Federal Court Cour fédérale

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IMM-3544-19
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Citation: 2020 FC 705

Ottawa, Ontario, June 18, 2020

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

AKINO NICHOLAS MCLEISH

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Mr. Akino McLeish [Mr. McLeish], brings three related Applications for Judicial Review [the Applications], which challenge the finding that he is inadmissible to Canada due to serious criminality and the resulting Deportation Order.

[2] These reasons address all three Applications.

[3] The first Application challenges the "A 44 Report" of the Inland Enforcement Officer of the Canadian Border Services Agency [the Officer] made pursuant to subsection 44(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act], which recommended that Mr. McLeish be referred to an Admissibility Hearing.

[4] The second Application challenges the decision of the Minister's Delegate, on behalf of the Minister, pursuant to subsection 44(2) of the Act. The Minister's Delegate considered the Officer's Report along with the documentation and evidence relied on by the Officer and, based on her opinion that Mr. McLeish is inadmissible to Canada pursuant to paragraph 36(1)(a) of the Act for serious criminality, the Minister's Delegate referred Mr. McLeish to the Immigration Division [ID] for an Admissibility Hearing.

[5] The third Application challenges the decision of the ID. The ID found Mr. McLeish inadmissible to Canada for serious criminality pursuant to paragraph 36(1)(a) of the Act and issued a Deportation Order.

[6] Mr. McLeish argues that the decisions are unreasonable because the Officer, and in turn, the Minister's Delegate, failed to consider or failed to reasonably assess humanitarian and compassionate [H&C] factors as submitted by Mr. McLeish, in particular, the best interests of his two children [BIOC].

[7] These Applications focus on the scope of the discretion of the Officer and Minister's Delegate to refer a foreign national or permanent resident to an Admissibility Hearing pursuant to section 44 and how the prevailing jurisprudence should be applied.

[8] For the reasons that follow, the Applications are dismissed. The jurisprudence has established that the Officer and Minister's Delegate have limited discretion in determining whether to refer a foreign national or permanent resident to an admissibility hearing. There is no obligation on the Officer or the Minister's Delegate to consider H&C factors, particularly where inadmissibility arises from serious criminality. However, where the Officer and Minister's Delegate exercise their limited discretion to consider H&C factors in the context of the rationale for their recommendation whether to refer a foreign national or permanent resident to the ID, the consideration of the H&C factors must be reasonable. In the present case, the Officer's Report recited, but did not assess, the H&C submissions made by Mr. McLeish. The rationale for the Officer's recommendation and the referral to the ID by the Minister's Delegate was based on Mr. McLeish's history of violence, weapons and drug offences and his criminal convictions. The Officer's recommendation is reasonable, as is the decision of the Minister's Delegate. The decision of the ID is also reasonable as it is based on the determination that Mr. McLeish, as he acknowledged, was convicted of offences that fall within paragraph 36(1)(a) of the Act.

I. Background

[9] Mr. McLeish is a 28-year old citizen of Jamaica. He landed in Canada as a permanent resident at the age of 11, due to sponsorship by his father. Mr. McLeish spent significant periods

in the care of the Children's Aid Society with placements in several foster homes and a group home.

[10] Mr. McLeish had a troubled youth, lacked parental guidance and became involved in criminal activity as a youth and as an adult.

[11] In January 2013, Mr. McLeish was convicted of firearms related offences and was sentenced to 3 years of imprisonment plus a period of probation. In June 2017, he was convicted of possession of a controlled substance for the purpose of trafficking (cocaine), and possession of a restricted weapon. These offences were committed while he was on probation. He was sentenced to two years in custody and granted credit for time served in pre-sentence custody.

[12] In December 2017, the Canada Border Services Agency [CBSA] notified Mr. McLeish that there were reasonable grounds to believe he was inadmissible to Canada due to his criminal convictions. He was invited to complete a form and to make any additional submissions about why a removal order should not be sought. Mr. McLeish provided submissions with attachments and requested that he not be referred for an Admissibility Hearing based on his circumstances, including H&C grounds.

II. The Decisions under Review

A. *The Officer's Report and Recommendation pursuant to Subsection 44(1)*

[13] The Officer's Report is in a standard form with several headings. The Report first sets out background information about Mr. McLeish, including his description, immigration status, address, marital status and his relatives within and outside Canada.

[14] The Report sets out Mr. McLeish's reportable and non-reportable convictions and the details of the offences charged, with reference to the police reports.

