Federal Court  Cour fédérale

Date: 20200210

Docket: IMM-6151-18

Citation: 2020 FC 222

Ottawa, Ontario, February 10, 2020

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

RAPHAEL NORMAN REID,
BY HIS LITIGATION GUARDIAN,
SUSAN WOOLNER

Applicant

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION
AND THE MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS

Respondents

JUDGMENT AND REASONS

I. INTRODUCTION

[1] Mr. Raphael Norman Reid, by his Litigation Guardian, Ms. Susan Woolner (the "Applicant") seeks judicial review of the decision of Mr. Christopher Pennings, a Canada Border Services Agent acting as a Delegate (the "Delegate") of the Minister of Public Safety and

Emergency Preparedness. The Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness (the "Minister") are the respondents (the "Respondents") in this application for judicial review.

[2] In the decision made on November 7, 2018, the Delegate issued an exclusion order against the Applicant pursuant to subsection 44(2) of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (the "Act") and subparagraph 228(1)(c)(iii) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the "Regulations"), because he did not hold a visa for entry into Canada as required by paragraph 20(1)(b) of the Act.

II. BACKGROUND

[3] The following details are taken from the Certified Tribunal Record (the "CTR"); the affidavit of Ms. Woolner, sworn January 25, 2019, filed by the Applicant in support of his application for judicial review; the affidavit of the Delegate, sworn July 25, 2019, filed by the Respondents; and from the cross-examination of the Delegate.

[4] The Applicant is a citizen of Jamaica.

[5] According to her affidavit, Ms. Woolner is the self-appointed litigation guardian of the Applicant; no such appointment was made pursuant to Rule 115 of the *Federal Courts Rules*, SOR/98-106 ("the Rules").

[6] No designated representative was appointed to represent the Applicant, pursuant to section 167 of the Act.

[7] By letter, dated November 6, 2019, the Applicant's counsel notified the Court that Ms. Woolner had passed away.

[8] The Applicant arrived in Canada at Toronto Pearson International Airport on November 7, 2018, and presented a false passport.

[9] Upon questioning by a Canada Border Services Agency Officer (the "Officer"), the Applicant first told the Officer that he came to Canada for a holiday. Later he said he wanted "to make a new life, maybe find work," but that he did not intend to stay forever "just for a bit." In response to questions, he also told the Officer he had no problems in Jamaica and it was safe to return.

[10] Following this questioning, the Officer prepared a report pursuant to subsection 44(1) of the Act, referring the Applicant to the Delegate who issued the exclusion order after conducting his own examination.

[11] During the examination, the Delegate read the subsection 44(1) report in its entirety to the Applicant and explained it in "layman's terms." The Applicant told the Delegate he understood the report, and had nothing to correct or clarify. When asked if there was anything to fear in Jamaica, he responded "no."

[12] Subsequently, the Delegate issued an order for detention pursuant to subsection 55(2) of the Act, on the ground the Applicant would fail to report for removal if he were to be released, since his identity could not be established. The Delegate expressed concerns about the Applicant's credibility and the lack of evidence to establish his identity.

[13] On December 17, 2018, Dr. Vince Murphy conducted a cognitive assessment of the Applicant and prepared a report. In his report, Dr. Murphy assessed the Applicant's cognitive profile, academic achievement, personality and emotional development, and learning profile. He concluded that the Applicant had delayed verbal and non-verbal functioning as well as deficits in his reading and writing abilities.

[14] The Applicant relies on this report as proof of his cognitive impairments. The Respondent objects to this evidence, on the grounds that Dr. Murphy was not qualified as an expert.

[15] In his affidavit, the Delegate deposed that based on the Applicant's responses and demeanor, there were no indications that he did not understand or appreciate the nature and purpose of the examination. The Delegate maintained this position upon his cross-examination.

III. SUBMISSIONS

A. *The Applicant's Submissions*

[16] The Applicant now submits that the Delegate breached his right to procedural fairness because he did not follow the Immigration, Refugees and Citizenship Canada "Enforcement Manual 6: Review of reports under subsection A44 (1)" about the review of a section 44 report.

[17] The Applicant also argues that the Delegate acted unreasonably by failing to refer him to an admissibility hearing at the Immigration Division, pursuant to subsection 44(2) of the Act, because the Delegate knew, or should have known, that he was unable to understand the nature of the proceedings, thereby triggering the operation of paragraph 228(4)(b) of the Regulations.

[18] Further, the Applicant submits that subsection 99(3) of the Act and paragraph 228(4)(b) of the Regulations contravene subsection 15(1) of the *Canadian Charter of Rights and Freedoms*, s 7, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 (the "Charter").

[19] The Applicant notes that subsection 99(3) of the Act provides the opportunity to seek refugee status in Canada but this opportunity is only available to individuals who claim refugee status prior to the issuance of a removal order. He submits that individuals with mental incapacities are less likely to understand the importance of claiming refugee status immediately upon entry to Canada and consequently, are disadvantaged if they lose the ability to make a refugee claim.

