

Federal Court



Cour fédérale

**Date: 20191218**

**Docket: IMM-1357-19**

**Citation: 2019 FC 1643**

**Toronto, Ontario, December 18, 2019**

**PRESENT: The Honourable Mr. Justice Martineau**

**BETWEEN:**

**DWAYNE WINSTON GAYLE**

**Applicant**

**and**

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

**Respondent**

**JUDGMENT AND REASONS**

[1] This is an application for judicial review of the refusal of a Canada Border Services Agency officer [Officer] to defer the removal of the applicant to Jamaica.

[2] The applicant was born in Jamaica in 1985. He is a citizen of only that country, but immigrated to Canada with his parents when he was two years old and became a permanent resident. He has never returned to Jamaica. He lives in Toronto with his wife, who is a Canadian

citizen, and the two children of the marriage are Canadian citizens. Both spouses have children from prior relationships: the applicant has a child who lives in Windsor with his mother, and his wife has two children who live with the applicant and his wife and for whom the applicant is a father figure. The applicant's parents both had substance abuse issues, as does the applicant. He is being treated for substance abuse and depression at the Centre for Addiction and Mental Health in Toronto.

[3] The applicant has been convicted of several offences, the first of which under the then *Young Offenders Act*. In September 2012, he was convicted of assault causing bodily harm against the woman who would become his wife. The applicant was found inadmissible to Canada for serious criminality under paragraph 36(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act], and was issued a deportation order in May 2013. The applicant appealed to the Immigration Appeal Division [IAD] of the Immigration and Refugee Board, but the appeal was dismissed in 2016. With the assistance of counsel, he applied for a pre-removal risk assessment [PRRA] and for permanent residence on humanitarian and compassionate [H&C] grounds, but both were refused in March 2017. An application for judicial review of the H&C decision in the Federal Court was dismissed in September 2017. In November 2017, the applicant applied for permanent residence on H&C grounds a second time, this time noting his mental health and addiction issues. The application is still being processed after more than two years, which is surprising in light of the following facts.

[4] In February 2019, the CBSA took the first step to enforcing the deportation order by sending the applicant a direction to report on March 13, 2019 for removal from Canada. The

applicant requested that the CBSA defer his removal. The applicant notably relied on medical reports that serve as evidence of harm that would result to the applicant's mental health if he were removed to Jamaica. They attest to a diagnosis of depression, substance use and symptoms of anxiety and post-traumatic stress disorder. Based on a 60 minute telemedicine interview, the psychiatrist Dr. Young wrote on 30 January 2019:

I do think it very likely that he would try to kill himself and eventually succeed if he were to be deported to Jamaica. [...] It is extremely important that [the applicant] remain in Canada with his family who are required to assist him with his mental health and addiction issues and be able to continue to access mental health treatment here.

[5] Following the commencement of the present proceeding, the Officer refused to defer the removal and provided notes to file dated March 4, 2019 that served as reasons. On March 6, 2019, Mr. Justice Russell granted, with very strong reasons for doing so, the applicant's motion for a stay of removal.

[6] It is not challenged that the standard of reasonableness applies to this judicial review application (*Li v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 548) and that the CBSA Officer has a limited discretion to grant a deferral of removal. A reasonable decision falls into a range of acceptable outcomes that are defensible on the facts and the law, and it is justified, transparent and intelligible (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]).

[7] The applicant argues that the Officer arbitrarily discarded new medical evidence in his case, particularly the report that describes a serious risk of his death by suicide if he is separated

from his family and removed to Jamaica. He submits this is compelling evidence that he needs to remain in Canada while his H&C application is processed and considered. Evidence of such a serious risk deserves careful consideration, but the Officer assigned it low weight while providing inadequate justification for doing so. The decision is unreasonable and the matter should be returned to the CBSA for redetermination by a different officer.

[8] The respondent relies mainly on the CBSA Officer's limited discretion to defer removal and which does not duplicate a PRRA or H&C Officer's role. The respondent asserts the various expert opinions in the medical evidence are not sufficiently substantiated. The respondent points out that Dr. Young's concerns about the applicant being very likely to die by suicide if he were deported were not corroborated by the evidence of any of his regular treating professionals. The respondent argues that the possibility of suicidal ideation, fear induced by the fear of deportation, lack of facilities in the destination country or speculative evidence generally are all insufficient reasons to interfere with a removal from Canada due to criminality.

[9] I accept that the applicant's pending H&C application is not generally sufficient ground to interfere with the enforcement of a valid removal order under issued under section 48 of the Act. On the mental health issue, I note that the depression and addiction are common threads through all the medical evidence submitted by the applicant to the Officer. This consistency, combined with the seriousness of the risk described by Dr. Young—that the applicant is “very likely” to die by suicide—required careful consideration of the report, even in the context of a deferral request and the limited discretion available to the CBSA Officer. (See *Baron and Peter v Canada (Public Safety and Emergency Preparedness)*, 2014 FC 1073, which both look to the

2001 decision in *Wang v Canada (Citizenship and Immigration)*, [2001] 3 FC 682), where the test for removals officers is set out as “the risk of death, extreme sanction or inhuman treatment” (paragraph 48). Obviously, a serious risk of suicide is a risk of death.

[10] While the threat of removal may be an aggravating factor in the applicant’s mental illness and suicide risk, independent and pre-existing issues contribute as well, including depression, addiction and guilt over his assault of his wife. These factors are identified in Dr. Young’s report and others, particularly Dr. Gozlan’s of October 2017. The presence of the applicant’s family is also noted by Dr. Young as essential in the effectiveness of the applicant’s ongoing treatment and his well-being. This goes beyond mere suicidal ideation. It is also beyond speculation due to the ties to the longstanding depression and anxiety. It is more than a fear of being removed, and it is based on more than a lack of facilities in the destination country, because of the central importance of the applicant being with his family.

[11] I am satisfied that the refusal to defer is not an acceptable outcome.

[12] For these reasons, the present application is granted. The decision made on March 4, 2019 not to defer the removal of the applicant is set aside. Since the circumstances may have changed, it is not necessary to refer the matter back for redetermination to the CBSA who has yet to issue a direction to report if it still wishes to execute the removal order. There is no question for certification.

**JUDGMENT in IMM-1357-19**

**THIS COURT'S JUDGMENT is that** the application for judicial review be granted.

The decision made on March 4, 2019 not to defer the removal of the applicant is set aside. No question is certified.

“Luc Martineau”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-1357-19

**STYLE OF CAUSE:** DWAYNE WINSTON GAYLE v THE MINISTER OF  
PUBLIC SAFETY AND EMERGENCY  
PREPAREDNESS

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** DECEMBER 18, 2019

**JUDGMENT AND REASONS:** MARTINEAU J.

**DATED:** DECEMBER 18, 2019

**APPEARANCES:**

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