Federal Court  Cour fédérale

Date: 20110718

Docket: IMM-3404-10

Citation: 2011 FC 895

Ottawa, Ontario, July 18, 2011

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

AUDLEY HORACE GARDNER
BY HIS LITIGATION GUARDIAN,
MARCIA REID

Applicant

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of Jillan Sadek, Director of Case Determination in the Case Management Branch of Citizenship and Immigration Canada (the Officer) dated April 22, 2010. The Officer decided not to grant the Applicant permanent resident status based on humanitarian and compassionate (H&C) grounds. The Applicant sought to

overcome inadmissibility for serious criminality. This decision was communicated to the Applicant by way of letter, dated May 28, 2010.

[2] Based on the reasons that follow, this application is dismissed.

I. Background

A. *The Facts*

[3] The Applicant, Audley Horace Gardner, is a 48 year-old citizen of Jamaica. His sister sponsored him to come to Canada in 1980, when he was just 18 years old. Eight years later, the Applicant was diagnosed with paranoid schizophrenia and found not criminally responsible following a violent offence. The Applicant received in-patient care for a year and a half. After his discharge in 1993, the Applicant received outpatient care in the form of weekly assessments and medication monitoring. He was given antipsychotic medication by injection until 2003, at which time he began taking pills instead. The Applicant is also diabetic.

[4] In 2004, the Applicant was evicted from his apartment. He was unable to secure new housing and spent the next year and a half living in various homeless shelters. The Applicant's counsel indicated that this time period coincided with the return of the Applicant's schizophrenic symptoms as it became increasingly difficult for him to take his medication regularly and manage both his schizophrenia and his diabetes.

[5] On October 29, 2004, the Applicant stabbed a fellow resident at the shelter where he lived. The Applicant was convicted of assault with a weapon in June of 2005. He was found inadmissible on the grounds of serious criminality and ordered deported on April 24, 2007. He was also convicted of two other assaults in the year following the 2004 stabbing, one with a weapon.

[6] On January 31, 2008 the Immigration Appeal Division (IAD) dismissed the Applicant's appeal of the deportation order. The panel found that while "something must have happened" in 2005, they had no evidence before them to explain what that "something" was, and no reliable medical evidence demonstrating that the Applicant's violent behaviour could be controlled. The Applicant testified that he remained on antipsychotic medication. Based on the lack of evidence to the contrary before the IAD, the panel found that the Applicant had committed these violent assaults while on medication, and therefore he posed too great a continuing threat to the health and safety of the Canadian public for the panel to exercise its H&C jurisdiction under paragraph 67(1)(c) of the *Immigration and Refugee Protection Act*, RS 2001, c 27 [IRPA]. The Applicant applied for leave and judicial review of the IAD's decision. Leave was denied on June 3, 2008.

[7] The Applicant submitted a Pre-Removal Risk Assessment (PRRA) application on February 11, 2008. A negative PRRA decision was rendered on April 30, 2008. The PRRA officer found that any risk to life the Applicant faced upon returning to Jamaica was due to the inadequacy of medical care available in Jamaica. Thus, the Applicant fell within the medical exception under subparagraph 97(1)(b)(iv) of the IRPA. The PRRA officer went on to review the documentary evidence and concluded that "should the applicant require legal, medical, or financial assistance, he would have avenues of recourse available to him."

[8] The Applicant has been in detention at Toronto West Detention Centre since 2007.

[9] The Applicant applied for permanent residence on H&C grounds on November 28, 2008.

[10] On October 20, 2010, Justice John O'Keefe found the Applicant unfit to instruct counsel and appointed the Applicant's niece, Ms. Marcia Reid, as his litigation guardian.

B. *Impugned Decision*

[11] The H&C Officer weighed the possible danger the Applicant might pose to the Canadian public against the possible risk to the Applicant upon return to Jamaica and found that a waiver of the Applicant's criminal inadmissibility was not warranted in the circumstances.

[12] The Officer concluded that it was likely that the Applicant would pose a danger to the Canadian public in the future. She relied on the IAD's decision to establish that the Applicant was a high risk offender who violently attacked strangers without provocation.

