Federal Court  Cour fédérale

Date: 20191021

Dockets: IMM-4426-18
IMM-4427-18

Citation: 2019 FC 1314

Ottawa, Ontario, October 21, 2019

PRESENT: The Honourable Mr. Justice Barnes

Docket: IMM-4426-18

BETWEEN:

EVERAD WESTON WOLLERY SURGEON

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

Docket: IMM-4427-18

AND BETWEEN:

EVERAD WESTON WOLLERY SURGEON

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] These two applications challenge related decisions affecting the Applicant's permanent residency status, and this single set of reasons will serve to resolve both proceedings. The first decision under review was made by a Minister's Delegate [Delegate] under s 44 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] on November 20, 2017. The effect of that decision was to refer Mr. Surgeon's case to the Immigration Division (ID) for an admissibility hearing based on the Delegate's opinion that Mr. Surgeon was inadmissible to Canada under s 36(1)(a) of the IRPA for serious criminality. The second decision under review was made by the ID on July 31, 2018. This decision found Mr. Surgeon inadmissible, and ordered his deportation. The parties agree that the ID's decision will stand or fall on the outcome of the Court's review of the Delegate's decision. There is also no disagreement that the standard of review in both cases is reasonableness.

[2] It is common ground that Mr. Surgeon is a Jamaican citizen. He came to Canada at the age of eight and obtained permanent residency, presumably on the strength of his mother's status here. He was abused by his mother and placed into foster care at the age of 12. Eventually, his mother conceded wardship to the Province of Ontario. He appears to have been moved with some frequency from one group home to another until the age of 18. Needless to say, his living situation was less than ideal and, perhaps not surprisingly, he got involved in the gang and drug culture. Over the succeeding years, Mr. Surgeon amassed a substantial criminal record involving more than 40 convictions. At present, he is serving a five and a half year custodial sentence for convictions for assault with a weapon, unlawful use of a firearm, and possession of a prohibited

weapon. It was those convictions that triggered the admissibility process that is the subject of these proceedings.

[3] Mr. Surgeon complains about the reasonableness of the Delegate's decision, saying that it fails to appropriately assess mitigating personal circumstances, most notably his disadvantaged childhood, and the failure of child welfare authorities to seek Canadian citizenship for him before he ran afoul of the Criminal Code. His situation is also said to be "on all fours" with the decision in *Abdi v Canada (Public Safety and Emergency Preparedness),* 2018 FC 733, 294 ACWS (3d) 818. In that case, Justice Ann Marie McDonald dealt with circumstances similar to this one, which involved an asserted failure by child welfare authorities to seek the applicant's timely Canadian citizenship. As in *Abdi*, it is argued that the Delegate failed to consider the *Charter* values inherent in Mr. Surgeon's disadvantaged childhood circumstances. For that he relies on the decision in *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at paras 58-59, [2018] 2 SCR 293, holding that administrative decision-makers are required to achieve a proportionate balance between the *Charter* protections at play and their relevant statutory mandate. This argument is expressed in more detail in Mr. Surgeon's Memorandum of Argument at paras 56-57, as follows:

> 56. In the case at bar, as in *Abdi*, there are unique facts at play that required, at a minimum, some consideration of the Charter values at play. As a young Black male noncitizen, a former Crown ward, and a person who suffers from mental illness, the Applicant is clearly a member of several historically disadvantaged groups. In deciding whether to refer him to a hearing that would result in a removal order being made against him, the Minister's delegate was required to consider the non-discrimination guarantee under s. 15(1) of the *Charter*. The delegate's failure in this regard mirrors the error identified by the Court in *Abdi*:
>
> > [87] Here, Mr. Abdi provided detailed submissions on his particular and unique facts, including the fact

> that he was a long-term ward of the state. With respect to his lack of Canadian citizenship, he highlighted the fact that the DCS intervened to remove his name from his aunt's citizenship application. These factors may be relevant considerations with respect to a s.15 *Charter* value of non-discrimination in the MD's referral decision. But they were not considered. There is no indication in the record or in the MD's decision that she turned her mind to any of these considerations.
>
> 57. As the Court found in *Abdi*, the failure of a decision maker to even consider Charter values vitiates the decision in itself because it renders judicial review impossible, by preventing the Court from reviewing on a reasonableness standard the decision-maker's balancing of statutory objectives and *Charter* rights and values.
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> [Also see para 21 of the Applicant's Reply.] [Footnotes omitted.]

