Federal Court  Cour fédérale

Date: 20120619

Docket: IMM-5978-11

Citation: 2012 FC 783

Ottawa, Ontario, June 19, 2012

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

MARK ANTHONY BELL

Applicant

and

THE MINISTER CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 (Act) for judicial review of the decision of the Immigration Appeal Division (IAD) of the Immigration and Refugee Board, dated 5 August 2011 (Decision), which dismissed the Applicant's appeal and cancelled a stay of his deportation.

BACKGROUND

[2] The Applicant is a 43-year-old citizen of Jamaica and permanent resident of Canada. He landed in Canada in 1983, when he was fourteen, having been sponsored here by his father.

[3] The Applicant was convicted of trafficking in a narcotic under paragraph 4(1) of the former *Narcotic Control Act* in 1990. After this conviction, an immigration officer prepared a report against him under subsection 27(1) of the *Immigration Act* RSC 1985, c I-2 (Immigration Act). The Applicant was then directed to an inquiry under subsection 27(3) of the Immigration Act. Following the inquiry, the Immigration Division (ID) found the Applicant was inadmissible under paragraph 27(1)(*d*) of the Immigration Act. The ID issued a deportation order against him under subsection 32(2) of the Immigration Act (Deportation Order).

[4] The Applicant appealed the Deportation Order to the IAD and, on 30 July 1999, the IAD found the Deportation Order was valid in law (1999 Hearing). The Applicant was represented by counsel (Ounapuu) at the 1999 Hearing. After the hearing, the IAD also stayed the Deportation Order for three years with conditions. The IAD ordered the Applicant to report every six months and to give details of his employment, living arrangements, and marital status. He was also ordered to report any criminal convictions, change of address, and change in marital or common law relationships. The IAD also forbade the Applicant from possessing weapons, illegally using or selling drugs, and ordered him to keep the peace and be of good behaviour. The IAD ordered an oral review of the Deportation Order for 19 May 2000 and an oral reconsideration of the stay for 30 June 2002.

[5] At the 19 May 2000 review (2000 Review) – at which the Applicant was self-represented – the IAD found he had breached several conditions of his stay. The Applicant had filed a report late, over-stated his education, was convicted of two traffic offences, and had a number of unpaid traffic fines. The IAD accepted the Applicant had made significant steps toward rehabilitation, but found he had some way to go. The IAD ordered the stay of removal continued for two years with amendments. In addition to the previous conditions, it ordered the Applicant to seek details of his outstanding fines and report to the IAD with a payment schedule. It also ordered him not to drive while his driver's license was suspended and to report any criminal convictions and parole conditions. The IAD set his case for further review on 30 July 2002.

[6] The IAD again reviewed the Deportation Order on 28 February 2003 (2003 Hearing). The Applicant was represented by counsel (Jackman) at this hearing. After this hearing, the IAD found the Applicant had again breached the conditions of the stay. The IAD found he had failed to report a charge and conviction under the *Highway Traffic Act* RSO 1990 c H-8 (HTA). He also had not reported two charges of mischief, though the IAD noted he later corrected this omission in a subsequent report. The IAD also found he had not submitted a plan for paying his traffic fines and had not made progress toward paying them, as he had been ordered to do. It also found he had driven while his driver's license was suspended, in breach of the conditions imposed on him after the previous hearing. The IAD extended the stay for another two years, noting that the Applicant was at risk of removal if he did not meet his conditions.

[7] The Applicant appeared before the IAD a fourth time on 25 July 2005 (2005 Hearing), where he was also represented by counsel (Green). In the period between the 2003 Hearing and the 2005 Hearing, the Applicant had been charged with two counts of assault and two counts of

threatening assault. He was released on bail, but was charged and convicted of three counts of breach of a recognizance; the IAD found this was a breach of the condition to keep the peace and be of good behaviour. The IAD took a dim view of the Applicant's breaches of his stay, but found he should not be removed from Canada. The IAD stressed in its reasons that there was a limit to the behaviour it would tolerate, cautioning the Applicant that if he breached his conditions again, this would indicate he could not be trusted. The IAD extended the stay for a further two years with similar conditions to those imposed before. However, it required him to report in person with written reports every six months.

[8] The Applicant's fifth appearance before the IAD was on 2 May 2008 (2008 Hearing). He was represented by counsel again (Baqi). This review was to be an end of stay review, but Applicant's and Respondent's counsel jointly recommend the stay be extended for another year so he could deal with new criminal charges. The IAD extend the Applicant's stay on condition he make substantial efforts to pay of his outstanding fines.

[9] The Applicant appeared before the IAD again on 26 November 2009 without counsel (2009 Hearing). The IAD extended his stay for a year on the same conditions and recommended reconsideration for 26 November 2010.

[10] The IAD issued the Applicant a Notice of Reconsideration of Appeal under subsection 68(3) of the Act and subsection 26(3) of the *Immigration Appeal Division Rules* SOR 2002-230 (IAD Rules). This notice required him to indicate whether he had complied with the conditions of his stay. The Applicant informed the IAD on 29 August 2010 that he had not complied with the conditions because he had again failed to comply with a recognizance. The Respondent provided the Applicant with disclosure on 23 December 2010 which showed outstanding charges against him

and the outstanding amount of fines which had been levied against him. The Respondent requested an oral review of the Applicant's stay, so the IAD scheduled a hearing for 25 March 2011 and notified the Applicant of this hearing on 25 January 2011.