[13] The Officer found that "Mr. Gardiner's criminal offences appear to be tied to his mental health – specifically whether or not he takes the medicine required to treat his mental illness." (Certified Tribunal Record (CTR) pg 6) She noted that Dr. Siu's medical report indicated that the Applicant had "poor insight into his mental illness" and at the time of assessment the Applicant was at risk of discontinuing his medication if not closely monitored (CTR pg 7). The Officer then

assessed the Applicant's plan to ensure he remained medicated, which included living with his niece (who works for an organization that helps families of persons with mental illness), as well as participation in a community mental health program five days a week. She concluded that this plan was inadequate, since the Applicant had not consented to receiving his medication by injection instead of orally, and all the elements of the plan depended on the ongoing voluntary participation of both the Applicant and his niece.

[14] The Officer then weighed the above potential to re-offend against the Applicant's connections to Canada and the hardship facing the Applicant if returned to Jamaica. She found that the Applicant's departure would not be a great hardship for his family remaining in Canada, and that while the Applicant had lived most of his life in Canada, he did not demonstrate any economic establishment or positive involvement in the community.

[15] The Officer found that the appropriate medication was available in Jamaica, as well as subsidies to assist appropriately registered persons in meeting the cost of the prescription. The Officer noted that the Canada Border Services Agency (CBSA) had attempted to make suitable reception arrangements for the Applicant upon his return.

[16] The Officer acknowledged Counsel's submissions recounting the results of their investigation of the CBSA arrangements. Counsel's investigation revealed that the organization that the individual responsible for arranging the Applicant's reception in Jamaica, Captain Rubin Phillips, purportedly worked with had recently severed ties with him for appropriating thousands of

dollars. The Officer confirmed with the CBSA that they continued to work with this individual and his new organization.

[17] The Officer also referred to a report from a prominent Jamaican psychiatrist, Dr. Wendel Abel, regarding the availability of mental health services in Jamaica. Dr. Abel was also included as a participant in the CBSA's arrangements for the Applicant's reception in Jamaica. His report included comments indicating that the Applicant would be unlikely to be able to afford the cost of medication in Jamaica, even if he were able to get them at the subsidized rate. The psychiatrist indicated that the Applicant could live in a shelter for a maximum of thirty days, and while there was one mental hospital in Jamaica, it did not have enough beds to provide transitional housing to unstable deportees. He noted that since the Applicant did not have family members residing in Jamaica to support him, "this man is more likely than not to end up on the streets of Jamaica." (CTR pg 15)

[18] The Officer concluded that she had no reason to doubt the psychiatrist's statements regarding the treatment available in Jamaica, but accorded his statements regarding the Applicant's level of family support and ability to afford medication little weight, since the doctor had not personally met the Applicant and had no first-hand knowledge of the family's whereabouts or finances. The Officer then relied on the psychiatrist's evidence that 30 days of housing would be available, subsidized medication was available as long as the Applicant secured a tax-payer registration number, and that the mental hospital is able to serve acutely mentally ill patients.

[19] The Officer looked at a UK Home Office Report – which indicated that Jamaica intended to move from centralized to community-based provision of mental health services, and which observed that most psychiatric patients lived in the community supported by family and nurses – as evidence that community-based treatment was available.

[20] Counsel submitted that due to the inadequate care available in Jamaica, the Applicant would likely become homeless and subject to public and police brutality. The Officer looked at the documentary evidence and concluded that the Jamaican authorities were aware of problems faced by the mentally-ill in the system and were taking steps to address them. The Officer noted that the Applicant might be subject to unprovoked attacks by prejudiced members of the public, but noted evidence of community outrage at these attacks, indicating that the public was "not all indifferent to the plight of mentally ill street persons." (CTR pg 20) The Officer referred to the PRRA officer's conclusion that state protection would be available. The Officer found that Counsel's submissions with regards to the likelihood of the Applicant being mistreated if he becomes homeless or imprisoned were speculative, as there was insufficient evidence to suggest that the majority of those with mental illness end up on the street.

[21] Counsel submitted that the Applicant has no support system in Jamaica. The Officer pointed to the fact that the Applicant's father, who resides in Jamaica, visited him in detention in 2009 and the Applicant had expressed interest in seeing him again. The Applicant also has a brother there. She noted that "If Mr. Gardner's family in Canada is indeed attached and committed enough to help him in Canada it is not evident why they would be disinterested in redirecting their energies and financial resources to assist him in Jamaica." (CTR pg 22)

[22] The Officer found that the level of care the Applicant would receive in Jamaica might be less than in Canada, but that some level of care was available. The Officer acknowledged that the Applicant would benefit from assistance with daily tasks, but found that he had family members interested in his welfare who appeared to be willing to offer assistance. The Officer concluded that while it was possible that the Applicant would end up homeless, abused and imprisoned, she was not satisfied that this was more likely than not to occur.