[4] Mr. Surgeon concedes that, unlike *Abdi*, he put no such *Charter* argument to the Delegate or to the ID. Nevertheless, he argues that the Delegate had a responsibility to identify and address the *Charter* issues, whether they were expressly raised or not. This, he says, is fatal to both decisions under review. Before proceeding to consider the adequacy of the Delegate's reasoning for referring Mr. Surgeon's case to the ID, it is important to reflect on the scope of Delegate's statutory authority. It is very limited.

[5] In *McAlpin v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 422, [2018] FCJ No 423 [*McAlpin*], Chief Justice Paul Crampton held that, for cases involving serious criminality, the Delegate is entitled to prioritize public safety and security even to the point of refraining from considering mitigating personal circumstances [see para 65]. More recently in *Lin v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 862, 308 ACWS (3d) 609, I described the Delegate's limited authority in the following way:

[16] Neither the Officer nor the Delegate is authorized or required to make findings of fact or law. They conduct a summary review of the record before them on the strength of which they express non-binding opinions about potential inadmissibility. This is no more than a screening exercise that triggers an adjudication. It is at the adjudicative stage where controversial issues of law and evidence can be assessed and resolved. As the Federal Court of Appeal held in *Canada (Minister of Public Safety and Emergency Preparedness) v Cha*, 2006 FCA 126 at paras 47 and 48, [2007] 1 FCR 409, the referral process is intended only to assess readily and objectively ascertainable facts concerning admissibility. It does not call for a long and detailed assessment of issues that can be properly assessed and fully resolved in later proceedings. To the extent that there is any discretion not to make a referral to the ID, it is up to the Officer and the Delegate to determine how that will be exercised and what evidence will be applied to the task. This point was made by Justice James Russell in *Faci*, above, at para 63:

> [63] The jurisprudence of this Court makes clear that, when deciding whether to recommend an admissibility hearing, the Minister's Delegate has the discretion, not the obligation, to consider the factors set out in ENF 6. See *Lee*, above, at paragraph 44; and *Hernandez v Canada (Minister of Citizenship and Immigration)*, 2005 FC 429 at paragraphs 22-23. The Minister's Delegate in this case reasonably concluded that country conditions need not be considered at this stage of the process because a risk assessment would have to be done before the Applicant could be removed.

[17] Although the Court in *Cha*, above, was careful to limit the application of its reasons to cases involving foreign nationals I cannot identify a rational basis to extend a more generous substantive discretion to permanent residents under s 44. I accept that greater due process requirements may apply to permanent residents because they are at risk of losing their residency status. However, unlike some provisions in the IRPA that grant heightened substantive rights to permanent residents, s 44 treats foreign nationals and permanent residents alike. Accordingly, whatever the basis of inadmissibility may be, the discretion not to make a referral to the ID is the same for both classes.

[18] The decision of the Federal Court of Appeal in *Sharma v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 319, 274 ACWS (3d) 382 (FCA), is also instructive on the scope of the discretion available to the Officer and the Delegate in the

exercise of their s 44 authority. Mr. Sharma was a permanent resident who faced an admissibility hearing on the ground of criminality. The Court recognized that the Officer and the Delegate had "some flexibility when deciding whether or not to write an admissibility report" but their discretion was said to be "very limited" with respect to both foreign nationals and permanent residents. Beyond observing that a permanent resident may be entitled to "a somewhat higher level of participatory rights" the decision does not identify a broader substantive discretion favouring that class of residents. Indeed, the Court applied the security rationale from its earlier decision in *Cha*, above, to Mr. Sharma saying that it applied with equal force to foreign nationals and permanent residents [see para 23]. The decision described the very limited purpose served by the s 44 process in the following way:

> [33] The case review of recommendations prior to the public danger opinion or the internal risk opinion triggered by a humanitarian application are of a different nature and cannot be analogized to the report and the referral envisaged by subsections 44(1) and (2). I agree with the respondent that the inadmissibility report and the case highlights are more in the nature of pro forma documents, whose essential purpose is to list relevant information from the file (revolving around the criminal conviction and related objective facts) and to provide a brief rationale for the Officer's actions and recommendation. They are clearly distinguishable from case review recommendations in the context of public danger opinion and internal risk opinions, which are more akin to advocacy tools.
>
> [37] …Yet, as previously noted, the decisions to make a report and to refer it to the ID are administrative in nature, and do not translate to any change in status for the appellant. Only the ID can make a removal order in this case, and the appellant has a number of other recourses available to him before actually being removed from the country (applications for judicial review of the report, of the referral and of the ID decisions, a pre-removal risk assessment, and an H&C application)…

[19] Clearly the Court was not sympathetic to the kind of arguments made by the Applicants' in these proceedings that the

> s 44 referral process includes an obligation to sort out complex matters of evidence and credibility or to assess issues of law beyond forming a bare opinion as to whether a person is inadmissible.
>
> [20] For these reasons I conclude that the scope of discretion available to the Applicants in these cases is no greater than that described in *Cha*, above, which is to say that aggravating and disputed mitigating circumstances are effectively off the table. It is open to the Officer and the Delegate to reflect on "clear and non-controversial" facts concerning the grounds of inadmissibility – and presumably to entertain a submission about those facts – but the legal obligation extends no further than that. [1]

[6] Mr. Surgeon says that the Delegate's decision is unreasonable because it is "little more than a recitation of evidence without analysis". The argument is particularized in his Further Memorandum of Argument at paras 43 and 49:

> 43. The notes acknowledge the Applicant's evidence that he was a child in care throughout his childhood in Canada, that he had a hard childhood, and that he believed that he was a citizen and that responsibility for his status lay with child protection services who had custody over him; they also acknowledge his early diagnosis of mental illness. However, the officer's notes fail to actually *assess* these factors as considerations relevant to whether or not to make the referral, or explain why they were not a sufficient basis upon which to exercise discretion not to refer the report. Instead, the officer focuses on the seriousness of the Applicant's offenses, the fact that he had received warnings in the past, and the officer's belief that the Applicant is a poor role model for his children, concluding:
>
> > After considering all of the factors in this case including the length of time spent in Canada, his Canadian children and common law spouse and taking into consideration Parliament's objectives of the Immigration and Refugee Protection Act and the Faster Removal of Foreign Criminals Act I recommend an Admissibility Hearing.

[1] This decision is presently on appeal.

...

> 49. In the case at bar, **there is no analysis whatsoever**. There is no explanation of why the Minister's delegate determined that the Applicant's history in Canada, and in particular the fact that he was a ward of the state as a child and that the state failed to take steps to secure citizenship for him, was not a sufficient basis, along with the other factors raised, including his racialization and his mental health status, to overcome the seriousness of his convictions such that he should not be referred to the Immigration Division for a removal order. As in *Ayyad*, there is not enough in the reasons and the record to enable the Court to review the reasonableness of the decision-making process.
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> [Footnotes omitted.]

[7] The three authorities cited by Mr. Surgeon in support of this argument are *Ayyad v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1101,246 ACWS (3d) 513; *Canada (*Minister of *Citizenship and Immigration) v Arastu*, 2008 FC 1222, [2008] FCJ No 1561, and *Melendez v Canada (*Minister of *Public Safety and Emergency Preparedness)*, 2016 FC 1363, [2016] FCJ No 1434. The *Ayyad* and *Arastu* decisions dealt with the adequacy of reasons in citizenship cases and are not helpful in the context of a s 44 referral. *Melendez* did involve a s 44 Delegate referral and the Court granted relief on the following basis:

> [37] Even if the Applicant's submissions may have required further detail, this Court on judicial review cannot speculate as to why the Officer and, in turn, the Delegate rejected the Applicant's submissions which were clearly before them. This is not a case like *Spencer* where the officer's narrative report at least noted being "sensitive to the best interests of subject's Canadian-born children." In this case, the only mention whatsoever of the Applicant's younger sisters and unborn child is in the one sentence summary of the "previously unknown information". There is not even a perfunctory statement that such interests were considered, let alone acknowledged, identified or assessed in any manner whatsoever.