[11] The IAD notified the Applicant on 31 March 2011 it had scheduled another hearing for 28 June 2011 (2011 Hearing). The Applicant was unrepresented at this hearing, which resulted in the Decision under review in this case.

[12] After the 2011 Hearing, the IAD considered the Applicant and Respondent's submissions. On 5 August 2011, the IAD dismissed the Applicant's appeal and cancelled his stay of removal. There is currently no stay in place to prevent the Applicant's removal from Canada.

DECISION UNDER REVIEW

Adjournment Request

[13] At the 2011 Hearing, the Applicant asked the IAD to adjourn to a later date so he could retain counsel on his application. This request was denied. The IAD considered section 48 of the IAD Rules and the IAD *Chairpersons Guideline 6 – Scheduling and Changing the Date or Time of a Proceeding* (Guideline 6) and found the Applicant had had more than enough time to prepare for the hearing and was aware of his obligation to do so. He was notified of the 2011 Hearing on 31 March 2011, but had made no efforts to investigate or retain counsel, and had said he last spoke with a lawyer about his appeal approximately a year before the 2011 Hearing.

[14] The IAD also noted the Applicant was facing several outstanding criminal changers, including trafficking in a controlled substance under paragraph 5(3)(*a*) of the *Controlled Drugs and*

Substances Act SC 1996 c 19 (CDSA). The Applicant was unable to tell the IAD the status of his trial, but the Certified Tribunal Record (CTR) indicates it was scheduled for 15 June 2011 – two weeks before the 2011 Hearing. The IAD also noted he was scheduled to be tried on other charges under the CDSA and the HTA. The Applicant said his former counsel told him his outstanding criminal charges would have to be dealt with before the IAD could deal with his stay, but the IAD found its review of his stay was not tied to those charges.

[15] The IAD found it was not appropriate to adjourn the 2011 Hearing because of other proceedings, noting the Applicant had the right of appeal to the IAD before removal. It found the Applicant's situation was a serious matter which needed to be adjudicated as soon as practically possible. The IAD also said an acquittal would have no effect on its decision to extend the stay. Further, if he were convicted under subsection 5(3) of the CDSA, subsection 68(4) of the Act operated to automatically cancel any stay of removal.

[16] Further, the IAD found the Applicant had appeared unrepresented before the IAD in the past and the Respondent would be prejudiced by an adjournment. It found the Respondent had an interest in a swift decision. The IAD noted the Applicant's appeal had been on its roster since 1999 and he had kept appearing before the IAD only because he kept breaching his conditions.

Analysis

[17] The IAD reviewed the history of the Applicant's deportation order and proceedings before it before turning to the merits of his appeal.

[18] The IAD said the onus to show special relief was merited lay on the Applicant. It also noted that it had to consider the best interests of any child affected by the Decision and the factors set out by the IAD in *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IADD No 4 and confirmed by the Supreme Court of Canada in *Chieu v Canada (Minister of Citizenship and Immigration)* 2002 SCC 3. Of the *Ribic* factors, the IAD pointed to the seriousness of the offences leading to the deportation order, the possibility of rehabilitation, time spent in Canada, and hardship caused by removal from Canada. The IAD also noted that it could consider any other unusual circumstances.

Offence Leading to Deportation Order

[19] The IAD found the Applicant's convictions, including the offence which initially brought him to the attention of immigration authorities, weighed against special relief. The IAD noted the Applicant had been convicted of trafficking in marijuana and found this was a serious offence as it bore a potential life sentence. The IAD also noted he had been convicted of assault with a weapon, possession of a prohibited weapon, and obstruction of a peace officer. The Applicant had also been convicted of several offences under the HTA for which he had outstanding fines in excess of $2000. He also had admitted to not disclosing income to the Ontario Works program in the face of his obligation to do so. The IAD found the Applicant had also breached a condition of his stay because he had not met his obligation to report income and charges for possession of a controlled substance to the Respondent.

Prospects for Rehabilitation

[20] The IAD also found the Applicant's prospects for rehabilitation were minimal and did not weigh in favour of extending his stay in Canada. It found that he had made few efforts to rehabilitate, noting he had continued to accumulate criminal convictions and breach the conditions of his stay. The IAD found the degree of the Applicant's non-compliance with his conditions was great, given his failure to report his new charges, use of drugs, and increased traffic fines. It referred to its earlier decision in which it said that

> The [Applicant] needs to understand that he cannot blithely continue to abuse the system, a system that has repeatedly offered him a further chance to remain in Canada. The [IAD] is of the opinion that if the [Applicant] was to breach his stay again that he should have his appeal dismissed regardless of whether he is determined to be an immediate threat to Canadian society or not.

[21] The IAD said rehabilitation is demonstrated by both the absence of criminality and demonstration of respect for Canada and her laws. It found the Applicant had consistently demonstrated a disregard for his stay conditions through his continuing involvement in criminal activities and offences under the HTA.

