Federal Court Cour fédérale

Date: 20161208

Docket: IMM-4624-15

Citation: 2016 FC 1351

Ottawa, Ontario, December 8, 2016

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

MARVIN DONOVAN MCINTYRE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application pursuant to s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for judicial review of a decision of the Immigration Appeal Division of the Immigration and Refugee Board of Canada [IAD], dated September 10, 2015 [Decision], which dismissed the Applicant's appeal of a removal order.

II. BACKGROUND

[2] The Applicant is a 53-year-old permanent resident of Canada. He is originally from Jamaica and arrived in Canada in 2000, sponsored by his then-wife. The Applicant has two children and two grandchildren.

[3] The Applicant was issued a removal order after being found to be a person described in s 36(1)(a) of the Act, having been convicted of an offence for which a term of imprisonment of more than six months was imposed or ten years or more could have been imposed. He appealed the removal order on humanitarian and compassionate [H&C] grounds and challenges the IAD's dismissal of the appeal in this judicial review.

III. DECISION UNDER REVIEW

[4] The IAD dismissed the Applicant's appeal after considering the Applicant's oral testimony and documentation on the grounds that the Applicant did not establish that special relief was merited. The IAD (composed of a one-person panel) premised its decision-making on the *Ribic* factors: *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IABD No 4 [*Ribic*]; *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3 [*Chieu*]; *Al Sagban v Canada (Minister of Citizenship and Immigration),* 2002 SCC 4.

[5] The IAD first considered how the Applicant obtained permanent resident status. The IAD viewed the Applicant's testimony as not credible and concluded that he fraudulently obtained his

permanent resident status in Canada and was not truthful in his testimony. The fact that the Applicant landed as part of an orchestrated fraud weighed against granting him special relief.

[6] Next, the IAD considered the seriousness of the offence. It was noted that the Applicant had had a similar conviction overturned prior to the triggering offence. Additionally, the Applicant's behaviour was not an isolated event or the result of impairment; the illegal conduct was planned and part of an organized, repetitive, and long-term pattern of behaviour that was sexual in nature and involved vulnerable victims who were minors. These considerations weighed against granting him special relief.

[7] The IAD discussed the possibility of rehabilitation, stating that the Applicant had completed therapy and was subsequently described as "a low risk to reoffend" by his psychiatrist. However, given the years of predatory behaviour, the IAD did not accept that the Applicant was completely rehabilitated, only that it was established there was a possibility of rehabilitation and that the Applicant was committed to avoiding further criminality. Nonetheless, this factor was deemed to be favourable in granting a stay of removal.

[8] The Applicant's degree of establishment in Canada was the next factor assessed. The IAD referenced the Applicant's poor economic performance and future prospects and the fact that the Applicant was raised, educated, and held employment in his home country before immigration to Canada at age 39. The establishment factor was determined not to weigh in favour of granting special relief.

[9] The IAD then gave consideration to the Applicant's community and family support. The Applicant provided a letter of financial support from his sister-in-law, two letters of support from his children, and a letter from his church that indicated his volunteer work. While the IAD found the Applicant's family support in Canada weighed in favour of granting special relief, the evidence was deemed minimal and, consequently, this factor was not accorded significant positive weight.

[10] In discussing the impact the Applicant's removal from Canada would have on members of his family and friends, the IAD concluded this factor did not weigh in favour of granting special relief because there was no evidence that anyone would suffer significant hardship as a result of the removal.

[11] Looking next to potential hardship on return to Jamaica, the IAD considered that the Applicant had spent the vast majority of his life in Jamaica and there were no language or cultural barriers to re-entry. Although the Applicant had argued he would be unable to access psychiatric treatment resources for his condition in Jamaica, the IAD noted that the Applicant was not currently in therapy and did not have plans to pursue further therapy. Finally, the IAD noted that the persecution the Applicant might face as a homosexual man in Jamaica might have been a compelling factor; however, no evidence regarding country conditions had been submitted. Since the onus was on the Applicant to establish the situation in Jamaica for homosexual men, the IAD did not take judicial notice. Thus, this factor did not weigh in favour of granting special relief.