> [38] In the circumstances of this case, it was insufficient and unreasonable for the Delegate to simply and only state that the Applicant's submissions had been "reviewed and considered". Neither the Delegate nor, for that matter, the Officer provided any explanation as to why the Applicant's submissions were insufficient. The decision in this case is such that it is not possible to determine whether the Delegate reviewed and considered the Applicant's submissions in a reasonable manner because neither the Delegate nor the Officer offered any meaningful explanation as to why the Applicant's submissions were rejected.
>
> [39] It is true that the Delegate concurred with the Officer's statement that "due [to] the seriousness of the offenses committed," the Applicant should be referred for an admissibility hearing. However, the seriousness of the offences committed is not, in and of itself, a reason to reject and not engage, even if briefly, with the Applicant's submissions except to the extent of simply acknowledging that they had been reviewed and considered. The seriousness of the offences committed was stated as a standalone conclusion for which no reasons were stated as to why this factor outweighed the various H&C factors raised by the Applicant. The referral decision is unbalanced in this regard and, consequently, unintelligible and cannot be justified in respect of the facts and the law.

[8] The reasons provided in Mr. Surgeon's case, in the form of a s 44 Narrative Report, are far more robust than the unparticularized references noted above. In this case, the reasons contain information about Mr. Surgeon's employment and educational background, relevant humanitarian and compassionate factors, and his plans for life after release from custody. The ultimate rationale for referring Mr. Surgeon's to the ID was the following:

> On 19 October 2017 Mr. Wollery was notified regarding allegations as per section 36.(1)(a).
>
> He acknowledged he received CBSA's letter dated 18October2017. He acknowledged he had the opportunity to read it and understood.
>
> On 19 October 2017 Mr. Wollery was counselled regarding the reporting process, the possibility of the case being referred to an Admissibility Hearing and the consequences of the Hearing. He

was further counselled that should a Deportation Order be issued the right to appeal is lost as he was convicted of serious criminality and sentenced to a term of imprisonment of at least six months. He stated that he understood.

On 19 October 2017 Mr. Wollery was counselled that should a deportation order be issued against him that he would have the ability to apply for a Pre Removal Risk Assessment before being removed from Canada.

He indicated he wished to proceed.

On 19 October 2017 Mr. Wollery was counselled regarding the provision to submit letters of support or any other information for consideration by 10 November 2017. He was counselled that he may seek the assistance of legal counsel for those submissions if he wishes.

On 6 Nov 2017 and again 9 Nov 2017 submissions were received. Those submissions were read and reviewed in their entirety.

Mr. Woolery Surgeon has been in Canada since the age of 8 years old. He was taken by Children's Aid Society shortly after coming to Canada and grew up in the foster environment. He believed that CAS had applied for his citizenship as a child and claims he was never aware that he was not a Canadian citizen. He is a long term permanent resident. He was convicted of serious criminality many times within the first ten years of entering Canada however because he was between the ages of 8 and 18 they were Youth Criminal Justice Act offences and as non reportable convictions he still represents a Long Term Permanent Resident.

His letters of submission do illustrate that he had a hard childhood and formative years moving from foster home to foster home. The letters illustrate him having bi-polar disorder which undiagnosed made it hard for him to function normally. Without a stable supportive environment he leaned on friends and associates over family. Those friends ended up being the wrong friends and led him into a life of crime.

His own submission details how most of his total convictions were as a youth dealing with group homes and having no support system. He is not being reported under A44 for youth offences. He details how his first firearms conviction he pled guilty at his lawyers advice after spending almost two years in pre sentence custody while the other two people charged had gotten bail because they had family to bail them out. He stated that the gun

was not his and that he was at a friend's house when the search warrant was executed but because he didn't get bail he had already served the time that the crown was seeking for that offence anyways. If he pled guilty, he would be released from jail on time served. He completely denies any involvement or responsibility for the fact that he was living at the residence at the time, the firearm was in plain sight during the arrest, he was on probation for many previous convictions already at the time, and the search warrant was the result of a drug trafficking investigation which resulted in drug trafficking charges as well. Nevertheless, he was given a warning letter for that incident as no action was taken by CBSA. This conviction is now his third firearms related offence.

