Federal Court  Cour fédérale

Date: 20210428

Docket: IMM-1595-20

Citation: 2021 FC 371

Ottawa, Ontario, April 28, 2021

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

IAN GEORGE MOWATT

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This decision addresses an application for judicial review of a decision of the Immigration Appeal Division [IAD] of the Immigration and Refugee Board of Canada dated February 7, 2020 [the Decision]. In the Decision, the IAD refused to grant the Applicant special relief, based on humanitarian and compassionate [H&C] considerations under s 67(1)(c) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], against an exclusion order that

had been issued against him because he made deliberate misrepresentations on his application to become a permanent resident.

[2] As explained in greater detail below, this application is dismissed, because the Applicant's arguments have not raised a reasonable apprehension of bias on the part of the IAD or demonstrated any unreasonable analysis in the Decision.

II. **Background**

[3] The Applicant, Ian George Mowatt, is a citizen of Jamaica. Between 1994 and 2006, he traveled back and forth between Jamaica and the United States of America [US]. While in the US, the Applicant was convicted of two criminal charges under one or more aliases. First, in New York State in 1996, he was charged and convicted of marijuana possession and sentenced to three years probation, which he completed. Second, in Texas in 1999, he was charged for possession of 50 to 2,000 pounds of marijuana. He was initially released on a bond, which he forfeited by failing to attend court. In 2004 he was arrested in New York and returned to Texas, where he was sentenced to two years in prison for the drug possession charge. After he served this sentence, he was removed from the US to Jamaica in 2006. The Applicant used a passport in the name of Roy Morgan to leave the US.

[4] The Applicant first entered Canada in December 2009 using a passport in his own name, on a Temporary Resident Visa [TRV]. He returned to Canada in December 2010, again on a TRV, and has lived in Canada since 2010. The Applicant married in 2012, and his wife sponsored him to become a permanent resident under the family class as her spouse. The

Applicant became a permanent resident on August 15, 2014. He and his wife separated in late 2014 and divorced in 2015.

[5] The Applicant made several misrepresentations on his spousal sponsorship application. He did not indicate that he had aliases, and he did not indicate that he had been convicted in another country or that he had been ordered to leave another country.

[6] The Applicant has three daughters, all of whom were born and grew up in Jamaica. His elder daughters are twins, born in 1993, and his younger daughter was born in 2006. Once he became a permanent resident, he applied for his daughters to come to Canada, and they landed as permanent residents in 2015. Initially all of the Applicant's daughters lived with him in St. Thomas, Ontario. His two eldest daughters have since moved to London, Ontario. The Applicant and his younger daughter currently live in St. Thomas with the Applicant's fiancée.

[7] On January 21, 2017, the Applicant was in a vehicle that mistakenly traveled across the Ambassador Bridge to the Canada-US border. Fingerprinting at the border led US border officials to discover the Applicant's criminal history in the US. He was detained in the US for several months and was released back into Canada on May 23, 2017.

[8] The Applicant was subsequently charged and, in a proceeding in the Ontario Court of Justice, convicted for misrepresentation contrary to s 127(a) of IRPA. He received a 90 day intermittent sentence, which he has completed.

[9] On January 8, 2018, the Canadian Border Services Agency [CBSA] issued a report pursuant to s 44(1) of IRPA, finding the Applicant inadmissible for direct misrepresentation of material facts in his spousal sponsorship application. The Immigration and Refugee Board of Canada, Immigration Division held an admissibility hearing and then issued an exclusion order against him. The Applicant appealed the exclusion order to the IAD. He did not challenge the legal validity of the exclusion order on appeal but sought to retain permanent resident status based on H&C considerations under s 67(1)(c) of IRPA.

III. **IAD Decision**

[10] In the Decision that is the subject of this application for judicial review, the IAD refused the Applicant's appeal, finding that the exclusion order was legally valid and that there were insufficient H&C considerations to justify granting special relief.