[23] Given the conclusion that the Applicant poses a danger to the public and was not at more than a mere risk of harm upon being returned to Jamaica, and after considering the Applicant's special needs, the Officer declined to waive the Applicant's inadmissibility for serious criminality on H&C grounds, notwithstanding his long residency in Canada.

II. Issues

A. Did the Officer draw unreasonable conclusions from the evidence before her?

(i) Did the Officer unreasonably reject the proposed plan of care, based on an exaggerated perception of the Applicant's danger to the public?

(ii) Did the officer unreasonably conclude that the Applicant would have family support in Jamaica?

(iii) Did the officer unreasonably conclude that the Applicant would not face risk in Jamaica?

B. Does subsection 36(1) of the IRPA affect permanent residents with mental illness in a discriminatory manner contrary to section 15 of the Charter?

III. Analysis

Standard of Review

[24] The standard of review for questions of law is correctness, and the standard of review for questions of fact and questions of mixed fact and law is reasonableness. This is a judicial review of an H&C decision. The Applicant submits he raises a question of law. However, in my view, the applicant raises three questions of fact and a Charter challenge. As discussed in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 D.L.R. (4th) 193 at para 61, the standard of review for discretionary decisions made on H&C grounds is reasonableness: "The decision about whether to grant an H&C exemption involves considerable appreciation of the facts of a person's case, and is not one that involves definitive legal rules." The Supreme Court held in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 53 that "Where the question is one of fact, discretion or policy, deference will usually apply automatically [citations omitted]." Therefore, the three issues raising questions of fact should be reviewed according to the reasonableness standard.

[25] Reasonableness has been held to require consideration of the existence of justification, transparency, and intelligibility within the decision-making process. It is also concerned with

whether the decision falls within a range of acceptable outcomes that are defensible in respect of facts and law (*Dunsmuir*, above, at para 47).

[26] A Charter challenge raises neither a question of law or question of fact. It raises a question of constitutional validity and therefore falls outside of the standard of review.

A. *Did the Officer Draw Unreasonable Conclusions from the Evidence Before Her?*

(i) Did the Officer Unreasonably Reject the Proposed Plan of Care, Based on an Exaggerated Perception of the Applicant's Risk to the Public?

[27] The Applicant argues that the Officer set an unrealistic and unreasonable standard for what would constitute a sufficient plan of care and exaggerated the Applicant's risk of relapsing once stable and properly medicated.

[28] The Respondent submits that the Applicant is asking the Court to re-weigh the evidence. The Respondent argues that it was open to the Officer to come to the conclusion she came to, since the proposed plan relied on the voluntary participation of the Applicant.

[29] In my view, the Officer undertook a detailed analysis of the Applicant's file and came to a reasonable conclusion. As a long-time Canadian resident suffering from mental illness, the Applicant presents a sympathetic fact scenario. However, I am unable to say that she erred in concluding that the proposed care plan was insufficient.

[30] The Officer noted that the likelihood of the Applicant's rehabilitation was closely linked to the Applicant's ability to regularly take his medication. The Applicant indicated to the psychiatrist who interviewed him in September 2009 that he was unwilling to resume taking his medication by way of injection, as he had between 1993 and 2005 during which time he committed no crimes. The Applicant submits that he only stopped taking his medication regularly when he lost his housing and the Applicant's niece has offered to have the Applicant move in with her and her children to provide stable housing and ensure that he takes his medication daily. Although the Officer acknowledged that the Applicant's niece appears to be well-connected to resources that would be of great help to the Applicant, the Officer nonetheless had several concerns regarding the proposed plan and put them to the Applicant. The concerns were not abated after further submissions were received and the Officer remained concerned that the plan was weak because it relied on the continued voluntary participation of both the Applicant and his niece and involved exposing young children to the Applicant on a daily and intimate basis.