[15] The information regarding the sentences imposed is set out under the heading "Potential for Rehabilitation". In January 2013, Mr. McLeish was sentenced to 3 years, with credit for time served in pre-sentence custody for 17 months, and was released in June 2013, followed by a 36 months probation. In April 2016, while still on probation, Mr. McLeish was arrested and detained. In April 2017, he pled guilty to two of four charges; trafficking in cocaine and possession of a restricted weapon. He was sentenced to 2 years for one conviction and 6 months to be served concurrently for the other. Due to credit for time served in pre-sentence custody he was required to serve an additional 119 days.

[16] Under the heading "Degree of Establishment", the Officer noted that Mr. McLeish attended several schools in Canada, completed high school through a self-study program and has one semester remaining to complete a program at Fanshawe College.

[17] The Officer also noted Mr. McLeish’s list of employment since 2011 and his history of quitting his employment within a short period. At the time of his submissions, he was unemployed and on social assistance.

[18] The Officer acknowledged Mr. McLeish’s statement that he contributes between $500-$1000 per month to support his two children and girlfriend. The Officer added that Mr. McLeish has several debts, but does not have any assets or current employment. He was on social assistance until he was cut off on May 31, 2018.

[19] Under the heading “Humanitarian and Compassionate Factors and Other Information”, the Officer noted that Mr. McLeish lived in several foster homes until he reached the age of 16. He then moved in with his neighbor and her daughter, who he regards as a sister.

[20] The Officer noted Mr. McLeish’s submission that he plays the role of a loving father and partner to his children and his girlfriend and is the only male role model for his children and for the children of his neighbour’s daughter.

[21] The Officer noted that both of Mr. McLeish’s children were born while he was incarcerated. The Officer recounted Mr. McLeish’s submission that he is aware of the damage he has done to his family and the importance of family structure, which he had lacked.

[22] The Officer also noted Mr. McLeish’s submission that he is seeking counselling in parenting, relationship skills and debt management as well as other skills development programs.

[23] The Officer recounted Mr. McLeish’s statement that if he is removed from Canada, he believes he would die due to a lack of a support system in Jamaica and the poor living conditions.

[24] The Officer added that Mr. McLeish has a long history of trafficking in controlled substances and that no enforcement action was taken or warning letter issued after Mr. McLeish’s first conviction in 2013.

[25] Under the subheading “Best Interests of the Child”, the Officer set out the information required as noted on the form, specifically the children’s names and ages, and that they currently reside with both parents.

[26] Under the heading “Potential for Rehabilitation”, the Officer described Mr. McLeish’s offences, convictions and the sentences imposed, his history of quitting his employment, his submission that he was seeking counselling and skills development and his statement that he had contacted Fanshawe College regarding completion of his program.

[27] Under the heading “Recommendation And Rationale”, which directs the Officer to consider, among other things, whether the offence(s) involved violence, the sentence(s), whether there is a pattern of criminal behaviour and the potential for rehabilitation, the Officer began by stating that Mr. McLeish’s childhood and youth was “not ideal”. The Officer noted information from Mr. McLeish’s presentence report in June 2017, which recounted that as a youth he

exhibited aggressive, non-compliant, manipulative and threatening behaviour and sold drugs to support himself after running from group homes.

[28] The Officer noted that Mr. McLeish had spent considerable time in custody as a youth, including for violent offences. The Officer also noted his convictions and incarceration as an adult, including that he was on probation when he was arrested in 2016 and detained in pretrial custody.

[29] The Officer considered Mr. McLeish's "continuous steady record of arrests and detention since 2006", his history of violence, weapons and drugs, and that his last conviction was less than one year prior to this Report. The Officer added that it did not appear that Mr. McLeish had been charged with other offences since that time, and stated, "[b]e that as it may, it is this officer's recommendation that [Mr. McLeish] be referred to an Admissibility Hearing".

[30] The Officer also noted that Mr. McLeish was a long term permanent resident, but would not have a right of appeal due to the sentence imposed. (This refers to section 64 of the Act, which provides that there is no appeal to the Immigration Appeal Division where inadmissibility is due to serious criminality).

B. *The Decision of the Minister's Delegate*

[31] The Minister's Delegate set out her decision that Mr. McLeish be referred to an Admissibility Hearing under the heading "Decision of the Minister's Delegate" at the end of the

Officer's Report. Under the subheading, "Rationale", the Minister's Delegate noted that she had carefully reviewed the Report and concurred with the recommendation of the Officer.

[32] The Minister's Delegate noted Mr. McLeish's continuous steady record of arrests and detention since 2006 and that the police reports outlined very serious occurrences. The Minister's Delegate stated, "I do not feel that a warning letter would serve the purpose of deterring client from further criminal activity."