A. *Credibility*

[11] At the outset of its analysis, the IAD commented on the Applicant's credibility. It observed that he came to the hearing with a long history of being dishonest and fraudulent with various authorities. The IAD found that the Applicant was forthcoming in some matters but maintained a resistance to disclosing unfavourable evidence and lacked candour. It also held that he continued to withhold information about his criminal and immigration history from others, including his family. Overall, the IAD found that the Applicant did not provide sufficient credible testimony to support his appeal.

B. *Seriousness of Misrepresentation*

[12] The IAD began its assessment of H&C considerations by evaluating the seriousness of the Applicant's misrepresentations. The Applicant argued that he made the misrepresentations to financially provide for his daughters and afford them with better opportunities. However, the IAD was not persuaded that the misrepresentations were his only, or best, option to provide for his children. Nor was it persuaded that providing for his children was the only reason for his misrepresentations.

[13] The Applicant also argued that he was the victim of discriminatory legislation and practices in the US criminal system and that the assessment of the seriousness of his misrepresentations should reflect that context. However, the IAD was not persuaded that the context of the Applicant's criminal history mitigated his actions. It concluded that the seriousness of the misrepresentations was extreme and weighed heavily against the Applicant.

C. *Lack of Meaningful Expression of Remorse*

[14] The IAD then evaluated whether the Applicant had made a meaningful expression of remorse. It found that his expressions of remorse were not spontaneous but rather were prompted by his discovery by the CBSA. Noting the Applicant's argument that his actions, including his misrepresentations to Canadian immigration authorities, were justified by his need to provide for his children, the IAD concluded that he lacked remorse and that this weighed against the appeal.

D. *Establishment*

[15] The IAD observed that the Applicant gained establishment in Canada only because of his misrepresentations and found that he had minimal establishment. It treated establishment as a negative factor.

E. *Best Interests of the Child*

[16] The IAD evaluated the best interests of the Applicant's 12 year old daughter. Referring to her happiness in Canada and generally good performance in school, the Applicant argued that maintaining the *status quo* was in his daughter's best interests. The IAD disagreed, finding that her best interests did not necessarily favour her remaining in Canada, although it was a viable, positive option for her to remain in Canada with her sisters and the Applicant's fiancée if her father was removed. Rather, the IAD found that her interests would be best served by living in the same country as both her mother and father, i.e. in Jamaica. Ultimately, the IAD found that the best interests of the child [BIOC] was a neutral factor.

F. *Support System in Canada*

[17] The IAD found that the Applicant had the support of his fiancée and his older daughters and weighed his support systems in Canada as a positive factor in the appeal.

G. *Family Ties in Canada and Impact of Departure*

[18] The IAD considered the Applicant's family ties and the impact of his departure, concluding that the impact upon his fiancée would be heavy but manageable. Noting that the Applicant has reasonably strong ties to Canada but also strong ties to Jamaica, the IAD found this to be a neutral factor in the appeal.

H. *Hardship*

[19] The IAD accepted that the Applicant would likely face some period of adjustment if he returns to Jamaica, but it found that he would not face serious hardship.

I. *Special or Unique Situations*

[20] The IAD found no special or unique circumstances weighing in the Applicant's favour. His counsel submitted articles about the intersection of being a Black man and systemic injustices in the American criminal system and urged the IAD to conduct a contextual analysis of how the Applicant's race and his experiences in the US impacted the H&C grounds in his appeal. However, the IAD found that the Applicant did not make out a link between his experiences in the US and Jamaica and his decision to misrepresent his criminal and immigration history to Canadian authorities.

J. *Conclusion*

[21] The IAD concluded that the H&C factors were not sufficient to justify granting special relief, given the serious and egregious nature of the Applicant's deliberate misrepresentations.

IV. **Issues and Standard of Review**

[22] The Applicant's Memorandum of Fact and Argument articulates the issues in this application as follows:

A. Whether the IAD's findings were unreasonable;

B. Whether the IAD erred in fact or law; and

C. Whether the IAD undertook a procedurally fair process in adjudicating the appeal herein given the role of administrative tribunals.