His letters of support speak of his only family support being his children, common law spouse, brothers and sisters in Canada. He is a young, physically healthy man that over time will be able to adapt to life in Jamaica. He speaks the language, lived there until 8 years old and is physically capable of working.

Mr. Woolery Surgeon is a very serious criminal. He has been involved in the Canadian Criminal Justice system since his first youth conviction in 2004 at only age 14. Since that time he has amassed 46 criminal convictions and 28 further withdrawn criminal charges. He is serving a Federal sentence in Kingston, Ontario for his third conviction for a loaded prohibited firearm. His offences are highly violent including weapons and drug dealing. It is clear that he has absolutely no regard for Canadian law.

He has received warning letters in the past which have done nothing to deter his criminal behaviour which has escalated to the point he is now a Federal Inmate.

He has two children in Canada and a step son. He claims to have been involved in their lives since their birth. However, given that he has spent much of his life since their birth incarcerated it is difficult to provide a consistent loving influence from behind bars. He does not represent a positive role model for his children and has put them in harm's way in the past when he was arrested while caring for one of his children.

After considering all of the factors in this case including the length of time spent in Canada, his Canadian children and common law spouse and taking into consideration Parliament's objectives of the Immigration and Refugee Protection Act and the Faster Removal of Foreign Criminals Act I recommend an Admissibility Hearing.

[9] Having regard to the very restricted mandate of the Delegate under s 44, as described in *McAlpin* and *Lin* above, including Chief Justice Crampton's holding in *McAlpin* that, in cases of serious criminality, the Delegate need not take into account mitigating personal circumstances, I am satisfied that these reasons pass muster. Indeed, these reasons are sufficient for Mr. Surgeon to understand why his case was referred to the ID. His criminal history was egregious, violent, long-standing and escalating, and it overwhelmed the mitigating circumstances he had presented in opposition to a referral. As the Delegate noted, Mr. Surgeon had been warned in 2013 that further criminal conduct could result in his deportation. Nevertheless, he engaged in an armed assault in the context of an apparent drug deal gone awry. This was his third conviction in about six years for a firearms offence. He was then in his late twenties and well past the point of youthful immaturity. He was frequently in jail and had not been a positive role model for his children. I am accordingly satisfied that the Delegate's reasons for referring Mr. Surgeon's case to the ID were sufficient and the decision was, in that respect, reasonable.

[10] The argument that, in the absence of a submission, the Delegate had a legal duty to parse out and reflect upon the *Charter* significance of Mr. Surgeon's childhood difficulties is equally without merit. As discussed, in *Lin* and *McAlpin*, above, the Delegate has a broad range of discretion to consider the evidence submitted by the person affected, and from which the Delegate is only required to express a non-binding admissibility opinion to the ID. With such a restricted mandate there is no obligation to ferret out complex legal issues or to accept at face value every assertion of personal hardship that a person advances. It follows that the Delegate is not required to independently reflect upon so-called *Charter* values before making a referral to the ID. The idea that a Delegate has a positive obligation to hunt for legal arguments or for

evidence was rejected by the Federal Court of Appeal in *Sharma v Canada*, 2016 FCA 319 at para 51, 274 ACWS (3d) 382. It also seems to me that if the Officer conducting a full-fledged humanitarian and compassionate review in *Owusu v Canada* (*Minister of Citizenship and Immigration)*, 2004 FCA 38, [2004] 2 FCR 635 was not obliged to make independent enquiries or to supplement a deficient application, there cannot be such an obligation in the exercise of a Delegate's s 44 mandate [see paras 8-10]. Furthermore, without expressing a view on the correctness of the decision in *Abdi*, above, I note that the *Charter* arguments advanced on Mr. Abdi's behalf were fully articulated to the Delegate, but ignored. That is a material distinction from Mr. Surgeon's case.

[11] Mr. Surgeon also contends that the Delegate erred by taking into consideration some 28 withdrawn criminal charges as proof of his criminal history and propensity for criminality. There are two references in the s 44 Narrative Report to withdrawn charges. The first reference appears at the foot of Section 4, which also lists numerous non-reportable convictions including convictions for assaults, assaults with weapons, resisting arrest with assault, obstruction and drug trafficking. The impugned reference states: "28 withdrawn charges stemming from 9 different arrest incident dates". The second reference to withdrawn charges is found in the following characterization of Mr. Surgeon' criminal history:

> Mr. Woolery Surgeon is a very serious criminal. He has been involved in the Canadian Criminal Justice system since his first youth conviction in 2004 at only age 14. Since that time he has amassed 46 criminal convictions and 28 further withdrawn criminal charges. He is serving a Federal sentence in Kingston, Ontario for his third conviction for a loaded prohibited firearm. His offences are highly violent including weapons and drug dealing. It is clear that he has absolutely no regard for Canadian law.