C. *The Decision of the Immigration Division—Finding of Inadmissibility and Deportation Order*

[33] The ID held a hearing and rendered its decision on August 23, 2019. Mr. McLeish responded to the ID's questions and acknowledged that he was a citizen of Jamaica and permanent resident of Canada. He acknowledged his convictions for possession of cocaine for the purpose of trafficking and possession of a restricted weapon and that he did not appeal these convictions.

[34] The ID was satisfied on a balance of probabilities that Mr. McLeish is inadmissible to Canada pursuant to paragraph 36(1)(a) of the Act. The ID noted the maximum punishment and the sentences imposed on Mr. McLeish for his convictions and concluded that paragraph 36(1)(a) applied.

III. Issue and Standard of Review

[35] The key issue is whether the recommendation of the Officer and, in turn, the decision of the Minister's Delegate, which relied on the Officer's Report and recommendation, are reasonable.

[36] The decision of the ID that Mr. McLeish is inadmissible to Canada arises from the Minister's Delegate's referral to the ID and is based on Mr. McLeish's acknowledgement of his convictions and the application of paragraph 36(1)(a) of the Act.

[37] The Officer's Report is considered to be part of the Minister's Delegate's reasons (*Burton v Canada (Minister of Public Safety and Emergency Preparedness)*, 2018 FC 753 at para 16, 295 ACWS (3d) 825).

[38] The standard of review of the Officer's Report and recommendation and the Minister's Delegate's recommendation is reasonableness (*Canada* (*Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 10, [2019] SCJ No 65 [*Vavilov*]).

[39] In *Vavilov*, the Supreme Court of Canada provided extensive guidance on what constitutes a reasonable decision, and on the conduct of a reasonableness review. A hallmark of a reasonable decision remains that the decision is justified, transparent and intelligible (at paras 99-100).

[40] A reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with respectful attention, seeking to understand the reasoning process followed by the decision maker to arrive at a conclusion. A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker (*Vavilov*, at paras 105-110).

[41] Absent exceptional circumstances, a reviewing court will not interfere with the decision maker's factual findings (*Vavilov*, at para 125).

IV. The Applicant's Submissions

[42] Mr. McLeish notes that the letter from CBSA dated December 14, 2017 invited him to make submissions on the reasons why he should not be referred to an Admissibility Hearing, including his degree of establishment, his family and community support and the degree of hardship if he were removed from Canada. He submits that the information requested, the headings on the CBSA form, and the headings in the Officer's Report mirror the "*Ribic* factors" (*Ribic v Canada (Minister of Employment and Immigration)*, [1985] IABD No 4, 1986 CarswellNat 1357 [*Ribic*]) which are intended to guide the exercise of discretion on H&C grounds. He submits that this indicates that H&C factors should be considered in determining whether to refer him to an Admissibility Hearing.

[43] Mr. McLeish notes that he made extensive submissions, including about the best interests of his children [BIOC], noting that his presence within the family is necessary and that he is involved and engaged with his children. He also provided, among other supporting documents,

"*A Study on Criminal Deportation, Jamaica*", which explains the negative impact of deportation on a deportee's family.

[44] Mr. McLeish submits that there is no other reason for the CBSA to request submissions or for him to make such submissions other than to raise H&C considerations because the factual information regarding his criminal convictions was already known to the CBSA. If those facts were determinative, no submissions on other matters should be requested.

[45] Mr. McLeish argues that the CBSA did not fulfill its undertaking; the Officer, and in turn, the Minister's Delegate, ignored or rejected important H&C considerations, particularly the BIOC, without explanation. He argues, more generally, that the Officer's assessment was not reasonable, and in turn, the Minister's Delegate's decision was not reasonable.

[46] Despite his argument that CBSA undertook to consider H&C factors, Mr. McLeish notes that whether or not H&C factors should be considered is not the issue. He acknowledges that Officers have limited discretion pursuant to section 44 and that there is no obligation to consider H&C factors in determining whether to refer a foreign national or permanent resident to an Admissibility Hearing (*Melendez v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 1363 at para 34, [2017] 3 FCR 354 [*Melendez*]; *McAlpin v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 422 at paras 65, 70, [2018] 4 FCR 225, [*McAlpin*]).

[47] Mr. McLeish first argues that the Officer considered some of his H&C submissions, under several headings in the Report, but rejected important factors, particularly the BIOC,

without any explanation, and more generally did not conduct a reasonable assessment. He relies on the principles set out by the Chief Justice in *McAlpin* at para 70, that where the Officer does consider H&C factors, the Officer's assessment must be reasonable. In addition, where the H&C considerations are rejected, the Officer must explain why.