[23] However, the Applicant's arguments, both in writing and orally, are not organized in accordance with this articulation of the issues. Rather, the Applicant refers to the reasonableness standard of review and raises a number of arguments about the substance of the Decision, which I agree are reviewable on a reasonableness standard. At the hearing, the Applicant's counsel also raised in her oral submissions an argument of implicit bias on the part of the IAD. I consider this argument to raise a matter of procedural fairness, reviewable on a standard of correctness (see *Oleynik v Canada (Attorney General)*, 2020 FCA 5 [*Oleynik*] at para 39).

V. **Analysis**

A. *Implicit Bias*

[24] The Applicant's arguments of implicit bias surround language employed by the IAD, both in its questioning of the Applicant at the hearing and in its subsequent Decision. The Applicant's counsel argues that these portions of the record demonstrate implicit bias on the part of the IAD member against the Applicant as a Black man from Jamaica.

[25] First, the Applicant's counsel points to certain portions of the transcript of the hearing before the IAD. In questioning the Applicant at the hearing about his relationships with his daughters and their mothers, the IAD posed the following questions:

A. "What was going on that you ended up with two daughters, did you have somebody you were seeing at the time?"

B. "So Sharmaine … were you two living together?"

C. "All right, and so when the twins were born, were you together at that time?"

D. "And so, what was the arrangement that you had with Sharmaine at that time, were you paying for them, were you both working when they were first born, what happened there?"

E. "But how did you convince her mother when she was already nine years old just sort of let full custody go to you?"

[26] I understand the Applicant's argument to be that the phrasing of these questions suggests a lack of respect for the Applicant's relationships. The Applicant's counsel submits, for instance, that the questions should have been framed in terms of those relationships representing a family.

[27] The Applicant's counsel raises similar concerns with the Decision itself, in which the IAD describes the progression of his relationship with his former wife. The IAD notes that he met her on his first visit to Canada and then in 2012 "connected with" her again. The Applicant's counsel argues this to be a pejorative choice of language.

[28] Also, in relation to the Applicant's original decision to come to Canada, the IAD refers to the Applicant's explanation that he needed to find new employment after his position in Jamaica ended in 2009 and then states, "[h]e set his sights on Canada." Again, I understand the Applicant's counsel to be arguing that this language represents a negative characterization of the Applicant's intentions.

[29] In analyzing these arguments, I note first the potential application of the common law principle of waiver, which requires that an applicant raise allegations of bias at the earliest practical opportunity. The Applicant or his counsel had an opportunity to argue before the IAD that the member's questioning raised a reasonable apprehension of bias but did not do so (see, e.g., *Singh v Canada (Minister of Citizenship and Immigration)*, 2005 FC 35 [*Singh*] at para 18). However, the Respondent did not raise this argument in this application, and I note that some of the language employed by the IAD on which the Applicant relies are contained in the Decision

itself and obviously could not have been raised during the hearing. Therefore, I decline to apply the principle of waiver and will address the merits of these arguments.

[30] Inappropriate comments or behaviour by a decision maker can give rise to a reasonable apprehension of bias (see, e.g., *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 SCC 699 at para 48). However, such allegations are very serious and must be substantiated (see *Singh* at para 19). The applicable test is whether an informed person, viewing the matter realistically and practically and having thought the matter through, would conclude that the decision-maker, either consciously or unconsciously, would not decide the matter fairly (see *Oleynik* at para 56).

[31] In my view, the isolated passages in the transcript and Decision cited by the Applicant do not satisfy this test. The cited portions of the transcript, and the phrase “connected with” in the Decision, demonstrate a somewhat colloquial use of language. However, I do not consider that language to support a finding that an informed person would conclude the IAD member would not decide the matter fairly.

[32] I consider the reference to the Applicant setting his sights on Canada to be a more “loaded” use of language, which I agree can be read as conveying an unfavourable impression of the Applicant’s intentions. However, the IAD makes this reference in the Decision itself, by which time it is the IAD’s role to form impressions of the Applicant relevant to H&C considerations. Those considerations include the Applicant’s intentions to the extent they reflect upon the circumstances of his misrepresentations, which the IAD found in the Decision to be

deliberate and calculated. In that context, I do not find the member's use of the impugned language to be problematic.