[12] With regard to the best interests of the child, only the interests of the Applicant's two Canadian grandchildren and his brother's children were assessed. The IAD found there was no evidence to suggest any of the children relied on the Applicant. He was also prohibited from being alone with anyone under sixteen as a result of his conviction. As a result, this factor did not weigh in favour of granting special relief.

[13] After consideration of all the *Ribic* factors, the IAD determined that the positive elements of the appeal were insufficient to overcome the negative aspects and dismissed the appeal.

IV. ISSUES

[14] The Applicant submits the following are at issue in this application:

1. What is the standard of review?
2. Was the Applicant denied procedural fairness due to the negligence of his former representative?
3. Did the IAD fail to address why a stay of the removal order was not warranted instead of a dismissal of the appeal, pursuant to s 68(1) of the Act?
4. Was the IAD's assessment of the Applicant's establishment and hardship unreasonable, in light of the evidence that he had two adult children in Canada and regular work experience?

V. STANDARD OF REVIEW

[15] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a

satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[16] The first issue concerns the Applicant's right to a fair proceeding, including competent representation. This is an issue of procedural fairness and attracts the standard of correctness: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43 [*Khosa*]; *Mission Institution v Khela*, 2014 SCC 24 at para 79; *Galyas v Canada (Citizenship and Immigration)*, 2013 FC 250 at para 27.

[17] The second issue is about whether the IAD incorrectly failed to address a stay of removal and is reviewed on a correctness standard: *Li v Canada (Citizenship and Immigration)*, 2015 FC 998 at para 16 [*Li*]; *Lewis v Canada (Minister of Citizenship and Immigration),* [1999] FCJ No 1227 [*Lewis*].

[18] The third issue goes to the overall reasonableness of the IAD's Decision.

[19] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible,

acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at para 47, and *Khosa,* above, at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

VI. STATUTORY PROVISIONS

[20] The following provisions from the Act are relevant in this proceeding:

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;
Removal order stayed	**Sursis**
68 (1) To stay a removal order, the Immigration Appeal Division must be satisfied, taking into account the best interests of a child directly affected by the decision, that sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.	68 (1) Il est sursis à la mesure de renvoi sur preuve qu'il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.

VII. ARGUMENTS

A. *Applicant*

(1) Professional Negligence

[21] The Applicant says that the test for determining whether the incompetence of counsel amounts to a breach of procedural fairness is found in *R v B (GD)*, 2000 SCC 22. The Supreme Court of Canada said at paragraph 26 in that case that "it must be established, first, that counsel's acts or omissions constituted incompetence and second, that a miscarriage of justice resulted."

[22] In the Decision, the IAD noted there was no objective evidence about the country conditions in Jamaica for the lesbian, gay, bisexual and transgender [LGBT] population and that this might have been "the most compelling aspect" in relation to the potential foreign hardship analysis, thus demonstrating the importance this evidence had on the Decision. The Applicant argues that his former representative acted negligently by failing to submit evidence about the conditions for the LGBT population in Jamaica. As a result, the Applicant's right to present his best case was prejudiced by the failure of his former representative to provide objective evidence that showed he was at risk in Jamaica as a gay man. The Applicant notified his former representative in writing to request an explanation about why the country condition reports were not tendered in support of the Applicant's appeal. Thus, the Applicant has shown he has met the test for incompetence counsel in this case.

[23] The jurisprudence allows the Court to admit new evidence when issues are raised with respect to procedural fairness. The Applicant submits new evidence of recent country condition reports that show homosexuality is illegal in Jamaica and that human rights violations ranging from violent community attacks to loss of employment for LGBT persons whose sexual orientation is discovered, exists amongst a "culture of homophobia". The disclosure of this evidence could have impacted the outcome of the Decision and it is a miscarriage of justice for the appeal to have been decided without a proper assessment of the hardship the Applicant will face in Jamaica as a homosexual.