[48] Upon further consideration of *McAlpin* at para 77, Mr. McLeish acknowledges that the principle relied on – that the Officer's assessment of H&C factors must be reasonable – applies only where the rationale for the recommendation includes consideration of H&C factors. Mr. McLeish now also argues that the Officer's "Rationale and Recommendation" did consider H&C factors. He reiterates that the Officer's assessment was not reasonable and important H&C factors were ignored or rejected without explanation.

[49] Mr. McLeish submits that a significant part of the "Rationale and Recommendation" reflects H&C considerations – in particular, the reference to his youth as "not ideal", his placement in foster homes and group homes, the reference to his pre-sentence report, which noted his aggressive and manipulative behaviour, his flight from group homes, and his sale of drugs to survive. He points to the Officer's statement that there were no new charges in the nine months since his release from custody and submits that this is a factor related to his potential rehabilitation. Mr. McLeish again submits that this is a reference to a *Ribic* factor, which guides the exercise of discretion on H&C grounds.

[50] Mr. McLeish alternatively argues that if it is not clear whether H&C factors were considered in the context of the "Rationale and Recommendation", then the recommendation is

not intelligible or transparent. As a result, the Court should find that the Officer's recommendation and the Minister's Delegate's decision are not reasonable.

V. The Respondent's Submissions

[51] The Respondent submits that the Officer's Report pursuant to the section 44 process is intended only to assess readily and objectively ascertainable facts concerning admissibility. There is no obligation to sort out complex matters of evidence and credibility, or to assess issues of law. The Officer is tasked with forming an opinion that a foreign national or permanent resident is inadmissible (*Sharma v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 319 at paras 33-37, [2017] 3 FCR 492 [*Sharma*]). The Respondent submits that the Officer did exactly as required; the Officer formed the opinion, then prepared the Report and recommendation, and the Minister's Delegate determined that it was well-founded.

[52] With respect to Mr. McLeish's argument that he was asked to make submissions, which the CBSA failed to consider, the Respondent submits that the CBSA provided a standard form, which requests submissions on several matters to ensure procedural fairness (*Lin v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 862 at para 11, 308 ACWS (3d) 609 [*Lin*]).

[53] The Respondent submits that neither the Officer nor the Minister's Delegate were required to consider Mr. McLeish's H&C submissions, particularly given that his inadmissibility is based on serious criminality pursuant to paragraph 36(1)(a) (*McAlpin*, at paras 73-76).

[54] The Respondent submits that the Officer noted Mr. McLeish's submissions in the Report but disputes Mr. McLeish's new argument that the Officer's Rationale and Recommendation included H&C considerations. The Respondent submits that the Officer set out only factual information and focussed on Mr. McLeish's criminal convictions and criminal history as the basis for the opinion that Mr. McLeish should be referred to an Admissibility Hearing.

[55] The Respondent acknowledges that if the Rationale had included the consideration of H&C factors, a reasonable assessment would have been required and the rejection of important H&C factors would have had to be explained.

VI. The Relevant Statutory Provisions

Serious criminality	**Grande criminalité**
36 (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	36 (1) Emportent interdiction de territoire pour grande criminalité les faits suivants
(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;	a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;
[…]	[…]
Loss of Status and Removal ***Report on Inadmissibility***	**Perte de statut et renvoi** ***Constat de l'interdiction de territoire***
Preparation of report	*Rapport d'interdiction de territoire*

44 (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.	44 (1) S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.
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.

VII. The Relevant Jurisprudence

[56] The uncertainty regarding the scope of discretion of Officers and Minister's Delegates to refer a foreign national or permanent resident to an Admissibility Hearing pursuant to subsections 44(1) and (2) has been settled, to a great extent, by recent jurisprudence of this Court. Although the Federal Court of Appeal has not definitively ruled on the specific issue of whether and to what extent H&C considerations should be considered at this stage, *Sharma* and *Canada (Minister of Citizenship and Immigration) v Bermudez,* 2016 FCA 131, [2017] 1 FCR 128 [*Bermudez*], have provided guidance. As noted by the Chief Justice in *McAlpin*, at para 63,

the Court of Appeal's comments in *Sharma*, even if in *obiter* "ought to prevail over any inconsistent jurisprudence of this Court".

[57] More recently, Justice Barnes certified specific questions in *Lin* and in *Surgeon v Canada (Citizenship and Immigration),* 2019 FC 1314, 311 ACWS (3d) 810 [*Surgeon*], that, if answered by the Court of Appeal, will provide additional guidance or certainty.

[58] As noted, Mr. McLeish submits that the issue is not the scope of the Officer's or Minister's Delegate's discretion to consider H&C factors, but whether that discretion was exercised reasonably. Although Mr. McLeish does not seek to revisit the jurisprudence, the starting point in addressing his arguments and determining whether the Officer's recommendation and the Minister's Delegate's decision are reasonable is to place the relevant provisions of the Act in their appropriate context and consider the evolution of the jurisprudence.