[12] Mr. Surgeon argues that by these observations the Officer made impermissible use of the evidence of withdrawn charges by treating it as an aggravating factor. This approach, he says, runs afoul of the teaching in cases like *McAlpin*, above, and *Abdi v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 950, 285 ACWS (3d) 141 [*Abdi* #2].

[13] In *Abdi* #2, Justice Richard Southcott set aside a Delegate's s 44 admissibility referral because it took account of over 100 mainly youth charges as proof of a "lifelong pattern of criminal activity". Justice Southcott's concern is well-expressed at para 40:

> [40] It is not possible for the Court to determine whether the Delegate would have characterized Mr. Abdi's history in the same manner, and arrived at the decision to refer him to an admissibility hearing, if he had not taken into account the 100 charges identified by the Officer. Therefore, if it was an error for the Delegate to take this information into account, it must result in a conclusion that the decision is unreasonable. As noted above, the Respondent has offered no alternative explanation for the role this information played in the decision-maker's analysis, i.e. other than as evidence of Mr. Abdi's criminality, and my view is that the record favours the conclusion that this information formed part of the basis for the conclusion that he demonstrated a lifelong pattern of criminal activity. As such, even though that criminality was not being considered as an index offence under s 36(1)(a) of IRPA, but rather as one of the factors in the exercise of the Delegate's discretion, my conclusion is that the charges were relied upon for an impermissible purpose.

[14] Justice Southcott recognized that credible evidence of criminal activity could be considered in forming such a characterization, but the bare fact of unproven or withdrawn charges was not a relevant consideration.

[15] To the same general effect is the decision by the Chief Justice Crampton in *McAlpin*, above, where the Delegate was found to have unreasonably placed significant weight on

evidence of withdrawn charges in concluding that there was a largely uninterrupted pattern of criminal behaviour. His concern was expressed as follows:

> [97] As noted at paragraph 87 above, the principal factors upon which the officer appears to have relied in recommending that Mr. McAlpin be referred to an admissibility hearing included his "significant criminal history," and "several withdrawn violent offences involving pointing a firearm and violence against exotic dancers." The officer characterized that criminal history as having spanned "the past thirty five years with few gaps." It appears from the face of the officer's decision that these factors were given significant weight in that decision.
>
> [98] The officer's characterization of Mr. McAlpin's "criminal history" as having spanned "the past thirty five years with few gaps" is only intelligible if that history is viewed as including the "many separate withdrawn charges during that time period" that were noted earlier in the officer's report. However, those charges were never proved, and therefore are not evidence of any "criminal history": *Sittampalam v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 326, at para 50 [***Sittampalam***]; *Balan v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 691, at para 21; *Kharrat v Canada (Citizenship and Immigration)*, 2007 FC 842, at para 21 [***Kharrat***].
>
> [99] Once those charges are excluded from consideration, Mr. McAlpin's "criminal history" consists of five non-reported convictions plus the four offences to which he pled guilty in 2014. The latter are described at paragraph 15 above. The former were for Failing to Remain at the Scene of an Accident (1975), Assault (1983), Driving While Ability Impaired (1987), Mischief under $5,000 (1996), and Failure to Stop at the Scene of an Accident (1997).
>
> [100] It is readily apparent from the foregoing brief summary of Mr. McAlpin's convictions that there are indeed significant gaps in his criminal history, namely, the eight-year gap between his first two convictions, the nine-year gap between his third and fourth convictions, and the seventeen-year gap between his fifth conviction in 1997 and his four convictions in 2016. Indeed, as a result of the latter gap, Arrell J characterized Mr. McAlpin's criminal record as being "dated."
>
> [101] Given the foregoing, it is reasonable to infer that the officer impermissibly relied on Mr. McAlpin's withdrawn charges in finding that he "has a significant criminal history that spans the

> past thirty five years with few gaps." To the extent that the officer and the Delegate then placed significant weight on that finding in reaching their decisions, those decisions were unreasonable.