(2) Reasons for Stay of Removal

[24] In certain circumstances, the IAD is required to address a request for a stay in its written reasons: see *Lewis*, above, at para 14. If an applicant explicitly requests a stay of removal and the facts suggest that a stay needs to be considered, the applicant is entitled to know why a stay of removal is not ordered instead of dismissing the appeal: see *Li*, above, at paras 25-26. The Applicant does not raise inadequate reasons as a stand-alone ground, as there are two additional errors submitted.

[25] The Applicant argues that the facts necessitate an explanation for why his request for a stay of removal was not granted. The Applicant's psychiatrist stated that the Applicant was at "low risk" of reoffending and the IAD also noted that it was "too early" to tell if the Applicant was able to avoid future criminality. The analysis of the Applicant's rehabilitation potential also weighed in favour of granting a stay of removal, yet the IAD did not explain why it chose not to

grant a stay of removal. The Applicant submits that the IAD erred in its failure to give any reasons as to why a stay of removal was not appropriate for the Applicant.

(3) Reasonableness of Assessment

[26] The Applicant challenges the reasonableness of the IAD's assessment of his establishment in Canada, including family ties, as well as the hardship that he faces in Jamaica. The Decision failed to refer to the Applicant's nearly 10 years of employment as a facilities transporter in a hospital and other positions. The Applicant submits that it was unreasonable for the IAD to find that his employment history is "very poor" and failed to even refer to any period of employment that the Applicant had in Canada prior to having conditions imposed on him that affected his ability to secure employment.

[27] The IAD was also unreasonable in its assessment of the hardship that the Applicant's family would face if he were removed from Canada. The Applicant testified about the strength of his relationship with his daughter and son, aged 21 and 26, respectively, who provided letters of support in his appeal. The Applicant's son, nephew, and sister-in-law also came to his hearing as support persons. The Applicant submits that the analysis of the hardship his family would face is cursory and does not assess the strength of the relationship; instead, the analysis only considered that his family did not rely on him financially.

B. *Respondent*

(1) Professional Negligence

[28] While the Applicant has provided formal notice under the protocol to former counsel of the allegations, there remains a dispute regarding the allegations. Furthermore, the Respondent submits that the Applicant mischaracterizes the Decision as stating that "the most compelling factor in assessing whether the Applicant would face hardship is whether he would face persecution as a gay man in Jamaica." The Decision actually states "what might have been the most compelling aspect of this factor is the persecution he might face as a homosexual man in Jamaica." Thus, the Applicant has not demonstrated that, but for the alleged conduct, there is a reasonable probability that the result of the original hearing would have been different.

(2) Reasons for Stay of Removal

[29] The Respondent submits that *Lewis*, above, is not appropriate in these circumstances. First, *Lewis* was about an unusual case, as noted by Justice Simpson. Second, post-*Lewis*, inadequacy is no longer a stand-alone ground for review and forms part of the reasonable analysis instead. Finally, the IAD understood a stay was being requested and dismissed the appeal.

(3) Reasonableness of Assessment

[30] Since the standard of review for a discretionary decision made by the IAD is reasonableness, significant judicial deference is owed to IAD decisions and decisions based on the evaluation and weighing of evidence before it: see *Khosa*, above, at paras 58 to 60.

VIII. ANALYSIS

[31] The Applicant has raised three major issues for review and I will deal with each in turn.

A. *Breach of Procedural Fairness*

[32] The Applicant says that his representative before the IAD did not provide any country condition reports about the risks faced by gay men in Jamaica. He says this amounts to professional negligence resulting in procedural unfairness because the IAD itself indicated in its Decision that this "might have been the most compelling aspect" of the foreign hardship he would face if returned to Jamaica. However, because no evidence of the risks faced by gay men in Jamaica was placed before the IAD, this potentially compelling factor was not considered because the IAD refused to take judicial notice of the situation of homosexual men in Jamaica so that the Applicant "failed to establish that any particular hardship might befall him because of his sexual orientation."