[59] The Act clearly provides that a person is inadmissible to Canada in certain circumstances, including where that person has been convicted of serious criminal offences. The Act defines these serious criminal offences in paragraph 36(1)(a) as those that would be subject to a punishment of at least 10 years (i.e. 10 years and up) and offences for which the person has received a sentence of imprisonment of more than 6 months (even where the maximum punishment for the offence is not 10 years and up).

[60] Before a determination is made that a foreign national or permanent resident is inadmissible, the Act sets out the process in section 44. In *Revell v Canada (Citizenship and*

Immigration), 2019 FCA 262, 311 ACWS (3d) 378 [*Revell*], the Court noted, at para 5, that the Act outlines “a comprehensive scheme for the adjudication and enforcement of allegations that a permanent resident is inadmissible”. The Court of Appeal described the scheme at paras 6-12.

[61] The Court of Appeal noted, among other things, that if a permanent resident loses their status and reverts to being a foreign national, there are still options for the foreign national to pursue if they seek to remain in Canada, including an application for an exemption from their inadmissibility on H&C grounds pursuant to section 25 of the Act (See paras 7-9).

[62] More recently, in *Lin* at paras 10-13, Justice Barnes also described the section 44 process. Justice Barnes noted that pursuant to subsection 44(1), the Officer need only form an opinion that the permanent resident is inadmissible. Based on this opinion, the Officer “may” prepare a Report setting out the relevant facts and the submissions. Justice Barnes noted that consistent with the duty of procedural fairness, the CBSA invites submissions using a standard form, including with respect to age, length of time in Canada, family support and responsibilities, conditions in the home country, degree of establishment, criminal history, history of non-compliance and current attitude. Where the Minister’s Delegate is of the opinion that the Officer’s Report is well-founded, the Minister’s Delegate “may” refer the foreign national or permanent resident or to an Admissibility Hearing.

[63] In *Melendez,* Justice Boswell set out principles regarding the scope of the discretion of Officers and Minister’s Delegates, including that: although a Minister’s Delegate has the discretion to consider H&C factors, there is no obligation to do so; and, where H&C factors are

"presented" by a permanent resident, the Minister's Delegate's consideration of those factors should be reasonable in the circumstances and the reasons for rejecting the factors should be briefly stated.

[64] As noted below, the principles set out in *Melendez* have been refined and some have been superseded.

[65] In *Sharma*, the Federal Court of Appeal commented on the scope of an Officer's discretion pursuant to section 44, but did not make a conclusive determination as it would not have affected the outcome of that case.

[66] In *Sharma*, the key issue was whether the duty of procedural fairness required that the applicant receive a copy of the section 44 Report. In considering the scope of the duty of procedural fairness and the application of the *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193, factors, Justice de Montigny considered the factor of the extent of discretion.

[67] Justice de Montigny's comments reflect the view that the Minister's Delegate has limited discretion to consider H&C factors where the grounds of inadmissibility are serious criminality, even with respect to permanent residents. Justice de Montigny noted that the Minister's Delegate's focus is on security and not on H&C considerations, which can be addressed in other applications, noting at para 23:

> [23] . . . At the end of the day, however, the officers and the Minister or his delegate must always be mindful of Parliament's

> intention to make security a top priority (see paragraphs 3(1)(*h*) and (*i*) of IRPA). The following rationale offered by this Court in *Cha* in support of a limited discretion would appear to apply with equal force to both foreign nationals and permanent residents:
>
> > [37] It cannot be, in my view, that Parliament would have in sections 36 and 44 of the Act spent so much effort defining objective circumstances in which persons who commit certain well defined offences in Canada are to be removed, to then grant the immigration officer or the Minister's delegate the option to keep these persons in Canada for reasons other than those contemplated by the Act and the Regulations. It is not the function of the immigration officer, when deciding whether or not to prepare a report on inadmissibility based on paragraph 36(2)(a) grounds, or the function of the Minister's delegate when he acts on a report, to deal with matters described in sections 25 (H&C considerations) and 112 (Pre-Removal Assessment Risk) of the Act . . .

[68] In *Sharma*, the Court of Appeal was also directly asked to address the scope of discretion pursuant to section 44, which went beyond the certified question. Justice de Montigny noted, at para 46, that the CBSA policy manuals, although not binding, included factors suggesting that Officers and the Minister's Delegate "are not constrained by the mere verification of a conviction and/or term of imprisonment".

