Federal Court  Cour fédérale

Date: 20200609

Docket: IMM-4388-19

Citation: 2020 FC 679

Ottawa, Ontario, June 9, 2020

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

EZROY MCLEAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Ezroy McLean is a citizen of Jamaica. He is 29 years old. He arrived in Canada in May 2012 and became a permanent resident, sponsored by his father.

[2] On September 10, 2014, Mr. McLean was convicted of one count of aggravated assault and one count of failure to appear. An inadmissibility report was prepared under s 44 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] on October 8, 2014, and referred to the Immigration Division [ID] of the Immigration and Refugee Board [IRB] on June 22, 2016. A hearing before the ID resulted in a deportation order against Mr. McLean dated February 26, 2018.

[3] Mr. McLean appealed the deportation order to the Immigration Appeal Division [IAD] of the IRB. He did not contest the validity of the deportation order, but argued there were sufficient humanitarian and compassionate [H&C] considerations to warrant special relief. The IAD disagreed and dismissed Mr. McLean's appeal on June 11, 2019.

[4] Mr. McLean seeks judicial review of the IAD's decision. He says the IAD made unreasonable findings regarding his level of remorse, the best interests of his seven-year old daughter, and the hardship he will face if he is required to leave Canada.

[5] The decision of the IAD was justified, intelligible and transparent, and falls within the range of acceptable outcomes. The application for judicial review is therefore dismissed.

II. Background

[6] Before Mr. McLean left Jamaica, he lived primarily with his mother. His daughter was born after Mr. McLean submitted his application for permanent residence, but before he arrived

in Canada. His daughter currently lives with her mother in Jamaica. Mr. McLean has completed Grade 10 in Jamaica, but says he is illiterate.

[7] As a permanent resident of Canada, Mr. McLean was eligible to obtain a Social Insurance Number [SIN]. However, he says he did not obtain a SIN because he never received a permanent residence [PR] card. He has supported himself with various short-term cash jobs. He has never filed income tax returns or received social assistance in Canada.

[8] The events that gave rise to Mr. McLean's conviction for aggravated assault occurred on May 24, 2013. Mr. McLean and the Minister offered different accounts of the circumstances in the hearing before the IAD. The Minister alleged that Mr. McLean was involved in an altercation with a man and his girlfriend, during which Mr. McLean threatened the man with a knife, chased him, and stabbed him twice in the upper back. Mr. McLean said that his victim initiated the incident by taunting him; the victim and his girlfriend approached Mr. McLean and yelled in his face; Mr. McLean noticed the victim's girlfriend had a large barbeque fork concealed in her sleeve; and he stabbed the victim twice out of fear.

[9] After he was charged, Mr. McLean travelled to Jamaica. He says he had difficulty returning to Canada because he did not have a PR card and was refused boarding on his flight home. This resulted in the additional charge of failure to appear. He pleaded guilty to the charges of aggravated assault and failure to appear on September 10, 2014. He received a suspended sentence with credit for 150 days of pre-trial custody, 18 months of probation, and a restitution fine of $1,400.00.

III. Decision under Review

[10] The IAD accepted that Mr. McLean's version of the circumstances surrounding the offence of aggravated assault was plausible, but noted his tendency to minimize his responsibility. The IAD found that Mr. McLean demonstrated little insight into the gravity of his offence, and expressed insufficient remorse.

[11] The IAD held that the evidence did not demonstrate Mr. McLean provided any significant financial support to his daughter. It concluded that her interests would be best served by her father's presence in her life in Jamaica. The IAD found that Mr. McLean's departure from Canada would not cause undue hardship for his family and other personal connections in Canada, and that he would not face undue hardship if he returned to Jamaica.

IV. Issue

[12] The sole issue raised by this application for judicial review is whether the IAD's decision was reasonable.

V. Analysis

[13] The IAD's decision is subject to review by this Court against the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]). The Court will intervene only if it is satisfied "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of

justification, intelligibility and transparency" (*Vavilov* at para 100). These criteria are met if the reasons allow the Court to understand why the decision was made, and determine whether the decision falls within a range of acceptable outcomes defensible in respect of the facts and law (*Vavilov* at paras 85-86, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[14] The Minister notes that an individual subject to a lawful removal order has no right whatsoever to remain in Canada. An individual appealing a lawful removal order does not, therefore, attempt to assert a right, but rather attempts to obtain a discretionary privilege (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 57, citing *Prata v Minister of Manpower & Immigration*, [1976] 1 SCR 376 at 380).

[15] The factors to be considered by the IAD in exercising its H&C jurisdiction were described in *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IABD No 4 (QL) [*Ribic*], and affirmed by the Supreme Court of Canada in *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3 [*Chieu*] at paragraph 40:

> In each case the Board looks to the same general areas to determine if having regard to all the circumstances of the case, the person should not be removed from Canada. These circumstances include the seriousness of the offence or offences leading to the deportation and the possibility of rehabilitation or in the alternative, the circumstances surrounding the failure to meet the conditions of admission which led to the deportation order. The Board looks to the length of time spent in Canada and the degree to which the appellant is established; family in Canada and the dislocation to that family that deportation of the appellant would cause; the support available for the appellant not only within the family but also within the community and the degree of hardship that would be caused to the appellant by his return to his country of nationality. While the general areas of review are similar in each case the facts are rarely, if ever, identical. [Emphasis original.]