[33] I agree with the Respondent that:

> 9. The incompetence of counsel will only constitute a breach of natural justice in "extraordinary circumstances." The

incompetence must be sufficiently specific and clearly supported by the evidence.

10. In order to establish that the incompetence of one's counsel resulted in a breach of procedural fairness, the onus is on an applicant to establish the following tripartite test:

1) The representative's alleged acts or omissions constituted incompetence;

2) There was a miscarriage of justice in the sense that, but for the alleged conduct, there is a reasonable probability that the result of the original hearing would have been different; and,

3) The representative was given notice and a reasonable opportunity to respond.

11. There is a high threshold governing the circumstances and evidentiary criteria that must be met before the Court will grant relief on the basis of the negligence of counsel.

12. The Supreme Court also confirmed that the onus is on the applicant to establish the acts or omissions of counsel that are alleged to have been incompetent and "the wisdom of hindsight has no place in this assessment".

13. With respect to the performance component, the incompetence or negligence of the representative must be sufficiently specific and clearly supported by the evidence.

14. With respect to the prejudice component the Court must be satisfied that a miscarriage of justice resulted, which must be "manifested in procedural unfairness, the reliability of the trial result having been compromised, or another readily apparent form."

15. Substantial prejudice must be shown to flow from or in consequence of the actions of incompetent counsel. The applicant must also establish that there is a reasonable probability that the result would have been different, but for the incompetence of the representative.

16. Where the applicant cannot meet the prejudice component of the test then it is undesirable for the Court to consider the performance component of the analysis. The object of an ineffectiveness claim is not to grade counsel's performance or

> professional conduct; the latter is best left to the profession's regulating body.
>
> [references omitted]

[34] In the present case, I believe that special and exceptional circumstances exist that have resulted in a breach of procedural fairness. The Applicant has notified previous counsel (an immigration consultant) of the problem and, although the consultant may not agree that he was negligent, there can be no doubt, in my view, that a failure to submit country documentation about the risks faced by gay men in Jamaica meant that evidence of high significance for the Applicant's case was not before the IAD. There is conflicting evidence between the Applicant and the consultant about when the Applicant raised his homosexuality as an issue, but there is no doubt that it was put forward as an issue before the IAD and that the consultant failed to submit the usual objective evidence on risks to homosexuals in Jamaica when there was ample opportunity to do so even after the hearing. The consultant offers no explanation on this crucial point.

[35] This case is exceptional in that the IAD goes as far as it can to indicate that "[w]hat might have been the most compelling aspect of this factor is the persecution he might face as a homosexual man in Jamaica." The IAD could only say that because it is fully aware of what homosexual men face in Jamaica. I also believe that the IAD, in saying what it did say, is indicating that evidence of high significance that could impact its decision has not been placed before it.

[36] The country reports on Jamaica demonstrate a high level of risk for the LGBT community in Jamaica and gay men in particular. Anyone who purports to represent Jamaican clients in the immigration context knows this, so that the consultant's failure to submit evidence on point suggests a high degree of incompetence. The Human Rights Watch Report for October 21, 2014 entitled "Not Safe at Home" is typical in its description of how homophobic Jamaican society is, and that even the police are often perpetrators of violence against the LGBT population. The report describes widespread human rights violations against those whose homosexuality is discovered, which often includes physical violence. The authoritative reports speak of widespread unchecked homophobic violence in Jamaica. The United States Department of State report for 2014 provides as follows:

> **Acts of Violence, Discrimination, and Other Abuses Based on Sexual Orientation and Gender Identity**
>
> The law prohibits "acts of gross indecency" (generally interpreted as any kind of physical intimacy) between persons of the same sex, in public or in private, punishable by two years in prison. There is also an "antibuggery" law that prohibits consensual same-sex sexual conduct between men, which is punishable by up to 10 years in prison, but it was not enforced during the year. Homophobia was widespread in the country, perpetuated by the country's dancehall culture through the songs and the behavior of some musicians. Lesbian, gay, bisexual, and transgender (LGBT) persons faced violence, harassment, and discrimination.
>
> In July an official at J-FLAG, a prominent LGBT NGO, withdrew the petition he had filed with the Supreme Court in 2013 challenging the antibuggery law. In dropping the suit, the petitioner cited threats against himself and his family.
>
> …
>
> NGOs continued to report serious human rights abuses, including assault with deadly weapons, "corrective rape" of women accused of being lesbians, arbitrary detention, mob attacks, stabbings, harassment of gay and lesbian patients by hospital and prison staff, and targeted shootings of such persons. Stigma and intimidation were likely factors in preventing victims from reporting incidents

> of discrimination in employment, occupation, and housing. Although individual police officers expressed sympathy for the plight of the LGBT community and worked to prevent and resolve instances of abuse, NGOs reported the police force in general did not recognize the extent and seriousness of bullying and violence directed against members of the LGBT community and failed to investigate such incidents.
>
> Prison wardens held male inmates considered gay in a separate facility for their protection. The method used for determining their sexual orientation was subjective and not regulated by the prison system, but inmates reportedly confirmed their sexual orientation for their own safety. There were reports of violence against gay inmates, perpetrated by the wardens and by other inmates, but few inmates sought recourse through the prison system.
>
> J-FLAG, in cooperation with the Ministry of Health, trained approximately 60 health-care workers to sensitize them to LGBT patients. Most health-care workers were not familiar with the specific health concerns and issues of their LGBT patients, resulting in a lack of adequate care and treatment. Although the country has universal health care, members of the LGBT community relied mainly on the Jamaica AIDS Support for Life clinic, claiming that the staff in the government's health system did not understand their needs and was unwelcoming. Training programs such as those conducted by J-FLAG, public advocacy by various NGOs and international donors, and increased focus by the government on the public health issue of HIV/AIDS increased the number of LGBT persons accessing the regular public sector health-care facilities.

[37] It is easy to see, in light of such evidence, why the IAD went out of its way to point out that what might have been the most compelling hardship factor had no evidence to support it. The IAD would not have sent this message if it didn't feel that a serious omission had occurred in this case.

[38] The Respondent says it cannot be said that the consultant presented no evidence in relation to the degree of hardship upon return, and elicited *viva voce* evidence from the Applicant

himself. It there was *viva voce* evidence of risk, the IAD failed to deal with it so that this could well be a reviewable error. However, the IAD itself points to the real problem. *Viva voce* evidence is not the same as objective, authoritative country condition evidence, which is what the IAD said was missing. No competent counsel would fail to submit the usual reports on Jamaica in this situation to demonstrate the unchecked, homophobic violence that prevails there.

[39] As was pointed out in *Chieu*, above, at para 40, the IAD has to look at all of the circumstances in order to make a decision, and that did not occur in this case because of the consultant's failure to submit the usual authoritative reports on the issue of violence against gay men in Jamaica.

[40] In these exceptional circumstances, I am willing to accept that the Applicant's risk of hardship in Jamaica has not been assessed because of the consultant's incompetence that has breached the Applicant's right to a fair hearing before the IAD. And given the objective evidence that was excluded, I think the Decision would have been otherwise had the procedural fairness not occurred.

B. *Failure to Consider Stay of Removal*

[41] The Applicant's representative before the IAD also explicitly requested a stay of removal in written submissions. The representative provided the rationale for a stay: the need for the passage of time to demonstrate to the IAD that the Applicant was fully rehabilitated. The request for a stay was not unfounded or unreasonable because the Applicant's treating psychiatrist provided evidence that the Applicant was at a low risk of re-offending and the IAD itself noted

that it was too early to determine if the Applicant was fully rehabilitated and would able to avoid future criminality. In fact, the IAD found that the Applicant's progress towards rehabilitation weighed in favour of granting a stay, but did not directly explain why a stay should not be granted in this case.