[20] The Applicant then submits that paragraph 228(4)(b) of the Regulations requires a referral to the Immigration Division if a person is under 18 years of age or is, in the Minister's opinion, unable to understand the nature of the proceedings. He argues that that there is a distinction between individuals with mental disabilities that are known to the Minister, and individuals who have disabilities of which the Minister is unaware. He submits that this creates a disadvantage, in that some individuals are denied the safeguards of paragraph 228(4)(b) of the Regulations.

[21] The Applicant argues that mental disabilities exist on a spectrum and "in order to find discrimination on the basis of disability, it is not necessary that all disabled persons be mistreated equally."

B. *The Respondents' Submissions*

[22] The Respondents raise a preliminary objection to the inclusion of certain evidence in the Applicant's Record, specifically an affidavit filed in support of his Pre-Removal Risk Assessment ("PRRA") application, a letter from his counsel in regards to his PRRA application and the Canada Border Services Agency's response, as well as the medical report prepared by Dr. Murphy. They argue that these documents were not evidence before the Delegate when the exclusion order was made and should not be considered by the Court.

[23] The Respondents submit that there was no breach of the procedural fairness due to the Applicant since a section 44 report attracts a low degree of participatory rights and there is no right to counsel.

[24] Further, the Respondents argue that it was reasonable for the Delegate to assess the Applicant's admissibility based on his use of a false passport and inconsistent responses given in the interview with the Officer. They submit that the Delegate reasonably determined that paragraph 228(4)(b) of the Regulations did not apply, based on his observations of the Applicant and his review of the notes made by the Officer.

[25] The Respondents argue that subsection 99(3) of the Act does not bar the accommodation of foreign nationals with mental disabilities and paragraph 228(4)(b) of the Regulations contemplates the fact that claimants may have mental disabilities. The Respondents deny that there was any breach of subsection 15(1) of the Charter.

IV. DISCUSSION AND DISPOSITION

[26] The first matter for consideration is the applicable standard of review.

[27] In the recent decision of *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, the Supreme Court of Canada said that correctness remains the standard of review for issues of procedural fairness and that, presumptively, the standard of reasonableness applies to decisions of administrative decision makers except where legislative intent or the rule of law requires otherwise. Neither exception applies in this case.

[28] The Supreme Court of Canada confirmed the content of the standard of reasonableness, as set out in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190.

[29] According to the decision in *Dunsmuir*, *supra*, the standard of reasonableness requires that a decision be justifiable, transparent and intelligible, falling within a range of possible, acceptable outcomes that are defensible on the law and the facts.

[30] The Applicant raised two issues of procedural fairness in this application, that is his mental capacity and his right to claim refugee status.

[31] The Respondents object to the inclusion of certain exhibits to the affidavit of Ms. Woolner, filed by the Applicant, as well as to the status of the report from Dr. Murphy as "expert evidence."

[32] In the present case, the Applicant included certain material as exhibits to the supporting affidavit, including materials in support of his PRRA application and Dr. Murphy's medical report, for the purpose of establishing a breach of procedural fairness arising from alleged mental incapacity.

[33] I acknowledge that generally, an application for judicial review proceeds only on the basis of the evidence that was before the decision maker; see the decision in *Ontario Assn. of Architects v. Assn. of Architectural Technologists of Ontario*, [2003] 1 F.C. 331 (F.C.A.). However, "new" evidence can be considered by the Court when an issue of procedural fairness is raised; see the decision in *Gitxsan Treaty Society v. Hospital Employees' Union*, [2000] 1 F.C. 135.

[34] The Applicant tendered the report of Dr. Murphy to show that he lacked the mental capacity to understand what was happening during the interview upon his arrival in Canada and the consequences upon his ability to make a claim for Refugee protection in Canada.

[35] Insofar as the exhibits and the medical report were submitted to support an argument about an alleged breach of procedural fairness, the material can remain in the record. However, the weight to be accorded this evidence is a matter for the Court.

[36] The report of Dr. Murphy is problematic. Dr. Murphy interviewed the Applicant some weeks after his arrival in Canada. His opinion about the Applicant's mental capacity on December 17, 2018 is not conclusive evidence that the Applicant did not understand what he said and did upon his arrival in Canada on November 7, 2018.

[37] In my opinion, the evidence of the Delegate is to be preferred over the evidence of Dr. Murphy. The Delegate interviewed the Applicant on November 7, 2018; he provided an affidavit on behalf of the Respondents in the application for judicial review; he was cross-examined upon his affidavit and he did not retract the statements made in his affidavit dated July 25, 2019.

[38] The report of Dr. Murphy at best raises a doubt about the Applicant's mental capacity, but a doubt is not enough to show that the Applicant did not know or understand what he said when he was questioned upon his arrival in Canada, first by the Officer and later, by the Delegate.

[39] In these circumstances, I am not satisfied that there is sufficient evidence to show that the Applicant did not understand the immigration interview process or was a vulnerable person who was entitled to enhanced procedural protection.

