant argues it was rejected on technicalities, but I disagree. There were several defects in the letter, as identified by the IAD in the following passage:

> [T]he Panel did not accept post-hearing evidence, as the letter is un-dated, the witness has had the benefit of discussing the issues with the appellant, since the hearing, and no request for post hearing evidence was made, in a timely manner.

[17] In my view the IAD's decision not to accept the girlfriend's letter was correct. The fatal flaw in the Applicant's request is that the girlfriend and the Applicant had the opportunity to discuss issues that arose in the hearing, and could tailor her letter accordingly. The IAD correctly asked the girlfriend to leave the hearing room to prevent contamination of her evidence as a result of her hearing what was being said. It would be inconsistent for the IAD, having ordered the Applicant's girlfriend to leave during the hearing, to then allow her to file evidence after the hearing since by then she might have learned what was said.

[18] The IAD afforded the Applicant with several indulgences. It allowed him to lead testimonial evidence notwithstanding his failure to comply with the rules requiring 20 days notice of their identities and other information designed to allow the IAD to adequately schedule

the hearing and to allow the Respondent to prepare for it. The IAD also allowed the Applicant to file documentary evidence that was walked in on the day of the hearing, again without giving the IAD or the Respondent time to prepare or respond to it. It previously had granted the Applicant's request for an adjournment to obtain different counsel, although he subsequently decided not to do so. In my view the IAD gave this Applicant "every possible and reasonable leeway to present [his] case in its entirety", and respected the principle that "strict and technical rules should be relaxed for unrepresented litigants" (*Da Costa Soares v Canada (Minister of Citizenship and Immigration)*, 2007 FC 190 at para 22; see also *Caceres v Canada (Minister of Citizenship and Immigration)*, 2004 FC 843 at paras 22-23).

[19] The Applicant also raised what I consider to be relatively minor errors in the IAD's reasons concerning the visits and expenses paid in respect of his daughter. He also alleged inadequate consideration of best interests of the children. These are assessed on the standard of reasonableness. Insofar as the best interests of the children are concerned, the IAD considered this matter on the evidence before it. In my view the IAD's decision read as a whole falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law as required by *Dunsmuir*.

[20] As noted already, there were no procedural errors in this case.

[21] In the result, this application for judicial review must be dismissed.

[22] Neither party proposed a question to certify, and none arises.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed, no question is certified, and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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