[42] As *Lewis*, above, makes clear, an appellant is entitled to know why a stay is denied. In the recent case of *Li*, above, the Court found that where an applicant explicitly requests a stay of removal, and if there are facts to support that a stay should be considered, the applicant is entitled to know why his or her application is dismissed instead of granting a stay.

[43] The Respondent concedes that there is no specific denial of a stay in the Decision but points out that the Officer refers to the request for stay throughout the Decision and that the denial is explained in the general conclusion of paragraphs 52 and 53:

> [52] The appellant came to Canada through fraudulent means as a fully formed adult and went on to commit serious offenses against children. He is in receipt of social assistance, has no apparent job prospects and I am not satisfied that anyone will suffer any significant hardship were he removed from Canada. It has not been established that it would be in the best interests of any child to grant special relief and the evidence of prospective hardship for the appellant was minimal.
>
> [53] While the appellant has demonstrated significant progress in terms of his rehabilitation and I accept that his risk of reoffending is now low, this positive element is insufficient to overcome the negative aspects of this appeal.

[44] Justice Mosley dealt with this issue in *Rajagopal v Canada (Public Safety and Emergency Preparedness)*, 2007 FC 523:

2. Assessment of Whether to Grant a Stay

[30] According to the applicant, if the applicant requests a stay as is the case here, the IAD must consider the request and give "good" reasons as to why it has refused it. As noted at paragraph 14 of *Lewis v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. 1227 (T.D.)(QL): "if a stay is requested and if the facts suggest that there is reason to consider a conditional stay, then, if reasons are given pursuant to section 69.4(5) of the Act, the applicant is entitled to know why a stay was denied".

[31] The applicant asserts that in the present case the IAD has failed to provide any meaningful analysis or reasons for its refusal to grant a stay, the extent of its attention being limited to a sweeping conclusion. As was noted in *Archibald v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 747 (T.D.)(QL) at paragraph 11: "a significant factor in assessing whether or not to stay the deportation order is an evaluation of the risk which exists that the applicant will re-offend". In the present case, the applicant asserts that the IAD's sole finding in this regard was based on its further finding that the applicant was not remorseful, which was in turn was based on the misconstrued nature of the police report. Therefore the IAD failed to consider all of the evidence which indicated that the applicant would likely not re-offend.

[32] The respondent asserts that the IAD did not err in refusing to grant a stay, and that it gave clear reasons for the refusal. The respondent asserts that the case law indicates that the applicant is entitled to know why the IAD denied a stay but that it does not support the assertion that the IAD must issue additional or special reasons in this regard.

[33] In dealing with the issue of whether or not to grant a stay, the IAD stated that "[s]tays of deportation are, by their very nature, special relief. However, as I have found the overall humanitarian and compassionate balance to weigh so negative as not to merit special relief. Special relief is therefore not warranted. It is therefore not appropriate for me to grant a stay". The IAD went on to note "[f]or all these reasons, I find that the case does not merit special relief under sections 67(1)(c) or 68(1)" of the Act.

[34] It is clear that the IAD's analysis as a whole was meant to apply to its decisions with respect to both paragraph 67(1)(c) and subsection 68(1) of the Act. The IAD therefore did not merely state a conclusion with respect to the stay issue.

[45] In the present case, it is not clear to me how the IAD's analysis as a whole is meant to apply to the request for a stay. In any event, that analysis is now flawed for the reasons of procedural fairness I have referred to above, so that this matter must go back for reconsideration.

C. *Unreasonable Assessment of Establishment and Hardship*

[46] The Applicant has raised unreasonableness as a further ground of review, but there is no point in my dealing with it because, on the basis of my conclusions set out above, this matter must be returned for reconsideration.

D. *Certification*

[47] Counsel concur that there is no question for certification and I agree.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is allowed. The Decision is quashed and the matter is returned for reconsideration in accordance with my reasons by a differently constituted IAD;
2. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4624-15
STYLE OF CAUSE:	MARVIN DONOVAN MCINTYRE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 22, 2016
JUDGMENT AND REASONS:	RUSSELL J.
DATED:	DECEMBER 8, 2016

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