Establishment

[22] The IAD found the Applicant was not well established in Canada. It looked at the changes which had occurred in his life during his time here. Although at the time of his initial deportation order he had a spouse, children, and a job, the Applicant no longer had any of these things. He had not submitted any letters of support and no one attended the 2011 Hearing on his behalf. The IAD found the Applicant did not have a significant recent employment history, although he said he had

some undeclared cash income. He also did not have any plan to work, other than relying on cash jobs and social assistance. Although the Applicant had limited assets, he also had no debts outside of his traffic fines.

Best Interests of the Children

[23] The IAD also found the Applicant's children would not be significantly negatively impacted by his removal and their interests did not weigh in favour of extending his stay. It noted that he has little contact with the mothers of his five children. Although he said he provided financial support to his children when asked to do so, he was unable to explain how he had managed to do this given his reliance on social assistance. The IAD found any financial support he provided to his children was limited and not essential to their well-being.

Establishment and Hardship

[24] The IAD also found that, although he would miss his family in Canada if he were removed, this emotional hardship weighed only marginally in the Applicant's favour. It noted that he had lived in Canada for 28 years but he was also familiar with the culture in Jamaica.

[25] The IAD found the Applicant's lack of meaningful establishment in Canada, his continued non-compliance with its orders, and non-compliance with the conditions of his stay weighed against granting his appeal. His continued inability to comply with conditions also militated against continuing his stay. The IAD found no purpose would be served by extending the Applicant's stay in Canada, there was no hope his behaviour would change, and it did not believe he was able to comply with the conditions of his stay.

Humanitarian and Compassionate Considerations

[26] Although Humanitarian and Compassionate considerations were present in his case, the IAD found they did not overcome other negative aspects. The Applicant had failed to establish that his family members would face hardship if he were removed, and the best interests of his children did not weigh in favour of granting a further extension. The IAD found the Applicant has continued to flaunt authorities at other levels of government. He has not investigated a repayment plan for his traffic fines and has not declared his cash income to the Ontario Works program.

Conclusion

[27] The IAD concluded the Applicant had not established sufficient humanitarian and compassionate grounds to warrant special relief. It found that extending his stay would be an invitation for him to fail again and the evidence did not support such an extension. The IAD therefore refused the Applicant's appeal and cancelled the stay of his removal.

STATUTORY PROVISIONS

[28] The following provisions of the Act are applicable in this proceeding:

66. After considering the appeal of a decision, the Immigration Appeal Division shall	**66.** Il est statué sur l'appel comme il suit :
(*a*) allow the appeal in accordance with section 67;	*a*) il y fait droit conformément à l'article 67;
(*b*) stay the removal order in accordance with section 68; or	*b*) il est sursis à la mesure de renvoi conformément à l'article 68;

(*c*) dismiss the appeal in accordance with section 69.

c) il est rejeté conformément à l'article 69.

[…]

[…]

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.

(2) Where the Immigration Appeal Division stays the removal order

(*a*) it shall impose any condition that is prescribed and may impose any condition that it considers necessary;

(*b*) all conditions imposed by the Immigration Division are cancelled;

(*c*) it may vary or cancel any non-prescribed condition imposed under paragraph (*a*); and

(*d*) it may cancel the stay, on application or on its own initiative.

(2) La section impose les conditions prévues par règlement et celles qu'elle estime indiquées, celles imposées par la Section de l'immigration étant alors annulées; les conditions non réglementaires peuvent être modifiées ou levées; le sursis est révocable d'office ou sur demande.

(3) If the Immigration Appeal Division has stayed a removal order, it may at any time, on application or on its own initiative, reconsider the appeal under this Division.

(3) Par la suite, l'appel peut, sur demande ou d'office, être repris et il en est disposé au titre de la présente section.

[29] The following provisions of the IAD Rules are also applicable in this case:

43. (1) An application must be made in writing and without delay unless	**43.** (1) Toute demande est faite sans délai par écrit sauf si :
(*a*) these Rules provide otherwise; or	*a*) les présentes règles indiquent le contraire;
(*b*) the Division allows it to be made orally at a proceeding after considering any relevant factors, including whether the party with reasonable effort could have made the application in writing before the proceeding.	*b*) la Section permet qu'elle soit faite oralement pendant une procédure après qu'elle ait considéré tout élément pertinent, notamment le fait que la partie n'aurait pu, malgré des efforts raisonnables, le faire par écrit avant la procédure.
[…]	[…]
48. (1) A party may make an application to the Division to change the date or time of a proceeding.	**48.** (1) Toute partie peut demander à la Section de changer la date ou l'heure d'une procédure.
(2) The party must	(2) La partie :
(*a*) follow rule 43, but is not required to give evidence in an affidavit or statutory declaration; and	*a*) fait sa demande selon la règle 43, mais n'a pas à y joindre d'affidavit ou de déclaration solennelle;
(*b*) give at least six dates, within the period specified by the Division, on which the party is available to start or continue the proceeding.	*b*) indique dans sa demande au moins six dates, comprises dans la période fixée par la Section, auxquelles elle est disponible pour commencer ou poursuivre la procédure.
(3) If the party's application is received by the recipients two working days or less before the date of a proceeding, the party must appear at the proceeding	(3) Dans le cas où les destinataires reçoivent la demande deux jours ouvrables ou moins avant la procédure, la partie doit se présenter à la

and make the request orally.

procédure et faire sa demande oralement.