[33] The Applicant also takes issue with the IAD's reference in the Decision to the Applicant having "already achieved his goals", as he and his daughters are already in Canada. The Applicants argues this implies a view by the IAD that he is lucky that immigration authorities are not seeking to remove his daughters as well as him. I find little merit to this submission. In this portion of the decision, the IAD explains that this case is dissimilar from one where, for instance, a permanent resident facing removal for criminality asks for relief to demonstrate rehabilitation by not offending in the future. In this context, the IAD notes that the present case does not involve a pattern of behaviour with potential for future re-offending, because the immigration objectives underlying his misrepresentations have already been achieved. I find nothing unreasonable or suggestive of bias in this analysis.

[34] In advancing the implicit bias arguments, the Applicant's counsel sometimes characterized the issue alternatively as a problem of "system design." However, I understand the system design arguments to be similar to those presented to the IAD, to the effect that there are systemic injustices in the American criminal justice system, including its approach to the criminalization of low-level drug offences, which have disproportionately affected Black people or other people of colour. The Applicant submits that the IAD struggled with the concept of unfair system design. He also argues that, in the portion of the Decision where the IAD considered these arguments, and elsewhere, the Decision demonstrates a confusion between the Applicant's testimony and the arguments of his counsel.

[35] I disagree that the Decision demonstrates confusion of the sort alleged, either in this portion of the Decision or elsewhere. The Decision often refers to submissions, views, or arguments of the Applicant, rather than expressly attributing those to his counsel. However, counsel's role is to advance those positions on the Applicant's behalf. I do not read the Decision as demonstrating a problematic failure to distinguish between evidence and argument that either demonstrates a reasonable apprehension of bias or affected the reasonableness of the Decision.

[36] As for whether the IAD failed to understand the argument surrounding system design, the Decision notes the submission of documentary evidence about the intersection of being a Black man in the US and the systemic injustices within the American criminal justice system. The IAD notes the Applicant's argument that the trauma of his experience in the US, including an overly harsh sentence and inhumane incarceration conditions, impacted his views on his current situation. The IAD also describes the Applicant's counsel's submission as a request that the member conduct a contextual analysis of how the Applicant's race and his experience in the US impact the H&C grounds in the appeal. In my view, this review demonstrates an understanding of the Applicant's argument.

[37] In the result, the IAD concluded that counsel had failed to articulate what specific conclusion the Applicant wanted the IAD to draw from this argument and had not sufficiently made out a link between the Applicant's experience in the US, and when he was in Jamaica, and his decision to misrepresent his criminal and immigration history to Canadian authorities. I have reviewed the portion of the transcript of the IAD hearing in which counsel advances this

argument, and I find nothing unreasonable, or indicative of bias, in the IAD's treatment of this argument in the Decision.

B. *Best Interests of the Child*

[38] The Applicant challenges the reasonableness of the IAD's BIOC analysis, arguing that the IAD erred by failing to determine the result that would be in his younger daughter's best interests or to consider the possibility that the best result involved him remaining in Canada with her.

[39] In my view, the Decision includes both aspects of analysis that the Applicant argues are missing. The IAD concluded that the result that would be in the Applicant's daughter's best interests was not for her to remain in Canada but rather for the Applicant and his daughter to return to Jamaica, where she could be in the same country as both her parents. The IAD also considered the Applicant's arguments in favour of what he described as the "status quo", which I read as the option where he and his daughter would both remain in Canada. Taking into account in part her older sister's comments that the Applicant's youngest daughter would benefit culturally from being with other Jamaican people, the IAD concluded that the status quo was not in the daughter's best interests.

[40] The Applicant takes issues with the reasonableness of these conclusions. However, these arguments represent a request for the Court to re-weigh the evidence and arrive at different conclusions than the Officer, which is not the Court's role in judicial review (see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 125).