[16] I accept Mr. Surgeon's premise that unproven or withdrawn criminal charges are, on their own, irrelevant to a s 44 admissibility assessment. The mere fact, however, that such matters are mentioned in the Delegate's decision to refer a case to the ID is not a basis to conclude they were afforded any material weight. In both *Abdi* and *McAlpin*, above, it was apparent that the unproven charges were actually taken into account by the respective Delegates in forming their opinions about ongoing patterns of criminal activity and to essentially fill in gaps in the proven criminal records. That is not the case here. Mr. Surgeon had a proven and lengthy record of serious, violent and escalating criminal behaviour that amply supported the Delegate's opinion that he had "absolutely no regard for Canadian law". This established evidence of serious ongoing criminality on the part of Mr. Surgeon required no supporting supplementation and I am not prepared to assume that the two bare references to withdrawn charges were material to the referral decision: see *Brace v Canada*, 2010 FC 582 at para 9, [2010] WDFL 4955.

[17] Notwithstanding the reasonableness of these decisions, cases like this do raise arguable policy concerns. Mr. Surgeon came to Canada as a young child. His family life was chaotic and he was made a ward of Ontario child welfare authorities. His criminal behaviour is largely a product of a dysfunctional family, mental health issues and his Canadian experiences in foster care. If public authorities failed to take reasonable steps to perfect his citizenship over a period of many years, a valid concern about the appropriateness of deportation does arise. That is, however, a matter for the Minister to consider and not for this Court.

[18] For the reasons provided above, these applications are dismissed.

[19] Counsel for Mr. Surgeon has proposed the following questions for certification:

> Does a Minister's Delegate acting pursuant to s. 44(2) of the IRPA have an obligation to consider *Charter* values, including equality and non-discrimination, when deciding whether to refer a report on inadmissibility to the Immigration Division for a hearing?
>
> Does this obligation, if any, depend in the subject of the report identifying and requesting consideration of *Charter* values?

[20] Beyond being linked to the first question, I am not entirely sure what the second question means. The Minister opposes the certification request on the following basis:

> Specifically, the Applicant has not established that *Charter* protections are actually engaged in this matter, which is required before proceeding to assess whether a decision reflects a proportionate balancing of the *Charter* protections at play. See *Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33 at para 31, and *Kreishan et al v Canada (MCI)*, 2019 FCA 223 at para 88.

[21] With some reservations about whether the questions posed will be dispositive and bearing in mind that my decision in *Lin v Canada*, above, is on appeal, I will certify the following questions:

> To what extent does a Minister's Delegate acting pursuant to s 44(2) of the IRPA have an obligation to consider personal mitigating circumstances including *Charter* values before referring the case of a permanent resident to the Immigration Division on the ground of serious criminality, and was the discretion reasonably exercised in this case?

JUDGMENT in IMM-4426-18 and IMM-4427-18

THIS COURT'S JUDGMENT is that these applications are dismissed but with the following questions being certified:

To what extent does a Minister's Delegate acting pursuant to s 44(2) of the IRPA have an obligation to consider personal mitigating circumstances including Charter values before referring the case of a permanent resident to the Immigration Division on the ground of serious criminality, and was the discretion reasonably exercised in this case?	[TRADUCTION] Dans quelle mesure le délégué du ministre agissant conformément au par. 44(2) de la LIPR est-il tenu de prendre en considération les circonstances personnelles atténuantes, y compris les valeurs consacrées par la Charte, avant de déférer le cas d'un résident permanent à la Section de l'immigration pour grande criminalité et le pouvoir discrétionnaire a-t-il été exercé de façon raisonnable en l'espèce?

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	IMM-4426-18 AND IMM-4427-18
DOCKET:	IMM-4426-18
STYLE OF CAUSE:	EVERAD WESTON WOLLERY SURGEON v MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
AND DOCKET:	IMM-4427-18
STYLE OF CAUSE:	EVERAD WESTON WOLLERY SURGEON v MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
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JUDGMENT AND REASONS BY:	BARNES J.
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