[31] The Applicant's submissions on this point largely amount to a claim that the proposed plan addressed all concerns raised by the psychiatrist, and as such, it could not reasonably be rejected by the Officer. Unfortunately, I do not accept this proposition. I understand that the Applicant's family did their utmost to put together a plan that they hope would be accepted. The Applicant submits that a voluntary plan is the only type of plan that can be arranged while the Applicant's illness is under control and while he is stable. Given the state of the law with regard to mental illness, I understand that the plan had to rely on the voluntary participation of the Applicant. However, it was still open to the Officer to find that the plan did not satisfactorily address potential risk issues. Because of the voluntary and thus ongoing-optional nature of the plan, the Officer was

concerned that the Applicant's niece and her two children would be exposed to an unacceptable level of risk. Given the psychiatrist's finding that the Applicant lacks insight into his mental illness and is "unable to identify significant consequences of discontinuing his antipsychotic medication" (CTR 7), this concern was reasonably rooted in the possibility that the Applicant might not remain stable. The Officer could have come to the opposite conclusion, but given that her decision was justified, transparent and intelligible, it must stand.

(ii) Did the Officer Unreasonably Conclude the Applicant Would Have Family and Community Support in Jamaica?

[32] The Applicant submits that the Officer erred in finding that community-based treatment is available in Jamaica and that the Applicant's family would be able to provide meaningful support to him there. The Applicant argues that these factual findings are unreasonable in the face of the evidence.

[33] The Respondent submits that the Applicant only asks the Court to re-weigh the evidence and disturb findings that were reasonably open to the Officer.

[34] The Officer referred to counsel's submissions relating to the unavailability of a support system for the Applicant in Jamaica and noted that the Applicant would only be offered a place in a group home for a period of 30 days. However, the Officer also noted that the Applicant would have access to subsidized medication, and should he become acutely mentally-ill the one mental hospital in Jamaica would still be able to serve him. The Officer also referred to a UK Home Office Report indicating the availability of community-based care:

> Currently all Jamaicans have access to free health care in the public system, hence all persons in the population who need psychotropic medication have access…In addition all severe and some mild mental disorders are covered in social insurance schemes.
> (CTR pg 17)

[35] Although the Applicant attempted to show that the arrangements made by CBSA for the Applicant's reception in Jamaica were inadequate, the Officer followed up with the CBSA. CBSA confirmed that they were still working with Captain Philip's, but recognized that he was no longer associated with the Family Unification Resettlement Initiative – Jamaica (FURI) agency. The Officer also noted that Dr. Abel, who provided a declaration describing the difficulties the Applicant will likely face should he be returned to Jamaica, was also referred to as participating in CBSA's reception plans for the Applicant.

[36] The Officer acknowledged that given the Applicant's statements to the psychiatrist indicating that he would only take his medication if it were provided to him for free, he would likely need personal and financial assistance and encouragement to ensure that he obtained the drugs required should he be returned to Jamaica. Although the Applicant submitted that he would have no support system in Jamaica, the Officer was of the opinion that Counsel was overstating the case, as his father visited him in 2009 at the Metro West detention centre and he has a brother in Jamaica. The Applicant submits that the Applicant's father is nearly 80 years old and suffering from pancreatic cancer, and his brother is estranged. According to the Applicant, the reason the CBSA needed to make reception arrangements at all was because there is no available family support in Jamaica.

[37] I must acknowledge that the Applicant's return to Jamaica will present him with many challenges. No one disputes that the Applicant would have better access to mental health resources and family support in Canada. Unfortunately, this factor alone does not allow me to disturb the Officer's findings, which follow a thorough analysis, and which I find to be reasonable in that they fall within a range of defensible outcomes. The documentary evidence suggests that the Applicant will be able to access a community-based psychiatric care network, partially-subsidized medication and hospitalization should his illness become acute. The Applicant's niece appears to be concerned with the Applicant's well-being, so, as noted by the Officer, the possibility exists that she, and other family members, might be able to re-direct financial assistance in order to help re-establish the Applicant in Jamaica. These conclusions were open to the Officer.

(iii) Did the Officer Unreasonably Conclude That the Applicant Would Not Face Risk in Jamaica?

[38] The Applicant submits that the Officer unreasonably dismissed the risks that the Applicant would face in Jamaica. The Applicant points to evidence showing that without family and financial support, the Applicant would likely end up homeless and vulnerable. Although the government has "begun to address" abuse of the mentally ill, this is no protection against the present reality.

