Federal Court		Cour fédérale

Date: 20090717

Docket: IMM-4790-08

Citation: 2009 FC 733

Vancouver, British Columbia, July 17, 2009

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

SAMUEL NATHANIEL BAILEY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

[1] Should a person be exiled from Canada because of a traffic ticket? Immediately following the hearing, I granted judicial review of the decision of an immigration officer not to permit Mr. Bailey to apply for a permanent resident visa from within Canada on humanitarian and compassionate grounds. These are the reasons why.

[2] Mr. Bailey did a very bad thing. He was charged, pleaded guilty, and in October 2000 was convicted of conspiracy to unlawfully traffic in cocaine and for being in possession of proceeds of

crime. He was sentenced to a term of imprisonment of five years and three months for the first offence, and one year consecutive for the second. He was paroled in December 2001 and has been convicted of no crime since. His parole supervision ended in February 2007.

[3] Mr. Bailey is not a Canadian citizen. He is from Jamaica. As a result of his conviction, he was ordered deported in June 2001, but the Immigration Appeal Division (IAD) of the Immigration and Refugee Board stayed the execution thereof on certain terms and conditions. One was that he was to report any criminal charge or conviction. Another, which was a check mark in a printed form, was that he was to "keep the peace and be of good behaviour." That stay was extended but later revoked because he had failed to "keep the peace and be of good behaviour." He offended British Columbia's *Motor Vehicle Act* by twice driving an automobile with an expired driving licence. According to an immigration officer:

> On 12 June 2007, I contacted the NWT Motor Vehicle office and requested they perform a driver's license verification for Samuel Nathaniel BAILEY. I spoke with Kelley Merilees-Keppel, Manager of Motor Vehicle Registrations. Ms. Merilees-Keppel advised that Mr. BAILEY had a driver's licence, in British Columbia, from June 12, 1990, to June 19, 1991. She also advised that Mr. BAILEY received two motor vehicle tickets, one in Westminster, B.C., in 2003 and one in Burnaby, B.C. in 2002. Both tickets were for driving without a licence under the [Motor Vehicle Act]. She also performed a Canada-wide driver's licence check and stated Mr. BAILEY had never obtained a driver's licence elsewhere but B.C.

[4] That information was not quite correct because Mr. Bailey had also had a Saskatchewan driver's licence which had expired two months before he received the first ticket.

[5] Mr. Bailey's case straddles the old *Immigration Act* and the current *Immigration and Refugee Protection Act* (*IRPA*), and brings into play transitional provisions. These are clearly set out in the decision of Mr. Justice Martineau on the judicial review of the IAD's revocation (2008 FC 938, 333 F.T.R. 282).

[6] As Mr. Justice Martineau noted, the recent jurisprudence in this Court has consistently followed the decision of the Newfoundland Court of Appeal in *R. v. R.(D.)* (1999) 138 C.C.C. (3d) 405, 178 Nfld. & P.E.I.R. 200. As stated in *Huynh v. Canada (Minister of Citizenship and Immigration)* 2003 FC 1426, [2003] F.C.J. No. 1844 (QL) at para. 7, by Mr. Justice O'Reilly, "…To be of "good behaviour," one must abide by federal, provincial or municipal statutes and regulations." This means, literally, that one is not of 'good behaviour' if one fails to return a book to a municipal library on time, or puts one's garbage out for collection one hour too soon.

[7] Mr. Bailey has been in a long-term, stable common-law relationship. His spouse attempted to sponsor him, but because of his conviction for serious criminality, that application had to be converted into a regular application to apply for permanent residence from within Canada on humanitarian and compassionate grounds. The normal rule is that one must apply from outside Canada.

[8] Section 25 of *IRPA* provides that the Minister may:

…examine the circumstances concerning the foreign national and may grant the foreign national permanent resident	[…]étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères

status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.	et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.

[9] The Officer totes up the Applicant's establishment in Canada and his connections with his homeland. The question is whether there would be unusual, undeserved or disproportionate hardship if Mr. Bailey had to apply from outside Canada. The standard of review is reasonableness as set out by the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration*, [1999] 2 S.C.R. 817.

[10] The Officer determined that Mr. Bailey is well-established in Canada and has no connections to speak of in his homeland. His mother and siblings are here, as are his two sons, currently aged 15 and 13. Although he is separated from their mother, who has custody, and has been in another common-law relationship since 2003, he is very much involved in his sons' lives. They visit regularly, vacation together, and with their mother he attends parent-teacher meetings. There are reports on file that his younger son is in particular need of him. The boys are of mixed race and it is important for them not only to continue to relate to their white mother, but also to their black father.