[41] I do note one aspect of the BIOC analysis in which I consider the IAD to have erred. The IAD noted that, as an alternative to returning to Jamaica with her father, it was a viable positive option for his daughter to remain in Canada with the Applicant's fiancée and her older sisters if the Applicant was removed from Canada. The Applicant notes that his fiancée had not committed to caring for his daughter if he was removed. I agree with this submission. However, this error does not undermine the reasonableness of the overall BIOC analysis, resulting in the conclusion that BIOC was a neutral factor, as that conclusion did not turn on the possibility of the daughter remaining in Canada with the Applicant's fiancée. Rather, it turned on the finding that returning to Jamaica with her father was the result that was in the daughter's best interests.

C. *Credibility*

[42] The Applicant takes issue with the IAD's findings related to his credibility. It found that he was forthcoming in his testimony on some matters but lacked candour on others, that he had a history of deliberate concealment from authorities and members of his family, and overall that he did not provide sufficient credible testimony to support his appeal.

[43] The Applicant argues that the transcript of the IAD hearing contradicts these conclusions, as it demonstrates that he spoke without hesitation and gave consistent testimony including making several admissions which were extremely contrary to his interests. This argument asks the Court to reassess the Applicant's credibility without raising any deficiencies in the IAD's analysis that could represent a reviewable error. The Applicant is asking the Court to assume a role that is outside its ambit on judicial review.

D. *Seriousness of Misrepresentations*

[44] The Applicant argues that the Decision is unreasonable and unintelligible because, in finding that the seriousness of the Applicant's misrepresentations is extreme, the IAD overlooked the fact that the Crown withdrew the charge under IRPA for failure to disclose criminal convictions.

[45] I find no merit to this submission. The record indicates that the charge for failure to disclose criminal convictions was withdrawn because the Applicant pleaded guilty to the charge for failure to disclose other names used. I do not consider the fact that one charge was withdrawn, in the context of a guilty plea on another, to have any significant bearing on the seriousness of the Applicant's misrepresentations to immigration authorities. I find no error in the IAD not having explicitly taken note of this fact in its Decision.

E. *Remorse*

[46] The IAD was not persuaded that the Applicant was remorseful for his actions. In arriving at this conclusion, the IAD noted the Applicant's testimony that he has worked hard and had "no trouble" since being in Canada. It found this demonstrated a lack of awareness of various defaults in his obligations, such as overstaying his TRV visit period, working illegally in Canada, working under someone else's social insurance number, failing to provide Notice of Assessments related to tax filings for more than one year, and the suspension of his drivers licence.

[47] The Applicant argues that, for most people, “trouble” refers to falling afoul of the criminal law and that it was therefore unreasonable for the IAD to reach an adverse conclusion as to his remorse because he considered himself not to have been in trouble, notwithstanding the defaults identified by the IAD. He also submits that the IAD’s conclusion that he was not remorseful represents an impermissible implausibility analysis. Again, I find no merit to the Applicant’s submissions. The IAD’s analysis is supported by the evidence, and I find nothing unreasonable therein.

F. *Alleged Factual Errors*

[48] The Applicant identifies a number of alleged factual errors in the Decision, which he submits undermine its reasonableness. By way of context, his counsel notes a comment on the cover page by which the IAD transmitted the Certified Tribunal Record to the Court. This page notes, in relation to the transcript of the IAD hearing, that the transcription company commented that the Applicant is not a native English speaker and is difficult to understand. His counsel points out that this comment is inaccurate, as English is the Applicant’s first language, but that he speaks with a strong Jamaican accent. His counsel raises this point as a possible explanation for the IAD having misunderstood some of his testimony, resulting in factual errors.

[49] The Applicant argues that the IAD erred in stating that he first entered the US under false identification or an alias. He disputes that this was his evidence. However, the statement in the Decision is that, between 1994 and 2006 when he frequently travelled between the US and Jamaica, he had more than one passport: one in his birth name and a fraudulent one in the name of his alias, Roy Morgan. This does not represent a finding that the Applicant used a false

passport to enter the United States. In other words, the Applicant has misconstrued this aspect of the Decision and has not identified a factual error.

[50] Similarly, the Applicant submits the IAD erred in stating that he had more than one passport between 1994 and 2006, implying that this was so throughout that time period. He argues that this was not his evidence. Rather, he testified that his wife arranged for the passport in the name Roy Morgan when he was advised of his deportation while incarcerated, which was between 2004 and 2006. Again, it appears that the Applicant has misconstrued the Decision. I do not read it as implying that he held the fraudulent passport throughout the 1994-2006 period.

