Federal Court  Cour fédérale

Date: 20190529

Docket: IMM-3486-18

Citation: 2019 FC 753

Ottawa, Ontario, May 29, 2019

PRESENT: Mr. Justice Ahmed

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

NIJAH MIKEY LUCIEN

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Minister of Public Safety and Emergency Preparedness (the "Applicant") seeks judicial review of an Immigration Appeal Division ("IAD") decision that granted a stay of removal under section 67(1)(c) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA") to Nijah Mikey Lucien (the "Respondent"). I will set the decision aside because it is not based on the evidence and is therefore unreasonable.

II. **Background**

[2] The Respondent is a 36 year old citizen of Saint Lucia who was issued an exclusion order on May 26, 2016. The facts behind that exclusion order stretch back to 2003, when the Respondent entered Canada on a visitor visa with the surname Mangroo. He made a refugee claim, but later abandoned that claim in 2005.

[3] The Respondent has four Canadian children with three different women. He was charged with three serious offences against one of these women: sexual assault with a weapon contrary to section 272 of the *Criminal Code*, RSC 1985, c C-46 ("Criminal Code"), assault with a weapon contrary to section 267(a) of the Criminal Code, and assault contrary to section 266 of the Criminal Code. He pleaded guilty and was convicted of assault with a weapon. Apparently, in order to give effect to his removal, the section 272 and 267(a) charges were both stayed.

[4] After removal, the Respondent returned to Canada using a passport in his mother's maiden name (Lucien) and a visitor visa expiring on January 18, 2008. In 2010, he became a permanent resident of Canada through a spousal sponsorship application. The Respondent concedes that his application contained four misrepresentations as follows: 1) failure to disclose his criminal convictions, 2) failure to disclose his two stayed charges, 3) failure to disclose that he had been previously ordered to leave Canada, and 4) failure to disclose his detention or incarceration.

[5] On June 1, 2016, the Respondent was issued an exclusion order related to his misrepresentations. He appealed this exclusion order to the IAD under section 67(1)(c) of the IRPA on the basis of humanitarian and compassionate factors, including the best interests of the children ("BIOC") directly affected.

[6] The Respondent's IAD appeal took place on April 11, 2018. In that appeal, the IAD considered the factors set out in *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IABD no 4 (QL) ("*Ribic"*). The *Ribic* factors were upheld by the Supreme Court of Canada in *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, and later the Federal Court adopted a modified version in *Wang v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1059, aff'd 2006 FCA 345 to be applied in cases where a party has made misrepresentations:

1. The seriousness of the misrepresentation leading to the removal order and the circumstances surrounding it;
2. The remorsefulness of the appellant
3. The length of time spent in Canada and the degree to which the appellant is established in Canada;
4. The appellant's family in Canada and the impact on the family that removal would cause;
5. The best interests of a child directly affected by the decision;
6. The support available to the appellant in the family and the community; and
7. The degree of hardship that would be caused by the appellant by removal from Canada, including the conditions in the likely country of removal.

[7] The IAD's finding on all but one factor was negative. For example, the IAD found that the Respondent's remorse was "hollow and self-serving", and his misrepresentations are serious. Although the Respondent's establishment was positive on the basis that he has been self-employed as a carpenter since 2008 and employs three subcontractors, this was discounted by the fact that his employment is rooted in his repeated misrepresentations. The IAD also found that the Respondent does not contribute to the community in Canada, his parents and five sisters

reside in Saint Lucia, and that a transition to Saint Lucia would not pose hardship sufficient to justify the appeal.

[8] The IAD reviewed the BIOC and the impact on his family if they do not travel with him to Saint Lucia. It noted that the Respondent's wife was laid off and as a result she has been unemployed for 18 months. It also noted that one of the Respondent's sons faces criminal charges and must live with him according to bond conditions. The Respondent's other son now visits every other weekend. The Respondent also testified that he helps his daughters with their school work. No evidence was submitted to further explain or support these submissions.

[9] The IAD determined that the BIOC is a positive factor. On this sole positive basis, the IAD granted a stay of the removal valid for a five year period. The IAD also exercised its discretion to impose ten conditions including a volunteering requirement:

> [10] volunteer with Habitat for Humanity on a substantive, meaningful basis during the period of the stay. The appellant must provide reliable evidence of such at his reporting meetings and should also be prepared to present reliable evidence on this matter at his stay reconsideration hearing(s) in the future. If the appellant is unable to continue with Habitat for Humanity he should explain why and begin volunteering in a substantive, meaningful and consistent manner with Tropicana Community Services, the Salvation Army or Volunteer Builders and keep reliable records of such involvement as evidence of his compliance with this stay condition.