[11] The Officer noted that Mr. Bailey successfully completed a Culinary Arts program in Vancouver, has done volunteer work and has worked in restaurants ever since. He is currently a sous-chef in a fine restaurant in North Vancouver. The Officer found that Mr. Bailey and his common-law partner share a loving and committed relationship, that he has a strong bond and loving relationship with his children, that he is a caring and loving father and plays an important role in their lives. She recognized that it was in the best interests of any child to have access to both parents and that separation "however temporary" may be emotionally difficult. She even took note of the school psychologist's letter but was satisfied that the younger son could rely on his mother for emotional support, and on the school psychologist to provide support and counselling when required.

[12] She was of the view that the children could maintain contact through telephone calls, correspondence and visits to Jamaica, while their father's application for permanent residence was being processed in the prescribed manner.

[13] Given Mr. Bailey's qualifications, she was of the view that he would be able to secure employment in Jamaica and provide financial assistance for his children.

[14] While at the time of the decision Mr. Bailey had been in Canada for 23 years, "I note that he has not kept a good civil record during this entire period." She referred to the criminal conviction, to which she said she gave significant weight, as well as the fact that it was due to his breach of the terms and conditions that the stay of his removal by the IAD had been lifted.

[15] All in all, while the positive factors were persuasive, they did not outweigh the negative.

[16] Was this a reasonable decision? As noted in *Baker* above at paragraph 15, these are important decisions that affect in a fundamental manner the future of individuals' lives and may have an important impact on the lives of any Canadian children of the Applicant "since they may be separated from one of their parents…" [Emphasis added]. At paragraph 63 and following, Madam Justice L'Heureux-Dubé considered reasonableness in the context of an H&C application. She held that it was "Parliament's intention that those exercising the discretion conferred by the statute act in a humanitarian and compassionate manner." Moreover, at paragraph 66 she found that:

> …Parliament also placed a high value on keeping citizens and permanent residents together with their close relatives who are already in Canada. The obligation to take seriously and place important weight on keeping children in contact with both parents, if possible, and maintaining connections between close family members is suggested by [the former Act, which does not differ in this regard from the current Act].
> [Emphasis added]

[17] Although not part of Canadian law, she noted at paragraph 71 that various international conventions "place special importance on protections for children and childhood, and on particular consideration of their interests, needs, and rights." [Emphasis added]

[18] In my opinion, the decision was unreasonable in a number of respects.

[19] The Officer assumed the separation would be temporary. Although she noted that Mr. Bailey's parole supervision had been completed in February 2007, she failed to take into

account that he cannot apply from outside Canada for permanent resident status unless and until he has been pardoned, and that pursuant to the *Criminal Records Act* his application cannot even be considered until five years have elapsed from the expiration of his probation, in other words, until 2012. Leaving aside such delays as there may be in processing such an application, which may or many not be granted, in the meantime the boys' childhood years will have slipped away. As noted by Mr. Justice Barnes in *Arulraj v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 529, [2006] F.C.J. No. 672 (QL) at para.17, if the granting of a visa to a person removed is little more than a formality "one wonders why the officer simply did not allow him to stay in Canada."

[20] There is nothing in the record to justify the Officer's assumption that Mr. Bailey will gain lawful employment in Jamaica to the extent that he will still be able to financially support his children.

[21] While Mr. Bailey was convicted of a serious criminal offence, he has served his time and paid his debt to Canadian society. Notwithstanding that conviction, the IAD permitted him to stay on conditions. While the Officer was not bound by the previous decisions of the IAD, there must be some rationale for departing from them. An analogy can be drawn from the jurisprudence developed with respect to detention reviews. Reasons should be articulated or the reader must be able to infer them (*Canada (Minister of Citizenship and Immigration) v. Thanabalasingham*, 2004 FCA 4, [2004] 3 F.C.R. 572). The only negative changed circumstance is that Mr. Bailey drove an automobile while his driver's licence had expired. That cannot be such a negative factor so as to

outweigh the positive. How many of us can say they have never as much as run afoul of a municipal by-law? “He that is without sin among you, let him first cast a stone at her” (*John, 8:7*).

[22] I repeat what I said at the beginning of *Espino v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1255, 301 F.T.R. 155:

> “Can you heare a good man grone And not relent, or not compassion him?" so it was said in Shakespeare's *Titus Andronicus*, Act IV, Scene I. Compassion has been defined as including suffering together with another, participation in suffering; fellow-feeling, sympathy, the feeling or emotion when a person is moved by the suffering or distress of another and by the desire to relieve it.

[23] Compassion was lacking in this case.

“Sean Harrington”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Mr. Phillip C. Rankin	FOR THE APPLICANT
Ms. Kimberly Shane	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Rankin & Bond Vancouver, BC	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada Vancouver, BC	FOR THE RESPONDENT