[51] The Applicant submits that the IAD erred by stating that, after his deportation from the US, he obtained his firearms license in Jamaica by withholding information. He notes his testimony that he already had his firearms license before being deported. His evidence was not that he obtained the license by withholding information about his deportation but rather that he obtained employment as a security guard in that manner.

[52] I agree that the IAD made a finding inconsistent with the evidence, in that it found that he withheld information as to his criminality both to obtain the license and to obtain employment, when it was actually only the latter. However, I find nothing material in this error to assist the Applicant. This portion of the IAD's analysis addressed the Applicant's argument before the IAD that his deception was necessary to secure employment, a submission the IAD did not accept. If anything, the Applicant's argument before the IAD is less compelling in the context of the firearms license already being available.

[53] The Applicant notes the IAD found that he obtained a birth certificate under a false identity, when in fact his evidence was that he obtained a driver's license in this manner. I agree this was a factual error but find no basis to conclude that the error as to the particular document that the Applicant fraudulently obtained serves to undermine the reasonableness of the IAD's adverse credibility finding.

[54] The Applicant argues that the IAD erred in concluding that his fiancée was unaware of his criminal, marital or immigration history. He notes that she testified she attended the US and Ontario court proceedings where that information was disclosed. I find no error in this portion of the Decision. I read the IAD's analysis as focusing upon whether the Applicant disclosed this information to his fiancée, not upon whether she became aware of the information through the matters in which he was prosecuted.

[55] The Applicant submits that the IAD erred in concluding that he stated he concealed his immigration and criminal history from the immigration consultant who assisted with his spousal sponsorship application. He argues he did not give evidence to that effect. Rather, he testified that he had no recollection of his consultant's questioning on these matters, other than that it was over the phone. I find no error here. It is reasonable for the IAD to have interpreted the evidence as a failure by the Applicant to disclose his criminal and immigration history to the consultant over the phone, given that the information was not included in his application.

[56] The Applicant argues that the IAD erred in finding he overstayed his first and second visits to Canada. I agree this represents a factual error, as the evidence is that he overstayed only

his second TRV, not his first. However, the fact that there was one overstay rather than two does not undermine the reasonableness of the Decision.

[57] The IAD found that the Applicant worked under someone else's social insurance number. The Applicant is correct that this is a factual error. His testimony was that he worked without a social insurance number and was paid in cash. This finding is one of the defaults underlying the IAD's negative assessment of the Applicant's expression of remorse. However, it is only one of several such defaults and does not undermine the reasonableness of that assessment.

[58] The Applicant also raises concern about errors in certain dates noted in the Decision. First, he refers to the IAD's statement (noted earlier in these Reasons) that he "connected with" his wife in 2012, when in fact he met her in 2009. I find no error here, as the IAD referred to the Applicant having met his wife during his first visit to Canada (which was in 2009).

[59] The Applicant does correctly identify errors in the dates when he moved in with his fiancée and the date when the vehicle in which he was traveling inadvertently entered the US. However, he has identified no basis for a conclusion that these errors are material to any analysis in the Decision.

[60] Finally, the Applicant argues that the IAD erred in describing the Applicant as stating that he had no choice but to break the law and in concluding he turned to illegal activities to support his children. He notes that his testimony was that his actions were taken to protect his visa and that he does not have any criminal convictions other than the two identified in the US.

However, the Applicant acknowledges his prosecution for violations of IRPA. I find no material error in this aspect of the IAD's analysis, which focuses upon the Applicant's effort to justify his misrepresentations to Canadian immigration authorities as being the for the benefit of his children through his immigration status. I do not understand the Applicant to be disputing that this has been his position.

VI. **Conclusion**

[61] Having considered the arguments advanced by the Applicant, I find no reviewable error on the part of the IAD. The Applicant has not established a reasonable apprehension of bias, and the Decision is reasonable. This application for judicial review must therefore be dismissed.

[62] Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-1595-20

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

No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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