[10] On July 24, 2018 the Applicant applied for judicial review of this decision.

III. **Issue**

[11] The sole issue I have considered in this judicial review is whether the IAD's BIOC decision is based on the evidence.

IV. **Standard of Review**

[12] The standard of review of the IAD's assessment of the evidence in regards to section 67(1)(c) of the IRPA is reasonableness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 57-59).

V. **Analysis**

A. *Is the IAD's BIOC decision based on the evidence?*

[13] The Applicant argues that the IAD's analysis is unreasonable because it was not based on sufficient evidence of the BIOC (*Semana v Canada (Citizenship and Immigration)*, 2016 FC 1082 at paras 37-38 [*Semana*]). The Applicant submits that the evidence was minimal, consisting only of family photographs, tax forms, one son's bail conditions, report cards for his two daughters, and the Respondent's own testimony.

[14] The Respondent argues that *Semana* is distinguishable and that the BIOC finding in the present case is supported by the evidentiary record. The Respondent submits that there was evidence to support his submission that he has young school aged children and a teenaged son who uses him as a surety for his bail.

[15] I agree with the Applicant. The BIOC, which was the sole positive factor, lacked sufficient supporting evidence and cannot logically lead to the IAD's conclusion that section 67(1)(c) of the IRPA was satisfied. Indeed, the negative factors in this case are numerous and significant. For instance, the IAD found that the Respondent's remorse is not credible and described his testimony as "hollow and self-serving." The IAD noted the Respondent's serious criminal conviction and that his attempt to control his anger involves watching online anger

management videos. The IAD also found that his positive establishment was discounted by his numerous misrepresentations, and the fact that he has not made any contribution to the community.

[16] The Respondent submitted minimal evidence consisting only of family photos, tax forms, the son's bail conditions, a few report cards, and the Respondent's own testimony. There is no evidence of the $200 per month support payments the Respondent allegedly makes. There is no evidence to support his testimony that he sees his son twice a week. The Respondent testified that he is trying to give his other son advice about staying away from the wrong crowds and go to school, but there are no letters of support from the Respondent's family or the school. It is also unclear what the IAD believes the Respondent's parenting role consists of, though it does describe his role as positive:

> [43] The only positive aspect weighing in favour of special relief in this case are the interests of the [Respondent's] daughters and his older son who is on bail. Without their interests and the positive role of the [Respondent] in their lives, this appeal would be dismissed.

[17] I reproduce a portion of the transcript where the Respondent was questioned by his lawyer at the IAD hearing:

> COUNSEL: Your – what impact- answer me this question and think about it for a moment- what impact – what impact on you- to anyone else – but I want you to tell this Panel, this Member, what impact would a removal have to you? To anyone else? In your own words. Sit up and breathe. Just give me an answer.
>
> [RESPONDENT] It will be devastated
>
> COUNSEL: To who? To what?
>
> [RESPONDENT]: It will be very devastated to my kids, to my wife. They are very much relying on me because I am- I am the breadwinner of the family, I help them with the schoolwork.

> COUNSEL: You help who with school work?
>
> [RESPONDENT]: Kiara, Mikea. You know, we-we do- we do everything together, as a family. And I do not know anything else, but them, my family. So this – this is the world to me, my family. So that is why today I am here. I want to say I am very sorry, once again, for what I have done, and please be remorseful towards my action. I know what I did was wrong. I am very sorry.

[18] The IAD accepted the Respondent's testimony that he is involved in his children's lives, yet little evidence of this was before the IAD and such evidence is especially important considering the IAD's prior negative credibility finding.

[19] In sum, there is insufficient evidence to connect the IAD's analysis to its conclusion. Considering the many significant negative factors, the lack of corroborating evidence to support the Applicant's testimony, and the IAD's negative credibility finding, the IAD's reasons do not disclose any justified, transparent and intelligible basis for the IAD to reasonably conclude that paragraph 67(1)(c) of the IRPA was satisfied. A decision not based on sufficient evidence is unreasonable, so I am setting the decision aside.

VI. **Certified Question**

[20] Counsel for both parties was asked if there were questions requiring certification, they each stated that there were no questions arising for certification and I concur.

VII. **Conclusion**

[21] This application for judicial review is granted.

JUDGMENT in IMM-3486-18

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted and the matter shall be re-determined by a differently constituted panel.

2. There is no question to certify.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3486-18
STYLE OF CAUSE:	THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS v NIJAH MIKEY LUCIEN
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