(4) In deciding the application, the Division must consider any relevant factors, including

(4) Pour statuer sur la demande, la Section prend en considération tout élément pertinent. Elle examine notamment:

(*a*) in the case of a date and time that was fixed after the Division consulted or tried to consult the party, any exceptional circumstances for allowing the application;

a) dans le cas où elle a fixé la date et l'heure de la procédure après avoir consulté ou tenté de consulter la partie, toute circonstance exceptionnelle qui justifie le changement;

(*b*) when the party made the application;

b) le moment auquel la demande a été faite;

(*c*) the time the party has had to prepare for the proceeding;

c) le temps dont la partie a disposé pour se préparer;

(*d*) the efforts made by the party to be ready to start or continue the proceeding;

d) les efforts qu'elle a faits pour être prête à commencer ou à poursuivre la procédure;

(*e*) in the case of a party who wants more time to obtain information in support of the party's arguments, the ability of the Division to proceed in the absence of that information without causing an injustice;

e) dans le cas où la partie a besoin d'un délai supplémentaire pour obtenir des renseignements appuyant ses arguments, la possibilité d'aller de l'avant en l'absence de ces renseignements sans causer une injustice;

(*f*) the knowledge and experience of any counsel who represents the party;

f) dans le cas où la partie est représentée, les connaissances et l'expérience de son conseil;

(*g*) any previous delays and the reasons for them;

g) tout report antérieur et sa justification;

(*h*) whether the time and date fixed for the proceeding were peremptory;

h) si la date et l'heure qui avaient été fixées étaient péremptoires;

(*i*) whether allowing the application would unreasonably delay the proceedings; and	*i*) si le fait d'accueillir la demande ralentirait l'affaire de manière déraisonnable;
(*j*) the nature and complexity of the matter to be heard.	*j*) la nature et la complexité de l'affaire.

ISSUES

[30] The Applicant raises the following issues in this application:

a. Whether the IAD breached his right to procedural fairness by not granting him an adjournment;

b. Whether the IAD's decision not to grant an adjournment was unreasonable.

STANDARD OF REVIEW

[31] The Supreme Court of Canada in *Dunsmuir v New Brunswick* 2008 SCC 9, 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 well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[32] Whether the IAD denied the Applicant his right to counsel is an issue of procedural fairness (see *Khan v Canada (Minister of Citizenship and Immigration)* 2010 FC 22 at paragraph 29). In *Canadian Union of Public Employees (C.U.P.E.) v Ontario (Minister of Labour)* 2003 SCC 29 (QL) the Supreme Court of Canada held at paragraph 100 that "It is for the courts, not the Minister, to provide the legal answer to procedural fairness questions."

The Supreme Court of Canada also held in *C.U.P.E.* that, where a decision maker acts contrary to a party's legitimate expectation, the reviewing court can grant procedural relief (see paragraph 131) Further, the Federal Court of Appeal in *Sketchley v Canada (Attorney General)* 2005 FCA 404 at paragraph 53 held that the "procedural fairness element is reviewed as a question of law. No deference is due. The decision-maker has either complied with the content of the duty of fairness appropriate for the particular circumstances, or has breached this duty." The standard of review on the first issue is correctness.

[33] In *Canada (Minister of Citizenship and Immigration) v Fox* 2009 FC 987, Justice Yves de Montigny held the standard of review with respect to the IAD's decision to grant an adjournment was reasonableness (at paragraph 35). Further, when deciding whether to grant an adjournment, the IAD must balance the factors set out in subsection 48(4) of the IAD Rules. This is a question of mixed fact and law on which the standard of review is generally reasonableness (see *Dunsmuir*, above, at paragraph 51). The standard of review on the second issue is reasonableness.

[34] 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 paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa* 2009 SCC 12 at paragraph 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."

ARGUMENTS

The Applicant

Breach of Procedural Fairness

[35] The Applicant says he had a legitimate expectation that his hearing would be adjourned so that his outstanding criminal charges could be disposed of before his appeal before the IAD was concluded. When the IAD did not meet this legitimate expectation, it denied him his right to counsel and breached his right to procedural fairness. He points out that the IAD had adjourned the hearing on 25 March 2011 so that his criminal charges could be dealt with. The adjournment the IAD granted on 25 March 2011 created a legitimate expectation that the 2011 Hearing would also be adjourned because his criminal charges were still outstanding.

[36] In the IAD's reasons given after the 2008 Hearing, it said that

> Given the serious nature of the new criminal charges, the panel finds that, in all the circumstances of this case, the joint submission is not unreasonable. Accordingly, the [IAD] orders that the stay of the deportation order will be continued for a further period of one amended year on the conditions as agreed by the [Applicant] and his counsel.

