

Federal Court



Cour fédérale

Date: 20100211

Docket: IMM-3144-09

Citation: 2010 FC 146

Toronto, Ontario, February 11, 2010

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

NICKALDO SMITH

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), of the decision of a Pre-Removal Risk Assessment Officer (the Officer) dated May 28, 2009 where Nickaldo Smith (the Applicant) was found not be a person described in sections 96 or 97 of the Act.

[2] The Applicant is a 28 year old citizen of Jamaica. He arrived in Canada in 1999, at the age of 17, having been sponsored by his mother to become a permanent resident.

[3] On November 10, 2003, the Applicant was convicted of assault with a weapon contrary to paragraph 267(a) of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46. Consequently, the Applicant was issued a deportation order on April 7, 2005. The Applicant appealed his deportation order to the Immigration Appeal Division of the Immigration and Refugee Board. The appeal was dismissed on April 5, 2009.

[4] The Applicant then submitted an application for a Pre-Removal Risk Assessment (PRRA) which the Officer rejected in a decision dated May 28, 2009 (the decision). The decision is the subject of the present application.

[5] In his PRRA application, the Applicant asserted that he feared persecution in Jamaica due to his sexual orientation and due to the fact that he would be a deportee. On this application, the Applicant only challenges the decision with respect to the first of these risks.

[6] The Applicant and his female partner, Karen Bernard (Karen), began dating in 2005. The Applicant discovered that he is bisexual after Karen encouraged him to explore his sexuality.

[7] Towards the end of March 2007, the Applicant began a sexual relationship with a man named John Diaz (John), who is a friend of Karen's. However, that relationship was short lived because the Applicant was placed in detention in April 2007 and John has not seen him since. The Applicant continues to be in a relationship with Karen.

[8] The Applicant's removal from Canada has been stayed by order dated June 25, 2009 pending the disposition of the present application.

[9] In his decision, the Officer reviews the evidence submitted by the Applicant on country conditions, and says that she has read and considered all of it. The Officer finds that "the articles submitted indicate that there is a general problem of violence and discrimination based on sexual preference in Jamaica and that deportees are generally treated badly and blamed for crimes in Jamaica."

[10] The Officer finds, however, that the Applicant is not likely to be persecuted because he does not fit the profile given in a U.K. Border Agency Operational Guidance Note. The profile is essentially a person who will be perceived to be gay. The Officer notes that the Applicant has been in a serious heterosexual relationship for four years and was only briefly intimate with John at the end of March 2007. As well, he was never persecuted while living in Jamaica.

[11] The Officer concludes:

The evidence presented by the applicant does not support the contention that state protection would not be forthcoming to this applicant. The applicant has provided insufficient evidence to demonstrate that there would be a lack of protection being offered by the Jamaican authorities for him as a bisexual man or as a deportee. Should the police act contrary to their mandate, there are avenues of recourse available to the applicant through higher authorities and/or NGOs. I find that this applicant has not met the burden of demonstrating that he would face more than a mere possibility of persecution and/or is more likely than not to face a risk of torture, risk to life, or risk of cruel and unusual treatment or punishment should he return to Jamaica.

[12] The Officer's decision on state protection is a question of mixed fact and law which should be reviewed on the standard of reasonableness (*Hinzman v. Canada (Minister of Citizenship and Immigration)*); *Hughey v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, 362 N.R. 1 at paragraph 38; *Perea v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1173, [2009] F.C.J. No. 1472 (QL) at paragraph 23). In conducting such a review, the Court looks to the justification, transparency and intelligibility of the decision and whether it falls within the range of acceptable outcomes defensible on the facts and in law (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 47).

[13] It is clear that state protection need only be "adequate," not "perfect" (*Blanco v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1487, [2005] F.C.J. No. 1826 (QL); *Mejia v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 354, [2009] F.C.J. No. 438 (QL)).

Police cannot be expected to successfully protect people in every case, so it is sufficient if the state makes serious efforts.

[14] Here, the respondent concedes that reference made by the Officer to NGO J-FLAG (page 4 of the decision) was an error. The citation at page 239 of the applicant's record confirms this error (availability of advocacy and support organizations). The Court considers that the Officer's error is not determinative. It was not the basis upon which he concluded that the applicant was not at risk if returned to Jamaica.

[15] The Court is also of the opinion that the Officer provided reasonable explanations why he was not convinced that the Applicant did not fit the profile of a gay person. He noted that the documents submitted did not relate personally to the Applicant. These conclusions are not unreasonable.

[16] The Court's intervention is not warranted.

[17] No questions for certification were proposed and none arise in this case.

JUDGMENT

THIS COURT ORDERS that the application for judicial review be dismissed. No question is certified.

“Michel Beaudry”

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-3144-09

STYLE OF CAUSE: NICKALDO SMITH
v.
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AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: February 11, 2010

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

DATED: February 11, 2010

APPEARANCES:

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