

Federal Court



Cour fédérale

Date: 20191025

Docket: IMM-634-19

Citation: 2019 FC 1331

Ottawa, Ontario, October 25, 2019

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

**DENNIS STEPHEN, BY HIS LITIGATION
GUARDIAN HOWARD GOODMAN**

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Dennis Stephen is a citizen of Grenada. He is 59 years old. He has lived in Canada without status for more than 20 years. Through his litigation guardian Howard Goodman, Mr. Stephen seeks judicial review of a decision by an immigration officer [Officer] to refuse his

request to apply for permanent residence from within Canada on humanitarian and compassionate [H&C] grounds.

[2] Mr. Stephen retained an immigration consultant, Roy Kellogg, to assist him with his H&C application. Mr. Stephen has a severe speech impediment. His brother Humphry accompanied him during meetings with Mr. Kellogg, and answered questions on Mr. Stephen's behalf.

[3] Acting on Humphry's instructions, Mr. Kellogg did not include in the H&C application evidence of Mr. Stephen's long-term common-law relationship with a woman in Canada, or his role in the life of the woman's granddaughter. Mr. Kellogg also omitted information regarding Mr. Stephen's employment in Canada, and evidence of his speech impediment or any possible cognitive impairment.

[4] After the Officer refused his H&C application, Mr. Stephen retained a lawyer to assist him in this application for leave and judicial review. The lawyer gave Mr. Kellogg notice of his intention to argue before this Court that the representation he provided to Mr. Stephen in his H&C application was inadequate. Mr. Kellogg's response to the notice did not dispute the essential allegations against him. Instead, Mr. Kellogg deflected any blame to Humphry, whom he described as the "villain" in the situation.

[5] I am persuaded that Mr. Kellogg's representation of Mr. Stephen in the H&C application was clearly deficient and resulted in a miscarriage of justice. The application for judicial review is allowed.

II. Decision under Review

[6] The Officer acknowledged that Mr. Stephen has an extended family network in Canada, including his niece's daughter who is teaching him to read and write. The Officer ascribed only moderate weight to this factor, noting that Mr. Stephen also has a sister in Grenada on whom he could rely for emotional support.

[7] The Officer noted Mr. Stephen's ability to maintain employment and support himself in Canada, despite not being able to read or write. The Officer accepted that the high unemployment rate in Grenada may make it difficult for him to find work in that country, particularly given his speech impediment and the lack of educational opportunities. Nevertheless, the Officer found that Mr. Stephen had presented insufficient evidence of his degree of impairment or the absence of resources in Grenada.

[8] The Officer attributed low value to Mr. Stephen's lengthy stay in Canada, observing that this was not due to matters beyond his control. The Officer noted that Mr. Stephen had provided little evidence that he had ever worked legally or paid taxes in Canada.

III. Issues

[9] Mr. Stephen challenges both the fairness and the reasonableness of the Officer's decision. In light of my conclusion regarding the inadequacy of Mr. Stephen's representation respecting his H&C application, it is unnecessary to consider the latter.

IV. Analysis

[10] Whether the incompetence of counsel resulted in a miscarriage of justice is a question of procedural fairness, and is reviewable by this Court against the standard of correctness (*Mcintyre v Canada (Citizenship and Immigration)*, 2016 FC 1351 at para 16 [*Mcintyre*]; *Ghuri v Canada (Citizenship and Immigration)*, 2016 FC 548 at para 22).

[11] In order to establish that the incompetence of counsel resulted in a breach of procedural fairness, an applicant must meet the following tripartite test (*Mcintyre* at para 33):

- (a) the representative's alleged acts or omissions constituted incompetence;
- (b) 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
- (c) the representative was given notice and a reasonable opportunity to respond.

[12] The submissions prepared by Mr. Kellogg in support of the H&C application omitted any mention of Mr. Stephen's common-law relationship with a woman in Canada; his relationship with the woman's granddaughter; information regarding his employment in Canada, including reference letters from his employers; and evidence of his speech impediment.

[13] Despite Mr. Stephen's difficulty communicating, Mr. Kellogg did not examine his capacity to understand and answer questions. In preparation for this application for leave and judicial review of the Officer's decision, Mr. Stephen's new counsel arranged for him to undergo a psychological assessment. The report of Dr. Eisenach includes the following observations:

1. Mr. Stephen is currently exhibiting symptoms meeting sufficient DSM-5 criteria for a diagnosis of Childhood-Onset Fluency Disorder (Stuttering). [...]

2. As the [Montreal Cognitive Assessment (MOCA)] is a screening tool and not sufficient for diagnosis, Mr. Stephen would require more comprehensive intelligence or neuropsychological testing to diagnose an intellectual disability. Nevertheless, the available evidence from Mr. Stephen's low performance on the MOCA along with his self-report, [Mr. Goodman's] collateral report regarding his difficulties with some activities of daily living, and my behavioural observations during the interview all suggest the presence of a cognitive impairment. Given his significant struggles with language, memory, and abstract thought, it is extremely unlikely that Mr. Stephen would have been able to understand and appreciate the nature of the legal proceedings associated with his immigration case without the assistance of a designated representative.

[14] The written submissions that Mr. Kellogg filed in support of Mr. Stephen's H&C application did not mention any possible cognitive impairment, because Mr. Kellogg did not consider this. Nor did Mr. Kellogg enquire about Humphry's authorization to speak on Mr. Stephen's behalf. Nor did he explore Humphry's reasons for not wanting to disclose

Mr. Stephen's relationship with his common-law spouse and her granddaughter, or explain the implications for the H&C application of not doing so. The written submissions were rife with grammatical errors and extraneous arguments.

[15] The Minister of Citizenship and Immigration suggests that the refusal to acknowledge Mr. Stephen's common-law relationship may have been a tactical decision to protect his partner, who similarly lacks status in Canada. However, given the evidence of Mr. Stephen's level of cognitive functioning, I am unable to determine whether the decision to withhold information regarding Mr. Stephen's relationships with his common-law partner and her granddaughter was his, or that of Humphry. Nor does this account for the other shortcomings in Mr. Kellogg's representation of Mr. Stephen.

[16] I am therefore persuaded that Mr. Kellogg's representation of Mr. Stephen in the H&C application was clearly deficient and resulted in a miscarriage of justice. The application for judicial review is allowed. Neither party proposed that a question be certified for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed,
and the matter is remitted to a different immigration officer for reconsideration.

"Simon Fothergill"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-634-19

STYLE OF CAUSE: DENNIS STEPHEN, BY HIS LITIGATION GUARDIAN
HOWARD GOODMAN v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: OCTOBER 10, 2019

**REASONS FOR JUDGMENT
AND JUDGMENT:** FOTHERGILL J.

DATED: OCTOBER 25, 2019

APPEARANCES:

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