[37] The Applicant's previous experience before the IAD gave him a legitimate expectation that his appeal would not proceed at the 2011 Hearing. Given this legitimate expectation, he had not retained counsel. He notes that he has retained counsel in the past and points to *C.U.P.E.*, above, where the Supreme Court of Canada held at paragraph 131 that

> The doctrine of legitimate expectation is "an extension of the rules of natural justice and procedural fairness": *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 557. It looks to the conduct of a Minister or other public authority in the exercise of a discretionary power including established practices, conduct or

> representations that can be characterized as clear, unambiguous and unqualified, that has induced in the complainants (here the unions) a reasonable expectation that they will retain a benefit or be consulted before a contrary decision is taken. To be "legitimate", such expectations must not conflict with a statutory duty. See: *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170; *Baker, supra*; *Mount Sinai, supra*, at para. 29; Brown and Evans, *supra*, at para. 7. Where the conditions for its application are satisfied, the Court may grant appropriate procedural remedies to respond to the "legitimate" expectation.

[38] The Applicant also says his previous counsel told him the 2011 Hearing would be adjourned so that his outstanding charges could be dealt with. In concert with his past experience before the IAD, this created a legitimate expectation that the 2011 Hearing would be adjourned. The IAD breached his right to procedural fairness when it acted contrary to his legitimate expectation.

Unreasonable Denial of Adjournment

[39] The IAD's denial of his request for an adjournment was unreasonable because it did not consider the nature and complexity of the matter it was to hear. The IAD said in its reasons that it considered the factors set out in section 48 of the IAD Rules and Guideline 6. The Applicant also notes the IAD said the information he said he received from his previous counsel – that the 2011 Hearing would be postponed to deal with his criminal charges – was incorrect.

[40] The Applicant asserts that his application is complex; it has involved multiple sittings of the IAD over the eleven years he has been subject to the Deportation Order. He points to *Ventura v Canada (Minister of Citizenship and Immigration)* 2011 FC 386, at paragraph 4, where Justice Douglas Campbell held that

> In my opinion, the statement that a hearing set to consider humanitarian and compassionate considerations is "not complex" is exceptionally unreasonable. It is hard to imagine a more complex

> subject than removing a father from his children, or, rather, removing the children from their father, regardless of his past conduct.

[41] The Applicant says his case is similar to *Ventura*, in that he is a long-term resident of Canada with a criminal record, a spotty employment record, and poor education. He has also had many proceedings before the IAD, just as Ventura did. Given the similarity of his case to *Ventura*, the Applicant says the IAD should have found his case is complex and granted him an adjournment on this basis. It was unreasonable for the IAD to expect the Applicant to proceed in a complex matter such as this without counsel.

The Respondent

No Legitimate Expectation

[42] The Respondent says the Applicant could not have a legitimate expectation the 2011 Hearing would be adjourned based upon the IAD's past conduct or the advice of his previous counsel. The IAD's conduct in this case does not meet the standard for creating a legitimate expectation which the Supreme Court of Canada articulated in *C.U.P.E.*, above. There is no evidence before this Court of a clear, unambiguous and unqualified past practice on the part of the IAD to adjourn hearings pending resolution of criminal matters. The Applicant ought to be aware from his past experience that pending criminal charges do not present an obstacle to continuing hearings before the IAD.

[43] The Respondent also says the Applicant's past experience with the IAD could not create a legitimate expectation the 2011 Hearing would be adjourned. He was granted an extension of his stay after the 2008 Hearing in response to a joint submission from his and Respondent's counsel. In

March 2011, the IAD granted an adjournment when the Applicant's criminal trial was scheduled to occur only two weeks after the IAD hearing. The IAD has also proceeded with hearings in the face of pending criminal charges against the Applicant. The 2003 Hearing occurred, notwithstanding pending criminal charges, as did the 2009 Hearing.

[44] Further, the Respondent notes the criminal charges on which the Applicant bases his legitimate expectation are the same charges which formed the basis for the extension of his stay in 2008 and the adjournment in March 2011. There was no evidence before the IAD of when the pending charges were to be dealt with, so there was nothing to support the Applicant's request for an adjournment.

[45] The Respondent also refers to an affidavit from Green, the Applicant's former counsel, in which she says she

> […] did not advise [the Applicant] that the [IAD] is obliged to postpone proceedings before it in order to allow for the final disposition of an Appellant's [sic] criminal charges however it is possible that I advised him that such postponements are often granted as in my experience representing both Appellants [sic] and the Minister before the Appeal Division, such an occurrence is not uncommon.

[46] Any comments Green may have made are insufficient to ground a legitimate expectation the 2011 Hearing would be postponed.

[47] Finally on this point, the Respondent says that gaps in the Applicant's evidence demonstrate he would not have had cause to rely on any expectation he may have had. The Applicant discovered after 25 March 2011 that his criminal trial was adjourned from April 2011 until 15 June 2011. Given that his criminal trial was scheduled to occur before the 2011 Hearing on 28 June 2011, he

could not have expected the IAD to postpone the 2011 Hearing because his charges would have been dealt with by the time the 2011 Hearing occurred. The Respondent says the Court can infer the Applicant did not know until after15 June 2011 that his criminal trial was put over until March 2012, and that he could have been prepared for the hearing.