[39] The Respondent submits that the Officer's conclusion was reasonable. The PRRA Officer found that legal, medical and financial assistance would be available to the Applicant in Jamaica. This, combined with the Officer's own findings regarding the level of care in Jamaica, left it open to the Officer to conclude that the Applicant's allegations of risk were based on a speculative chain of events.

[40] I agree with the Respondent that it was open to the Officer to find that the Applicant's allegations of risk did not necessarily result in the need for a positive H&C decision, given all the avenues for assistance the Officer found were available to the Applicant. The Applicant submitted evidence illustrating risks of both homelessness and abuse faced by the mentally ill. The Officer did not discount these risks but pointed out that it was not necessarily certain that the Applicant would end up on the street, and if he did it was not certain that he would be abused, for documentary evidence showed that the state is attempting to reduce the generalized mistreatment and stigma associated with the mentally ill. I find that it was reasonable for the Officer to find that there was no more than a mere possibility that the Applicant would face mistreatment if removed to Jamaica.

[41] The present matter is a difficult one. It vividly illustrates that citizens of Canada enjoy rights not shared by permanent residents, who can lawfully be removed from the country notwithstanding difficult personal circumstances or vulnerabilities. The Officer noted that the Applicant has a mental disorder which will render his life difficult no matter where he resides. It is important to remember that H&C consideration is exceptional and discretionary, and is not a "back door" through which to gain entry into Canada when the front door is closed (*Mayburov v Canada (Minister of Citizenship and Immigration)*, (2000), 183 FTR 280, 6 Imm LR (3d) 246 at para 39). Furthermore, jurisprudence of this Court establishes that mental illness or other illness does not give non-Canadians the right to remain in Canada (*Beaumont v Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 787, 159 ACWS (3d) 256 at para 14).

[42] The Officer gave thorough and detailed reasons. The decision is intelligible, justified and transparent. The Applicant has not shown that evidence was ignored or over-looked. Judicial deference is due to the decision and this Court will not interfere.

B. *Is Subsection 36(1) of the IRPA Affect Permanent Residents with Mental Illness in a Discriminatory Manner Contrary to Section 15 of the Charter?*

[43] The Applicant submits that subsection 36(1) of the IRPA, while facially neutral, adversely affects permanent residents with mental illness in a discriminatory way because it fails to take into account the already disadvantaged position of mentally ill foreign nationals. The result being that they are denied the benefit of permanent residence and protection from removal because of their disability, based on stereotypical assumptions that mentally ill people are inherently dangerous and incapable of rehabilitation.

[44] The Respondent submits that the Applicant's argument is speculative at best. The Respondent points out that section 6 of the Charter distinguishes between the right of citizens and non-citizens to remain in Canada. The Respondent relies on *Chiarelli v Canada (Minister of Employment and Immigration)*, [1990] 2 FC 299, 67 DLR (4th) 697 (FCA) as authority for the proposition that limiting the rights of non-citizens to remain in Canada in accordance with section 6 does not infringe section 15 of the Charter.

[45] The Applicant appears to be arguing for a positive duty to accommodate under section 15. In my opinion, this argument cannot be supported on the facts of this case.

[46] The current test for section 15 infringement is set out in *R v Kapp*, 2008 SCC 41. In order to satisfy the test, a claimant must establish that the provision creates a distinction on the basis of an enumerated or analogous ground, and that distinction must result in disadvantage or prejudice.

[47] The Applicant's claim fails at the first stage of the *Kapp* test. As pointed out by the Respondent, the Applicant's principal complaint is that subsection 36(1) fails to differentiate between permanent residents or foreign nationals without mental illness and permanent residents or foreign nationals with mental illness, and that the provision results in harsher treatment for those with mental illness. In *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, 151 DLR (4th) 577, the Supreme Court of Canada held that once the government creates a right available to everyone, in that case free health care, access to that right must be provided equally. However, in this case, the government has not created such a right. Section 6 of the Charter and *Chiarelli*, above, authoritatively establish that foreign nationals have no right to remain in Canada, no matter their state of mental or physical health. The Applicant's argument fails.

JUDGMENT

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

" D. G. Near "

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**IMM-3404-10**
STYLE OF CAUSE:	**AUDLEY HORACE GARDNER BY HIS LITIGATION GUARDIAN, MARCIA REID v. MCI**
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