[69] Justice de Montigny noted that the applicant had been invited to make submissions and that these submissions and the information on file had been taken into account. Justice de Montigny found that determining the extent of the Officer's discretion would have no bearing on the outcome of the case and concluded at para 48 ". . . it is preferable to leave this issue for another day, and in particular whether a person concerned is entitled to a full scale H&C analysis at the stage of the inadmissibility report."

[70] The Court of Appeal appears to have left the door open a crack for future arguments that H&C factors should be considered at the section 44 stage. However, the Court of Appeal's decision in *Bermudez* suggests that H&C factors should be considered only where the Act specifically provides for such consideration and should not be imported into other provisions or at every stage of the immigration process.

[71] In *Bermudez*, at para 33, Justice Boivin noted that the exercise of H&C discretion is exceptional and that there are very few references to H&C discretion in the Act, adding that section 25 is the main provision.

[72] Justice Boivin noted that section 25 permits those authorized by the Act to consider H&C factors in "expressly defined circumstances" and not in others, explaining at para 38:

> [38] Section 25 of the IRPA includes specific delegations of the Minister's authority to a limited class of individuals to exercise H&C discretion under clearly and expressly defined circumstances. It follows that non-citizens, whether they be foreign nationals or permanent residents, do not have the right to have H&C considerations imported and read into every provision of the IRPA, the application of which could jeopardize their status (*Canada (Minister of Citizenship and Immigration) v. Varga*, 2006 FCA 394, [2006] F.C.J. No. 1828 (QL), at para. 13; *Medovarski v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 S.C.R. 539; *Esteban v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 S.C.R. 539, at para 47). In other words, section 25 of the IRPA "was not intended to be an alternative immigration scheme" (*Kanthasamy*, at paras. 23 and 85).
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> [My emphasis]

[73] Justice Boivin concluded that H&C considerations do not apply with respect to section 108, the provision at issue in that case, noting, "[h]ad Parliament intended that H&C

considerations be taken into account in the cessation process, it would have used language to that effect. It has not done so."

[74] In *McAlpin*, the Chief Justice considered the guidance provided in *Sharma, Bermudez*, and *Cha v Canada (Minister of Citizenship & Immigration)*, 2006 FCA 126, [2006] FCJ No 491 [*Cha*], and the different purposes of section 44 and section 25 of the Act. This resulted in the Chief Justice's reformulation of the *Melendez* principles with respect to the scope of the Officer's and Minister's Delegate's discretion pursuant to subsections 44(1) and (2) in the context of allegations of criminality and serious criminality against permanent residents. The Chief Justice set out the principles at para 70:

> [70] . . . Maintaining the framework adopted by Justice Boswell, I would summarize the jurisprudence as follows:
>
> 1. In cases involving allegations of criminality or serious criminality on the part of permanent residents, there is conflicting case law as to whether immigration officers and ministerial delegates have any discretion under subss. 44(1) and (2) of the IRPA, respectively, beyond that of simply ascertaining and reporting the basic facts which underlie an opinion that a permanent resident in Canada is inadmissible, or that an officer's report is well founded.
>
> 2. In any event, any discretion to consider H&C factors under subss. 44(1) and (2) in such cases is very limited, if it exists at all.
>
> 3. Although an officer or a ministerial delegate may have very limited discretion to consider H&C factors in such cases, there is no general obligation or duty to do so.
>
> 4. However, where H&C factors are considered by an officer or by a ministerial delegate in explaining the rationale for a decision that is made under subs. 44(1) or (2), the assessment of those factors should be reasonable, having regard to the circumstances of the case. Where those factors are rejected, an explanation should be provided, even if only very brief in nature.

> 5. In this particular context, a reasonable assessment is one that at least takes account of the most important H&C factors that have been identified by the person who is alleged to be inadmissible, even only by listing those factors, to demonstrate that they were considered. A failure to mention any important H&C factors that have been identified, when purporting to take account of the H&C factors that have been raised, may well be unreasonable.
>
> [My emphasis]

[75] *McAlpin* clearly maintains the principle set out in *Melendez* that there is no requirement for the Officer or Minister's Delegate to consider H&C factors in determining whether to refer a permanent resident to an admissibility hearing. This is also consistent with the plain wording of section 44, which unlike the few other provisions of the Act (for example section 67, which applies to an appeal of a ID decision) that specifically refer to H&C considerations, clearly does not.