No Breach of Procedural Fairness

[48] The Respondent also says the right to counsel is not absolute and the parties are responsible for ensuring counsel are available and ready to proceed (see *Mervilus v Canada (Minister of Citizenship and Immigration)* 2004 FC 1206 at paragraph 17). He also points to subsection 162(2) of the Act which provides the IAD "shall deal with all proceedings before it as informally and quickly as the circumstances and the considerations of fairness and justice permit." In this case, there was no breach of procedural fairness when the IAD did not grant the Applicant an adjournment. The Applicant was granted a postponement on 25 March 2011 in part so that he could retain counsel and he had no legitimate expectation the 2011 Hearing would be postponed.

[49] The onus was on the Applicant to demonstrate special relief was warranted, so he should have prepared for the 2011 Hearing himself or by retaining counsel. He had three months to do so, but took no steps to prepare. The IAD's reasons for not granting the adjournment show that it took into account all relevant considerations and show no breach of procedural fairness. The Applicant had successfully represented himself in the past and has not established that he was prejudiced by not having counsel at the 2011 Hearing. Contrary to the Applicant's assertion, the IAD considered the complexity of the matter at hand and, unlike in *Ventura*, the Applicant was capable of representing himself. The Applicant simply chose not to prepare for the 2011 Hearing.

The Applicant's Reply

[50] The Applicant admits he was aware from past proceedings that outstanding criminal charges are not a bar to the IAD continuing with a hearing. However, he says his legitimate expectation in this case was based on a clear decision by the IAD on 25 March 2011 that his hearing should be adjourned so his pending charges could be dealt with. The situation with respect to his outstanding charges was the same at the 2011 Hearing as it was when the IAD grated an adjournment on 25 March 2011, so his expectation the 2011 Hearing would be adjourned was legitimate.

[51] The Applicant also says he is not alleging a substantive right, but asking for past procedure to be followed. He disputes the Respondent's assertion he had not learned his criminal trial was postponed until 15 June 2011, saying his affidavit on judicial review shows the outstanding charges were to be tried in April 2011; that trial was then put over until 8 March 2012. The Applicant has known since April 2011 that his charges would not be dealt with until March 2012, so he had no reason to obtain counsel for the 2011 Hearing.

[52] The Applicant further says his case is indistinguishable from *Ventura*, in that both he and Ventura have low education, an unstable work history, a criminal record, a history of drug and alcohol abuse, and issues with responsibility.

The Respondent's Further Memorandum

[53] The Respondent says the doctrine of legitimate expectations cannot create substantive legal rights and does not fetter a decision makers' discretion. Further, legitimate expectations cannot conflict with statutory authority to mandate a particular result. Although the Applicant may have

believed the 2011 Hearing would be adjourned so that his pending charges would be dealt with, this does not amount to a legitimate expectation. Although past hearings had been adjourned for this reason, this was only the case when counsel on both sides had made a joint submission on the issue or there was evidence the outstanding charges would be before the court shortly. Further, his previous counsel's advice was not so unequivocal as to form the basis of a legitimate expectation.

No Breach of Fairness

[54] The Respondent relies on *Wagg v Canada* 2003 FCA 303, at paragraph 19, where the Federal Court of Appeal held that

> It is trite law that the decision as to whether to grant an adjournment is a discretionary decision, which must be made fairly (see *Pierre v. Minister of Manpower & Immigration*, [1978] 2 F.C. 849, at p. 851, cited with approval in *Prassad v. Canada (MEI)*, [1989] 1 S.C.R. 560, at para. 17). There is no presumption that everyone is entitled to an adjournment. The Court will not interfere in the refusal to grant an adjournment unless there are exceptional circumstances (see *Siloch v. Canada*, [1993] F.C.J. No. 10 (F.C.A.)). Similarly, while it is in both the Court's and the litigant's best interests to have parties represented by counsel, the right to counsel is not absolute. In *Asomadu-Acheampong v. Canada (Minister of Employment and Immigration)* (1993), 69 F.T.R. 60, [1993] F.C.J. No. 984 (F.C.T.C.), Joyal J. said the following in response to a submission that the right to counsel was unqualified: [para8] I respectfully beg to disagree. A right to counsel is no more absolute than the right of a tribunal to determine its own process. In the event that there is a conflict between the two, I believe that for the right to counsel to predominate over the other, regard must be had to surrounding circumstances to determine if in fact an applicant has suffered any prejudice. In my view, the right to counsel is but an adjunct to the doctrine of natural justice and fairness, to the rule of audi alteram partem, to the rule of full answer and defence and to similar rules which have long developed to assure that the rights and obligations of any person subject to any kind of inquiry are to be adjudged and determined according to law. Unless there be found a breach of any such rule, resulting in some prejudice to a person, it cannot be said that a refusal to adjourn deprives a tribunal of its jurisdiction or is grounds to quash its decision.

[55] In *Wagg*, the Federal Court of Appeal held it was not an error for the Tax Court not to grant an adjournment so the appellant could consult with counsel. In the instant case, the Applicant had time to retain counsel but did not do so, so the IAD's refusal of his request for an adjournment does not require the Court to intervene.

[56] Although subsection 48(4) of the IAD Rules sets out the factors the IAD must consider, it is not required to mention all of them in its reasons. The Applicant essentially chose to represent himself and he must be held to this choice. Though he argues his case was so complex as to require the assistance of Counsel, he had successfully represented himself in the past; the IAD also asked him specific, directed questions and he was given the opportunity to make submissions. The Applicant disagrees with the IAD's Decision, but this does not show that a breach of procedural fairness occurred.

