Federal Court		Cour fédérale

Date: 20100923

Docket: IMM-812-10

Citation: 2010 FC 951

Toronto, Ontario, September 23, 2010

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

ROGER ANTHONY HAYDEN

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review, pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 of a decision of the Immigration Appeal Division of the Immigration and Refugee Board that denied an appeal from a Deportation Order issued by the Immigration Division of the Board. The applicant had asked the IAD to exercise its discretionary authority to grant him special relief on humanitarian and compassionate (H&C) grounds. For the reasons that follow, this application is dismissed.

[2] The applicant is a 46-year-old citizen of Jamaica. He initially came to Canada under the farm worker program, and later married a Canadian citizen who sponsored him for permanent residence. Shortly after he received permanent residence status the marriage broke down.

[3] The applicant has four children in Jamaica, two children in Canada, and one child in Canada for whom he stands in the place of parent. He claims that he has supported these children financially, despite his very limited means.

[4] In 2006 the applicant was convicted of dangerous operation of a motor vehicle and assault. The police report stated that the applicant became upset when the victim refused to perform fellatio, that he struck her on the back of the head, and that he then drove away while still holding the victim by her sweatshirt. Notwithstanding the conviction, the applicant disputes this version of events.

[5] In September 2007 the applicant was convicted of sexual assault and was subsequently sentenced to and served 15 months in jail, reduced for time served. This conviction related to an incident where the applicant raped a woman after a night of drinking and marijuana smoking. Again, notwithstanding the conviction, the applicant continues to inform others that the sex was consensual.

[6] The applicant's conviction for sexual assault led the Canada Border Services Agency to prepare a report pursuant to section 44 of the Act recommending an inadmissibility hearing. The hearing was held and the applicant was ordered deported.

[7] Upon appeal of the Deportation Order to the IAD, the IAD determined that there were insufficient H&C considerations to warrant special relief, and declined to either allow the appeal or stay the Deportation Order.

[8] The Board Member reviewed the applicant's background, relationships, children, and employment history, and then proceeded to review guiding principles applicable to the decision. She considered the following:

a. the serious nature of the offence, the significant trauma sexual assault inflicts on its victims, and the applicant's criminal history;

b. the possibility of the applicant becoming rehabilitated and the degree of remorse shown by the applicant, both of which she determined to be minimal based on the applicant's minimising of the seriousness of his conduct, failure to fully accept responsibility for his conduct, lack of proof of rehabilitation, and lack of a practical plan for rehabilitation;

c. the likelihood that the applicant could re-offend given the recent conviction, escalation in the seriousness of his offences, and lack of a practical plan for rehabilitation;

d. the applicant's establishment in Canada, which the panel found to be a neutral factor after considering the length of time spent in Canada, the applicant's lack of economic establishment, and the lack of evidence about the nature and extent of his emotional relationship with his children in Canada;

e. the applicant's community support in Canada, to which the Board ascribed little positive weight;

f. hardship the applicant would face if returned to Jamaica, which the Board determined to be a neutral factor given his roots there and his many family members who still live on the island; and

g. the best interests of his children, to which the Board did not ascribe much weight because the applicant had been incarcerated for much of their lives, had lost contact with his son, provided no cogent evidence regarding his emotional relationship with his daughter, and because there was no evidence the applicant was a positive influence on his children.

[9] I do not accept the applicant's submission that the IAD fettered its discretion by focusing extensively on the applicant's previous criminal convictions, thereby losing sight of the changes he has made since. First, it is clear on a reading of the decision as a whole that the Member considered many factors, including the applicant's criminal past. Second, she was correct in the factors she did consider as they are the relevant factors identified in *Ribic v. Canada (Minister of Employment and Immigration)*, [1985] I.A.B.D. No. 4 (QL) and confirmed by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12 and *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3. The first of those factors is the seriousness of the offences that led to the Deportation Order. Here the applicant had engaged in two extremely serious offences of a sexual nature against women. I cannot find on reading of the entire decision that the Member let the nature of these offences cloud her consideration of the other factors. She

examined each individually and independently and made no reference to the offences, except as relevant for her consideration.

[10] The applicant asserts that the Board erred in finding that the applicant "poses a high risk to re-offend and a high risk to public safety, in particular to women with whom he has a relationship." The basis for this alleged error is that the targets of the applicant's assaults were not random members of the public and because the probation report states that he is at a medium risk of re-offending. Admittedly, the targets of his attacks were not random; however, they most certainly are members of the public. While the probation report says that he is at a medium risk, the Member explained why this meant little to her as it was based on him having a score of 16 on the test without any explanation of the data that supported that finding. Her assessment cannot be said to be unreasonable in those circumstances. In any event, it is clear on a reading of the decision that the result would not have been different had the assessment of risk been lowered by one step.

[11] The applicant submits that the Board erred by placing more weight on certain negative factors, especially considering "evidence" that the applicant had given up drugs and alcohol. However, the applicant presented no evidence beyond his own testimony that he has not abused drugs or alcohol since his release from jail. The Board Member addressed this at para. 17 of her decision:

> Seemingly, drugs and alcohol played a role in his criminal acting out. He claims since he was released from jail in August 2008, he has not had substance abuse issues. Without other proof, the panel does not consider that as capacity to rehabilitate himself.

That is a reasonable finding based on the evidence that he had undertaken no treatment programs or taken advantage of any services directed to substance abuse since his release, particularly in light of the fact that the Member's decision was made only one year after his release.

[12] The applicant further submits that the IAD "ignored" his statement that he "feels bad" and treated his evidence regarding remorse and rehabilitation in a "cursory" manner. This submission is without merit. The Board Member's decision demonstrates that she gave thorough consideration to the issue of remorse and rehabilitation. The Board Member addressed the very testimony the applicant alleges she ignored at para. 18:

> The Appellant does not accept responsibility for his conduct, yet at the hearing he utters that he "feels bad about everything that happened … I really feel bad about it." There might be some contrition in his expression of remorse, but it is self-serving. The ingredients of the possibility of rehabilitation are more than an expression of remorse, even if sincere.

[13] Most telling about the applicant's claim that he feels remorse for his action is the fact that when his current girlfriend inquired about the circumstances that led to his conviction for sexual assault, he reiterated the same position that was rejected by the Court at trial, namely that the woman had consented but later changed her story. In short, the applicant offered little evidence that he appreciates and understand his past actions. In that light, as the member noted, his expressions of "feeling bad" are empty.

[14] Lastly, contrary to the applicant's submissions, the Board's finding that there was a lack of evidence of the applicant's emotional relationship with his children is not at odds with his

testimony. The Board considered what he had to say and specifically noted that he claims to support his daughter by providing $30 per week, that he has lost touch with his son since he went to jail, that he has been incarcerated for a significant period of his children's lives, and that there is no evidence to show that the applicant is a positive influence on his children.

[15] The Board was alert, alive and sensitive to the best interests of the applicant's children both in Canada and Jamaica. The submission that the Board failed to appreciate the objective of unifying family members in Canada expressed in subsection 3(1)(d) of the Act is without merit; the Board referred to this very section at para. 9 of its reasons and balanced this consideration against the other equally important factors.

[16] The Board's decision was transparent, well-reasoned, and thorough, and I find that it meets the standard expected of administrative decision-makers. It falls within the range of reasonable, acceptable outcomes which are defensible in fact and law.

[17] No question for certification was proposed by the parties and there is none on these facts.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application is dismissed; and

2. No question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-812-10
STYLE OF CAUSE:	ROGER ANTHONY HAYDEN v. THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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