[40] The Applicant argues that he suffered a breach of procedural fairness because the issuance of an exclusion order deprived him of the opportunity to present a claim for Refugee status, by operation of subsection 99 (3) of the Act. That subsection provides as follows:

Claim inside Canada	**Demande faite au Canada**
99 (3) A claim for refugee protection made by a person inside Canada must be made to an officer, may not be made by a person who is subject to a removal order, and is governed by this Part.	**99 (3)** Celle de la personne se trouvant au Canada se fait à l'agent et est régie par la présente partie; toutefois la personne visée par une mesure de renvoi n'est pas admise à la faire.

[41] In my opinion, this argument cannot succeed.

[42] According to the decision in *Mudalige Don v. Canada (Citizenship and Immigration)*, [2015] 2 F.C.R. 217 (F.C.A.), a similar argument was advanced in respect of an *ex parte* exclusion order. The Federal Court of Appeal rejected the submissions and said:

> In allowing for the timely issuance of a removal order, the legislator must be taken to have acted coherently, in full knowledge of the impact that such order has on the right to claim refugee protection (subsection 99(3) of the Act).

[43] It follows that I am not persuaded that the Applicant suffered any breach of procedural fairness.

[44] I turn now to the merits of the decision under review, that is the decision of the Delegate to issue an exclusion order against the Applicant. As noted, above, this decision is reviewable on the standard of reasonableness.

[45] The Delegate acted pursuant to the authority set out in subsection 44(2) of the Act which provides as follows:

Referral or Removal Order	**Suivi**
44 (2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.	**44 (2)** S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi.

[46] Subparagraph 228(1)(c)(iii) of the Regulations allows the Delegate to issue a removal order where a foreign national does not hold the required visa, as follows:

Subsection 44(2) of the Act — foreign nationals	**Application du paragraphe 44(2) de la Loi: étrangers**
228 (1) For the purposes of subsection 44(2) of the Act, and subject to subsections (3) and (4), if a report in respect of a foreign national does not	**228 (1)** Pour l'application du paragraphe 44(2) de la Loi, mais sous réserve des paragraphes (3) et (4), dans le cas où elle ne comporte pas de

include any grounds of inadmissibility other than those set out in the following circumstances, the report shall not be referred to the Immigration Division and any removal order made shall be	motif d'interdiction de territoire autre que ceux prévus dans l'une des circonstances ci-après, l'affaire n'est pas déférée à la Section de l'immigration et la mesure de renvoi à prendre est celle indiquée en regard du motif en cause :
…	…
(c) if the foreign national is inadmissible under section 41 of the Act on grounds of	**c)** en cas d'interdiction de territoire de l'étranger au titre de l'article 41 de la Loi pour manquement à :
…	…
(iii) failing to establish that they hold the visa or other document as required under section 20 of the Act, an exclusion order,	**(iii)** l'obligation prévue à l'article 20 de la Loi de prouver qu'il détient les visa et autres documents réglementaires, l'exclusion,
…	…

[47] Paragraph 228(4)(b) of the Regulations creates an exception to subsection 228(1) of the Regulations where there is a question of legal incapacity. Paragraph 228(4)(b) provides as follows:

Reports in respect of certain foreign nationals	**Affaire à l'égard de certains étrangers**
228 (4) For the purposes of subsection (1), a report in respect of a foreign national does not include a report in respect of a foreign national who:	**228 (4)** Pour l'application du paragraphe (1), l'affaire ne vise pas l'affaire à l'égard d'un étranger qui:
…	…

(b) is unable, in the opinion of the Minister, to appreciate the nature of the proceedings and is not accompanied by a parent or an adult legally responsible for them	**b)** soit n'est pas, selon le ministre, en mesure de comprendre la nature de la procédure et n'est pas accompagné par un parent ou un adulte qui en est légalement responsable

[48] By his own admission, the Applicant did not hold a visa to enter Canada.

[49] In my opinion, the Delegate's assessment of the Applicant's mental capacity is a question of mixed fact and law. The Delegate's finding in this regard is entitled to deference, according to the decision in *Dunsmuir*, *supra*.

[50] There is insufficient evidence to show that the Applicant falls within the scope of paragraph 228(4)(b) of the Regulations, that is an inability to "appreciate" the nature of the proceedings.

[51] In the circumstances disclosed by the material in the CTR, the Delegate reasonably issued the exclusion order and the Applicant has failed to show that the decision is unreasonableness, within the meaning of the test set out in *Dunsmuir*, *supra*.

[52] There remains the issue of an alleged Charter breach.

[53] The alleged Charter breach is based on the allegation that the Applicant suffered from a mental disability when he entered Canada under a false passport and there is no evidence that he suffered from a mental disability when he entered Canada.

[54] In my opinion, there is insufficient evidence in the record to entertain this argument. In *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, the Supreme Court of Canada cautioned against the adjudication of a breach of Charter rights in the absence of a sufficient evidentiary record.

[55] In the result, this application for judicial review is dismissed.

[56] There is no question for certification arising.

JUDGMENT in IMM-6151-18

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

There is no question for certification arising.

"E. Heneghan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6151-18
STYLE OF CAUSE:	RAPHAEL NORMAN REID, BY HIS LITIGATION GUARDIAN, SUSAN WOOLNER v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 16, 2019
JUDGMENT AND REASONS:	HENEGHAN J.
DATED:	FEBRUARY 10, 2020

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