[16] This list of factors is illustrative, not exhaustive. The weight accorded to any particular factor will vary according to the particular circumstances of a case. While the majority of the factors look to domestic considerations, the final factor includes consideration of potential foreign hardship (*Chieu* at para 40).

[17] During the hearing before the IAD, Mr. McLean was asked how he felt about his offence. His answer focused on the negative consequences for himself. Later in the hearing, he was asked about his understanding of the consequences for his victim. He said he did not know.

[18] Counsel for Mr. McLean notes that his client was prohibited from contacting his victim, and he therefore could not have known how his victim was affected by the crime. He argues that the IAD unreasonably expected him to volunteer "soul-searching insights" and did not probe his responses or ask further questions. He says that Mr. McLean's remorse was sufficiently demonstrated by his guilty plea, the completion of his sentence, his compliance with the probation order, his attendance at an anger management course, and by not reoffending.

[19] The IAD's reasons for concluding that Mr. McLean was not sufficiently remorseful were justified, intelligible and transparent. The IAD faulted both parties for failing to provide corroborative documentary evidence to support their versions of the events. The IAD found Mr. McLean's account of the assault to be plausible, but nevertheless concluded that the offence was serious and exposed the public to risk. The available evidence supported the IAD's conclusion that Mr. McLean failed to demonstrate much insight into the gravity of his offence

and tended to minimize his responsibility. Mr. McLean was represented by counsel. The IAD was not obliged to assist Mr. McLean in making his case.

[20] The IAD said the following about the best interests of Mr. McLean's daughter in Jamaica:

> The best interest of any child is to be with their parents whenever possible. In order for that to happen, the Appellant needs to be in Jamaica to do so. If the Appellant were to return to Jamaica, the child would benefit from having him physically present in her life. Likely on a daily basis, as she experienced in 2013-2014. This would be beneficial to her. I find the best interest of the child overall would not be negatively impacted if her father was to be removed to Jamaica.

[21] Mr. McLean argues that the IAD's analysis was paternalistic, relied on an unproven generalization about "[t]he best interest of any child", and unreasonably dismissed his testimony regarding the level of financial support he provides to his daughter. However, Mr. McLean offered little documentary evidence to show that he provides any meaningful financial support to his daughter. He said he would sometimes send $250 or $300, but it was unclear how often this occurred.

[22] Given Mr. McLean's precarious employment, it was open to the IAD to conclude that the financial support he provided to his daughter was minimal. There was no evidence to suggest he has a poor relationship with his daughter and, indeed, he testified that he communicates with her by telephone or video-chat every other week. The IAD's observation that it is generally in the best interests of "any child […] to be with their parents whenever possible" was consistent with the evidence presented in this case.

[23] Mr. McLean does not challenge the IAD's finding that his return to Jamaica would not cause undue hardship to his family and other personal connections in Canada.

[24] Mr. McLean's strongest argument concerns the IAD's finding that he will not, on a balance of probabilities, face hardship if he returns to Jamaica. Mr. McLean submitted numerous country condition reports indicating that persons deported to Jamaica with criminal records encounter stigma, and may be targeted by criminal gangs due to their perceived wealth. The IAD dealt with this argument as follows:

> The articles in this package [of documents], in my view, do not pertain [to] the Appellant's circumstances for many reasons, there is no information before me to suggest he would be returned and put in jail in Jamaica. He will not be living in Kingston, Jamaica as his family is from Trelawney, a completely different parish and area of the country; on the balance of probabilities, he would not be living on the streets and therefore should not be found dead on them. While he may return to a low-income circumstances, he grew up there and there is no evidence that he lived in poverty in the past; unemployment in Jamaica may be chronic but the Appellant has worked there on the farms in the past and now has factory and other work experience from his cash jobs that are transferable and can assist him in finding work there; and he has no issues with the criminal justice system in Jamaica […] [*sic* throughout]

[25] The IAD also noted the existence of social organizations that provide support to persons deported to Jamaica. However, given Mr. McLean's prior residence in Jamaica and familiarity with prevailing customs and conditions, nothing suggests he would require such assistance.

[26] One of the documents submitted by Mr. McLean indicated that prospective employers would be aware of his criminal convictions in Canada and reluctant to hire him. The report did

not specify how prospective employers in Jamaica would acquire this information. Much of the other information submitted by Mr. McLean was wholly unrelated to his circumstances, *i.e.*, elderly retirees, members of the LGBT+ community, and women.

[27] The IAD's conclusion that Mr. McLean will not, on a balance of probabilities, face hardship if he returns to Jamaica may seem overly optimistic. Read as a whole, however, I cannot say the IAD's analysis was unreasonable. Mr. McLean is originally from Jamaica. He lived there until he was a young adult. He reported no difficulties with homelessness, extreme poverty or criminality, even when he returned to Jamaica briefly after being charged in Canada for aggravated assault.

[28] Mr. McLean's family is from Trelawny Parish, not Kingston. The IAD found that family members with whom he has retained contact "will mitigate any challenges he may face upon his reintegration into Jamaican society", implicitly recognizing that he may face some challenges if he returns to Jamaica. The IAD reasonably concluded that these challenges were insufficient to warrant the exceptional and discretionary privilege of H&C relief.

VI. Conclusion

[29] The application for judicial review is dismissed. Neither party proposed that a question be certified for appeal.

JUDGMENT

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

"Simon Fothergill"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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