[76] The important difference between *Melendez* and *McAlpin* is with respect to Justice Boswell's approach in *Melendez* that where H&C submissions are "presented", they should be reasonably considered. In *McAlpin*, at para 77, the Chief Justice drew a clear distinction between noting the H&C submissions made by a permanent resident in the Officer's Report, including under the fixed heading of "Humanitarian and Compassionate Factors and Other Information", and considering H&C factors in reaching and setting out the rationale for the Officer's recommendation. Where the Officer assesses H&C factors in his or her rationale for the recommendation, the Officer's assessment must be reasonable and at least a brief explanation must be provided where important factors are rejected. In other words, where the Officer's

rationale indicates that H&C factors influenced the decision one way or the other, the assessment of the relevant factors must be reasonable.

[77] In *McAlpin* at para 77, the Chief Justice emphasized that the requirement to conduct a reasonable assessment of H&C factors applies only where H&C factors are considered in the rationale for the recommendation. The Chief Justice stated:

> 77 Turning to principles 4 and 5 set forth at paragraph 70 above, it bears underscoring that these apply to the stated rationale for a decision made under subss. 44(1) or (2). In my view, if an officer or a ministerial delegate does not refer to any H&C considerations in that part of their report or assessment, it cannot reasonably be claimed that such considerations were taken into account in reaching the opinion contemplated in those provisions. This is so even if such considerations are listed in the earlier part of the officer's assessment form that requires H&C factors to be identified, as happened in this case.
>
> [Emphasis added]

[78] In *Lin*, Justice Barnes considered the jurisprudence, including *Cha*, *Sharma* and *McAlpin* and concluded, at para 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. (My emphasis)

VIII. <u>The Officer's Recommendation, the Minister's Delegate's Decision and the Immigration Division's Decision Are Reasonable</u>

[79] In the present case, the Officer's Report recited or recounted the H&C submissions made by Mr. McLeish in a summary manner, along with other information, under the appropriate headings (as noted above at paras 13-33). The Officer did not assess the submissions with respect to their credibility or their weight. Nor did the Officer assess or balance the submissions regarding, for example, Mr. McLeish's relationship with his girlfriend and children, his desire to improve his skills and parenting, or his employment prospects, against the other information regarding his serious criminality. As noted in *Lin,* the Officer's task is to set out relevant facts and submissions, which is what the Officer did (*Lin,* at paras 10-13).

[80] As noted above, the prevailing jurisprudence establishes that there is no obligation on the Officer or Minister's Delegate to consider H&C factors, but where they do so, in the context of reaching a recommendation, their consideration must be reasonable (*McAlpin*, at paras 70 and 77). In *McAlpin,* at para 77, the Chief Justice emphasized that even if H&C factors are listed in other parts of the Officer's Report, but not in the stated rationale, "it cannot reasonably be claimed that such considerations were taken into account in reaching the opinion contemplated in those provisions."

[81] The Chief Justice's clarification and focus on the "stated rationale" signals that more than a simple recitation of the submissions – as occurred in the present case – is required to find that H&C factors were part of the rationale.

[82] Mr. McLeish’s alternative argument – that the Officer did consider H&C factors in the rationale for the recommendation but did not do so reasonably and did not explain why important factors were rejected – is based on an interpretation of the rationale designed to fit within the narrow principle emerging from *McAlpin*. The plain reading of the “Rationale and Recommendation” does not support Mr. McLeish’s interpretation.

[83] As noted, the Officer set out the H&C related submissions in the body of the Report, under the heading “Humanitarian and Compassionate Factors and Other Information” and “Degree of Establishment” without any additional commentary. The Officer did not mention these or other H&C considerations under the heading “Recommendation and Rationale”, with the exception of repeating that Mr. McLeish had been a ward of the Children’s Aid Society. There is no mention of his relationship with his girlfriend, his submission that he is a loving father who provides financial and emotional support, his submission that he is seeking counselling, or his concerns about returning to Jamaica, where he has no family or support system.

[84] Contrary to Mr. McLeish’s submission that the rationale included H&C considerations, the focus of the rationale was on factual information about Mr. McLeish’s behaviour as a youth, his violent offending as a youth and his continuous offending behaviour as an adult. It cannot be read as weighing any H&C factors against his serious criminality. Although Mr. McLeish argues that the Officer’s statement “[b]e that as it may, it is this officer’s recommendation that Mr. Akino McLeish be referred to an Admissibility Hearing” suggests a weighing of factors, that statement refers only to the previous sentence that notes that there have been no new charges

since his release, which was only nine months earlier. The stated rationale is based on his history of violence, weapons and drug offences and his criminal convictions. As noted in *McAlpin*, at paras 6 and 65, Parliament has placed a priority on public safety and security and it may be appropriate for Officers and Minister's Delegates to place significant weight on these factors, particularly in cases of serious criminality.

