

Federal Court



Cour fédérale

Date: 20170123

Docket: IMM-1759-16

Citation: 2017 FC 80

Toronto, Ontario, January 23, 2017

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

ZAVION FORDE

Applicant

and

**THE MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr Zavion Forde arrived in Canada from Jamaica in 2000 when he was 14. He was subsequently convicted of a sexual offence and ordered deported. However, Mr Forde's deportation was stayed in 2010 for a period of 5 years. He was later convicted of further offences, and the stay of his deportation was cancelled.

[2] Mr Forde appealed the removal order to the Immigration Appeal Division. After a hearing, the IAD dismissed his appeal. Mr Forde seeks to quash the IAD's decision arguing that he was treated unfairly and that the IAD did not take adequate account of the best interests of his children. He also contends that the IAD applied the wrong test and failed to evaluate the risks he would face if he returned to Jamaica.

[3] Mr Forde also argues that he is entitled to a new hearing because of a gap in the transcript of the proceedings before the IAD. The gap relates to about one hour of Mr Forde's examination-in-chief. He maintains that the absence of a full transcript impairs his ability to challenge the IAD's adverse credibility findings against him.

[4] I can find no basis on which to overturn the IAD's decision or order a new hearing. Having reviewed the entire record, I am satisfied that Mr Forde was treated fairly and that the IAD gave sufficient consideration to the best interests of his children. In addition, the gap in the transcript has not interfered with Mr Forde's ability to challenge the IAD's decision on this judicial review. Accordingly, I must dismiss this application for judicial review.

[5] There are five issues:

1. Did the IAD treat Mr Forde unfairly?
2. Did the IAD apply the wrong test?
3. Did the IAD give adequate consideration to the best interests of Mr Forde's children?

4. Did the IAD fail to consider the risks to Mr Forde in Jamaica?
5. Did the gap in the transcript impede Mr Forde's ability to seek judicial review of the IAD's decision?

II. Issue One – Did the IAD treat Mr Forde unfairly?

[6] Mr Forde maintains that the IAD breached an undertaking to consider evidence that he offered to provide after the hearing.

[7] The record does not bear out Mr Forde's position.

[8] At the end of the hearing, Mr Forde's counsel asked for an opportunity to provide proof that Mr Forde had completed a Partner Assault Response Program (PARS). While the IAD was concerned that the evidence had not already been provided and that there would be no opportunity for cross-examination, it nevertheless agreed that the document could be attached to counsel's forthcoming written submissions.

[9] In fact, counsel sent additional documents to the IAD after the hearing. Mr Forde contends that the IAD made a general commitment to consider additional evidence, not just his PARS document, so it should have evaluated that other evidence. The record clearly shows that the IAD agreed, reluctantly, to receive evidence about the PARS program. There is no support for Mr Forde's contention that the IAD promised to consider any further evidence that he might wish to provide.

III. Issue Two – Did the IAD apply the wrong test?

[10] Mr Forde argues that the IAD erred by approaching his hearing as if it was a fresh assessment of the factors that could justify a stay of removal. Rather, he says, the IAD should have accepted that the original stay was justified and merely considered whether there was new evidence showing that the stay should be cancelled.

[11] I disagree.

[12] The IAD properly considered all of the relevant evidence in deciding whether another stay of removal was justified. The burden fell on Mr Forde to persuade the IAD that a further stay should be imposed, and he failed to do so.

IV. Issue Three – Did the IAD give adequate consideration to the best interests of Mr Forde’s children?

[13] Mr Forde submits that the IAD gave only cursory attention to the interests of his children and also arrived at an unreasonable conclusion that their interests would not be seriously affected if he returned to Jamaica.

[14] In my view, the IAD adequately assessed the best interests of Mr Forde’s children.

[15] The IAD considered the amount of time Mr Forde spends with his children and how much financial support he is able to provide. It noted the inconsistencies in Mr Forde’s testimony

in these areas. It also observed that, in light of his criminal record, Mr Forde may not represent a good role model for his children.

[16] The IAD's analysis and conclusions were not unreasonable on the evidence before it.

V. Issue Four – Did the IAD fail to consider the risks to Mr Forde in Jamaica?

[17] Mr Forde argues that the IAD failed to respond to his testimony in which he expressed his fear of harm or death in Jamaica.

[18] I disagree.

[19] Mr Forde presented little evidence about conditions in Jamaica. The IAD specifically commented on the fact that Mr Forde had not addressed this issue in any serious way. The IAD was bound to respond meaningfully to the evidence before it. However, when little evidence is supplied, the IAD cannot be faulted for providing only a brief analysis.

VI. Issue Five – Did the gap in the transcript impede Mr Forde's ability to seek judicial review of the IAD's decision?

[20] The existence of a gap in the record does not amount to a breach of procedural fairness on its own. The question is whether the applicant's ability to challenge the decision-maker's findings has been compromised (*Agbon v Canada (Minister of Citizenship and Immigration)*, 2004 FC 356 at para 3).

[21] In some cases, for example, a gap in the record can be filled by way of an affidavit from the applicant or another person. In others, the passage of time or uncertainty about the content of the missing testimony will make an affidavit an inadequate substitute for the transcript.

[22] Here, the gap appears to be about an hour in duration. The transcript shows that the IAD took a short break after which the hearing abruptly ended. It is likely that the recording equipment was not restarted after the break. What is missing, therefore, is roughly an hour of Mr Forde's testimony-in-chief. When the hearing resumed some months later, Mr Forde was cross-examined by counsel for the Minister. Mr Forde's father then testified. Rather than making oral submissions at the end of the hearing, counsel agreed to provide the IAD with written submissions.

[23] Mr Forde contends that the missing testimony related to humanitarian and compassionate factors that might have justified allowing him to remain in Canada. The IAD ruled against him, finding that his testimony was vague in places and untruthful in others. He maintains that he cannot realistically challenge those findings given the gap in the transcript.

[24] As for a substituting affidavit, Mr Forde cannot recall what questions he was asked in chief or how he answered them.

[25] As mentioned, Mr Forde was permitted to make written submissions after the hearing. In those submissions, he made reference to the most favourable testimony before the IAD in arguing that he should be entitled to a further stay of his removal. I see no reference in those

submissions to any testimony that might have appeared in the missing transcript. Nor is there any specific reference in the IAD's reasons to any testimony that might have been given while the recording equipment was turned off.

[26] In the circumstances, therefore, a new hearing is not required.

VII. Conclusion and Disposition

[27] The IAD treated Mr Forde fairly and rendered reasonable conclusions on the evidence before it. Further, in the circumstances of this case, the lack of a full transcript did not prevent Mr Forde from challenging the adverse credibility findings made against him. A new hearing is not required. The application for judicial review is dismissed. Neither party proposed a question of general importance for me to certify, and none is stated.

JUDGMENT in IMM-1759-16

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed,
and no question of general importance is stated.

"James W. O'Reilly"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1759-16

STYLE OF CAUSE: ZAVION FORDE v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: NOVEMBER 2, 2016

JUDGMENT AND REASONS: O'REILLY J.

DATED: JANUARY 23, 2017

APPEARANCES:

Britt Gunn

FOR THE APPLICANT

Prathima Prashad

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Waldman & Associates
Barristers and Solicitors
Toronto, Ontario

FOR THE APPLICANT

William F. Pentney
Deputy Attorney General of
Canada
Toronto, Ontario

FOR THE RESPONDENT