ANALYSIS

[57] In the Decision, the IAD dealt with the Applicant's adjournment request as follows:

> [5] At the outset of the hearing, the appellant submitted an oral application requesting another date be set for his hearing in order for him to retain legal representation.
>
> [6] When the appellant was questioned by the panel as to why he failed to retain legal assistance for today's hearing, the appellant submitted it was because he had spoken with one of his former legal representatives, "*a long time ago*" or "*within the last year*" at which time his former counsel informed him that when there was a matter outstanding before a provincial court, that matter needed to be dealt with before having a hearing before the IAD or "*something of that sort*", and on that basis he did not bother to investigate or retain legal assistance for today's IAD hearing.
>
> [7] The panel carefully considered Rule 48 and Guideline 6 of the Immigration Appeal Division (IAD) with respect to postponements and determined among other reasons that the

appellant has had more than adequate time to prepare for his hearing and was aware of his obligations to prepare, including retaining legal assistance and submitting documents.

[8] In making this decision, the panel notes the appellant stated he was aware Member Sherman had provided him with a previous adjournment on March 25, 2011, partly to deal with his other charges and partly to retain legal assistance.

[9] The panel also considers that the appellant has a very lengthy hearing history before the IAD, dating back to 1999 when he was provided with his initial stay. The history of the appellant's appeals, stay orders and reviews before the IAD follows, including sittings when he was and was not represented.

[…]

[23] There are numerous outstanding criminal charges facing the appellant that include trafficking of a substance pursuant to section 5(3)(a) of the *Controlled Drugs and Substances Act*, (CDSA). He was scheduled for trial on June 15, 2011 but could not update on its status when asked by the panel. The appellant was also scheduled for trials in July 2011, December 2011, for his other charges that include two possessions of a substance under CDSA, and two failures to comply with bail, in addition to numerous charges under the *Highway Traffic Act*.

[24] It is unfortunate that the appellant has allegedly received erroneous information, allegedly from one of his former lawyers that this oral review of his most recent extension on his removal order ties to his criminal charges. It does not.

[25] Although the appellant indicates he is not prepared to proceed today, the panel is not granting his request for another date in order for him to retain legal assistance. In reaching this decision, the appellant was informed on or about March 31, 2011 with Notice to Appear on June 28, 2011 for his hearing before the IAD. He has made no efforts to investigate, let alone retain any legal assistance, given his admission he last spoke with legal representatives about this appeal about a year ago.

[26] It is not appropriate to adjourn this proceeding for different proceedings occurring simultaneously or in the future in other court systems. The appellant has been issued a removal order because of his prior criminal conviction. He has the right of appeal to this Tribunal prior to removal. That is a serious matter which needs to be

> adjudicated as soon as practically possible. This type of appeal is always given priority on the IAD schedule. In addition, if the appellant is acquitted by the criminal court, it has no effect on the panel's decision.
>
> [27] Should the appellant be convicted of the offence pursuant to section 5(3) of the CDSA, then the section 197 of the former *Immigration Act* in subsection 68(4) of IRPA operates to automatically cancel any stay of removal which may be imposed. Although the panel understands the appellant's desire to have legal representation, the panel notes the appellant has appeared independently before the IAD on previous occasions about this appeal, including in 2000 before Member Kelley.
>
> [28] The appellant ought not to be allowed to circumvent the correct application of the IRPA by way of another adjournment. In the panel's view there would be prejudice to the Minister in allowing such an adjournment. As an equal party to this proceeding, the Minister's interest in a swift decision in this matter and ultimately the ability to remove the appellant if the appeal is dismissed is acknowledged. This is recognized in the objectives of the immigration legislation that includes the security of the Canadian public. An adjournment of the proceeding to allow additional evidence that may include any criminal court judgments will result in additional delays, (for which the appellant had already been provided in March, 2011) and potentially results in a cancellation or a nullity of the effect of sub-section 68(4). This appeal has been on the IAD roster since 1999, and the appellant has now had six appearances before the IAD from his initial stay in 1999 and the subsequent extensions spending twelve years, simply because the appellant has continuously breached his conditions. For these reasons, the panel denied the appellant's request for an adjournment.

[58] The right to counsel is not absolute. The absence of counsel only renders the Decision invalid when that absence results in a denial of a fair hearing. See *Mervilus*, above.

[59] The Federal Court of Appeal in *Wagg*, above, at paragraph 19 gave the following guidance with respect to adjournment requests:

> [The] decision as to whether to grant an adjournment is a discretionary decision, which must be made fairly […] There is no presumption that everyone is entitled to an adjournment. The Court

> will not interfere in the refusal to grant an adjournment unless there are exceptional circumstances […] Similarly, while it is in both the Court's and the litigant's best interests to have parties represented by counsel, the right to counsel is not absolute. [citations omitted]

[60] Subsection 48(4) of the IAD Rules lists the factors to be considered in assessing applications to change the date or time of the proceeding. While the Rules indicate that any relevant factors must be considered, this Court has held that the IAD is not required to list all of the factors in subsection 48(4) of the Rules. See *Omeyaka v Canada (Public Safety and Emergency Preparedness)* 2011 FC 78 at paragraph 29 and *Julien v Canada (Minister of Citizenship and Immigration)* 2010 FC 351 at paragraph 30.