[85] The Officer's approach appears to be similar to that described in *McAlpin*. In *McAlpin*, at paras 80 – the Chief Justice noted that the Officer listed H&C considerations and other personal information under the heading "Humanitarian and Compassionate Factors and Other Information", but that these considerations were not mentioned in the rationale. The Chief Justice elaborated at paras 82-83:

> [82] However, in section 9 of the assessment form, under the heading "Recommendation and rationale," the officer made no mention whatsoever of those or other H&C considerations in articulating the rationale for his recommendation that Mr. McAlpin be referred to an admissibility hearing. It can reasonably be inferred from the absence of any discussion of H&C considerations in the latter section of the officer's initial Recommendation, that the officer exercised his discretion to not take such considerations into account in making that recommendation.
>
> [83] Given that the officer was under no obligation to consider those H&C factors, and given that he did not in fact take those factors into account in explaining the rationale for his decision to recommend that Mr. McAlpin be referred to an admissibility hearing, Mr. McAlpin's allegation cannot be sustained. In brief, contrary to his allegation, the officer did not engage in a partial assessment of some of the H&C factors that he had identified, without assessing what Mr. McAlpin asserts are the more compelling H&C considerations in his case, and without explaining how H&C considerations had been weighed against other relevant considerations. Instead, the officer simply decided not to take any of those H&C factors into account. In the absence of any obligation on the officer or the Delegate to take such factors into account, that was not unreasonable.

[Emphasis added]

[86] Similar to *McAlpin*, the Officer did not take into account any H&C factors in reaching his decision, and he was under no obligation to do so, particularly due to the Applicant's serious criminality.

[87] Mr. McLeish's alternative argument that it is not clear whether the Officer's rationale considered H&C factors, leading to a lack of transparency, is without merit. The Officer clearly conveyed why Mr. McLeish was referred to an Admissibility Hearing as did the Minister's Delegate.

[88] I appreciate Mr. McLeish's concern that his efforts to respond to the CBSA's invitation to make submissions, which include H&C type factors, are pointless if all the submissions need not be considered in determining whether to refer him to an Admissibility Hearing. As noted in *Lin*, the purpose of inviting submissions is to ensure procedural fairness by giving the permanent resident or foreign national an opportunity to provide information relevant to their status. In appropriate cases, the submissions could lead an Officer to the opinion that a warning letter should be issued. In the present case, the Officer focussed on Mr. McLeish's criminal convictions and past behaviour, which led to the reasonable opinion that he should be referred to an Admissibility Hearing.

[89] Mr. McLeish's argument that CBSA invited submissions on matters that reflect the *Ribic* factors, which signals that H&C factors should be considered, overlooks that the *Ribic* factors (as modified in subsequent jurisprudence) arise in the context of an appeal of a decision of the ID

which specifically permits consideration of H&C factors (section 67 of the Act). In the present case, Mr. McLeish has no right of appeal to the IAD because his inadmissibility is based on serious criminality.

[90] Mr. McLeish's submissions convey that he wants a second chance to remain in Canada and to embrace a different lifestyle for the benefit of his children. His H&C submissions, which he advanced in support of a different outcome, may be best addressed in the context of an application pursuant to section 25 of the Act, if he has that option. (*Sharma*, at para 37; *Lin*, at para 18; *Revell*, at para 48).

[91] In conclusion, the Officer did not err in focussing on Mr. McLeish's history of violence and his criminal convictions. The Officer's rationale is clearly stated and conveyed to Mr. McLeish why the Officer recommended that he be referred to an Admissibility Hearing. Similarly, the Minister's Delegate clearly conveyed that her decision to refer Mr. McLeish to an Admissibility Hearing was based on his continuous record of arrests and the serious offences set out in the police reports. Both the recommendation and decision are reasonable as both show a rational analysis that is justified in relation to the facts and to the law which constrains them.

[92] The ID's decision is also reasonable. Mr. McLeish acknowledged his convictions. The ID noted the maximum punishment for the offences for which Mr. McLeish had been convicted and the sentences imposed, concluded that paragraph 36(1)(a) of the Act applied and, as a result, found Mr. McLeish inadmissible to Canada.

[93] The Court notes that Mr. McLeish withdrew his request for costs in the event of success in his Applications.

JUDGMENT in files IMM-3541-19, IMM-3544-19 and IMM-5418-19

THIS COURT'S JUDGMENT is that:

1. The Applications for Judicial Review are dismissed.
2. No question for certification was proposed.
3. No costs are ordered.

"Catherine M. Kane"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	IMM-3541-19, IMM-3544-19, IMM-5418-19
STYLE OF CAUSE:	AKINO NICHOLAS MCLEISH v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JUNE 1, 2020
REASONS FOR JUDGMENT AND JUDGMENT:	KANE J.
DATED:	JUNE 18, 2020

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