[61] The IAD considered the Applicant's request for a postponement to retain counsel and denied it. In rendering its Decision on the postponement request, the IAD considered the applicable Rules and Guidelines. The IAD specifically noted the following:

a. The date on which the Applicant was informed of the 28 June 2011 hearing date;

b. The prior postponement;

c. The seriousness of the matter;

d. The lack of impact if the Applicant was acquitted of his charges currently before the criminal courts;

e. The Applicant's appearance before the IAD at previous hearings without counsel;

f. Prejudice to the Minister as a result of the Minister's interest in a swift decision in the matter; and

g. The length of time the appeal had been on the IAD roster, and why.

[62] While the IAD appropriately instructed itself on the applicable law in deciding whether or not to grant the adjournment request, a review of the transcript reveals that it based its Decision upon important and material misapprehensions of fact and failed to take into account other highly material considerations.

[63] The CTR does not show what occurred on 25 March 2011 which led the IAD to postpone the hearing until June 2011. However, the Applicant has sworn in his affidavit on judicial review that the IAD granted this postponement so that his outstanding charges could be dealt with. We do not know if the Respondent objected to this postponement. However, the fact the IAD granted a postponement on that day indicates the Respondent either did not object or, if he did, the IAD found his objections unpersuasive.

[64] Because the IAD postponed his hearing on 25 March 2011, the Applicant says that he came to the 28 June 2011 hearing expecting that a further postponement would be granted because the same criminal charges that had formed part of the reasons for granting the 25 March 2011 postponement had still not been dealt with. Also, he says he came to the 2011 Hearing without a lawyer because he thought the postponement would be granted.

[65] It is not necessary for me to decide whether or not the 25 March 2011 postponement amounts to the kind of representation that gives rise to a "legitimate expectation" in law. What is important is that the Applicant had already been granted a postponement so that his criminal charges could be dealt with. It was not unreasonable for him to conclude that he would receive a further postponement for the same reasons. In other words, the Applicant was not dragging his feet or simply trying to delay the full hearing of his case. He had good reason to believe that the IAD

would not want to deal with the appeal while the criminal charges were still not dealt with even if, as the IAD now says, the outcome of these changes would not affect its decision.

[66] The transcript shows that, once he learned that the IAD wanted to proceed even though the criminal charges had not been dealt with in other proceedings, the Applicant requested a short adjournment so that he could retain counsel. Once again, he was not dragging his feet.

[67] The transcript also shows that Minister's counsel "was willing to concede to a postponement" and agreed with the Applicant that the matter was "complex," so that it is entirely unfair for the IAD to rely upon "prejudice to the Minister" as one of the reasons for granting the adjournment, or to suggest that because the Applicant had appeared by himself before the IAD on a previous occasion that he did not require counsel to deal with this very important and complex hearing.

[68] So, any adjournment would have been short, there was no prejudice to the Minister, the Minister agreed the matter was complex, and this was a very important decision for the Applicant for which he legitimately thought he needed legal representation.

[69] The IAD also found the Applicant could proceed with the 2011 Hearing because he had represented himself before it in the past without taking into account the nature of the proceedings in which the Applicant had represented himself. When he represented himself at the 2000 review, all that was at issue were his failure to report on two occasions, his failure to file income tax returns and two outstanding charges under the HTA. The 2009 Hearing – where the Applicant represented himself again – appears to have proceeded summarily, without submissions from the Applicant or the Respondent. In contrast to these relatively simple proceedings, the 2011 Hearing involved

multiple new charges, a longer criminal history, and a more complicated family situation. It was not reasonable for the IAD to draw a parallel between the simple proceedings where the Applicant represented himself with the more complex hearing in 2011.

[70] Rather than focus on these important factors when applying Rule 48 and Guideline 6, the IAD invented reasons for not granting the adjournment that do not stand up to scrutiny. The Applicant was not attempting to "circumvent the correct application of the IRPA by way of another adjournment." All he wanted was a brief adjournment so that he could retain legal counsel to assist him with what is likely to be one of the most important decisions in his life. And there was no prejudice to the Minister, who agreed to the adjournment.

[71] The IAD cannot be faulted for wanting to get on with the appeal, but, given the long history of this matter and the immediate context of the request for an adjournment, it seems to me as though this is one of those special occasions where the refusal was unreasonable, and amounts to a breach of procedural fairness.

[72] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is allowed. The decision is quashed and the matter is returned for reconsideration by a differently constituted IAD.
2. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT

dNAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-5978-11
STYLE OF CAUSE:	**MARK ANTHONY BELL**
	- and -
	THE MINISTER CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 29, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	HON. MR. JUSTICE RUSSELL
DATED:	June 19, 2012

APPEARANCES:

Joel Sandaluk	**APPLICANT**
Sharon Stewart Guthrie	**RESPONDENT**

SOLICITORS OF RECORD:

Mamann, Sandaluk Barristers and Solicitors Toronto, Ontario	**APPLICANT**
Myles J. Kirvan, Q.C. Deputy Attorney General of Canada	**RESPONDENT**