Federal Court  Cour fédérale

Date: 20120210

Docket: IMM-4865-11

Citation: 2012 FC 196

Ottawa, Ontario, February 10, 2012

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

ATO BOSOMPEM

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Bosompem asks the Court to set aside the decision of the Immigration Appeal Division of the Immigration and Refugee Board dismissing his appeal and setting aside the stay of his removal that it had previously granted on January 14, 2008.

Background

[2] The applicant is 27 years of age and is a citizen of Ghana. He landed in Canada in 2000 when he was 15 and became a permanent resident. He completed grades 9 through 12 in Canada and has been working at a food service company for the past four years. He is the father of a two year old Canadian born daughter. The mother is a former girlfriend who figures prominently in the events that gave rise to the decision under review.

[3] In 2003, when he was 18, Mr. Bosompem was arrested for robbing a convenience store with his friend who was armed with a sawed-off shotgun. The record shows that the applicant was there as a look out; he never entered the convenience store and he did not carry a gun. The applicant was charged with armed robbery. He pled guilty to robbery, was acquitted of armed robbery, and was sentenced to 18 months in prison.

[4] As a consequence of the criminal conviction, a deportation order was issued against Mr. Bosompem; however, a consent order issued from the Immigration Appeal Division in 2008 staying his deportation for a period of three years, subject to conditions. Noteworthy among the conditions attached to the stay were that he "[n]ot commit any criminal offences… [r]espect all parole conditions and all probation orders…[and] [k]eep the peace and be of good behaviour."

[5] After his release from custody, Mr. Bosompem entered into a relationship with a woman he had known from school. Their period together was of short duration; however, a child was born soon after they separated. Sometime in March or beginning of April 2010, Mr. Bosompem and this former girlfriend had an argument concerning their daughter. Although he was not

living with the child and her mother, the record indicates that he agreed to pay child support and he regularly visited his daughter.

[6] In early 2010, the former girlfriend accused Mr. Bosompem of trying to choke their daughter when he enlarged the hole in the nipple of the baby bottle so that more food could flow. Because of that incident, his former girlfriend prohibited Mr. Bosompem from seeing his daughter and refused to answer his telephone calls.

[7] On April 22, 2010, following an argument relating to child support payments and custody of his daughter, Mr. Bosompem left his former girlfriend a voicemail stating: “I am going to murder you if you get me deported.” He left a second voicemail on May 5, 2010, stating: “I am going to beat you down and cut your face the next time I see you.” The former girlfriend reported these two threats to the police on May 7, 2010. Criminal charges were laid against Mr. Bosompem and he voluntarily surrendered himself to the police on June 3, 2010.

[8] He pled guilty and on January 20, 2011, Mr. Bosompem was convicted of threatening death and bodily harm contrary to subsection 264(1) of the *Criminal Code*, RSC 1985, c C-46. He received a suspended sentence, 18 months probation, and was required to “attend and actively participate in such counselling programs for anger management and domestic violence program (PARS) and any other counselling programs within 30 days of this order as recommended by your probation officer.”

[9] As required by his probation officer, Mr. Bosompem attended and completed an anger management program conducted by The Salvation Army on October 23, 2010.

[10] On June 30, 2011, Mr. Bosompem appeared before the Board for a reconsideration of the three year stay of deportation granted in 2008. On July 7, 2011, the Board set aside the stay of removal.

The Board's Decision

[11] The Board properly conducted its analysis of the evidence using the factors enunciated by the Board in *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IADD 4, which were approved by the Supreme Court of Canada in *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3: the seriousness of the offence, the prospects of rehabilitation, the establishment in Canada, the best interests of the applicant's daughter, and the hardship on him and his family members.

Seriousness of the offence

[12] The Board noted that although Mr. Bosompem did not have a lengthy criminal record, it was nonetheless serious. It found that "a threat of harm and/or murder from a person, who has in the past displayed a propensity towards violence by virtue of having a firearm in the commission of an offence, would be frightening and in my view makes the offence even more serious." Both of the applicant's offences were stated to weigh heavily against him.

Prospects of rehabilitation

[13] The Board found that Mr. Bosompem "attempted to minimize the seriousness of his last offence." This finding was based on his evidence that he did not mean the threats, that his former girlfriend knew he would never hurt her, that the threats were a result of her not allowing him to see his daughter, and that he moved on with his life and was now seeing his daughter and communicating with his former girlfriend through text messaging.

[14] Further, the Board stated that because of this "downplaying" of the offences it was "not persuaded that he has accepted responsibility for them." This was stated to be a factor that weighed heavily against him.

[15] Lastly, the Board noted that the only rehabilitative steps that were taken by Mr. Bosompem were Court-ordered and this too was found to be a factor weighing heavily against him.

[16] As a result, the Board found his "prospects for rehabilitation have diminished given his new conviction … demonstrates that he is still a potential threat to Canadian society."

Establishment in Canada

[17] The Board attributed moderate weight in favour of Mr. Bosompem as a result of his establishment because of his young age and his four years of stable employment.

Family in Canada and best interests of a child directly affected by the decision

[18] The Board noted the presence of some close family members such as Mr. Bosompem's new girlfriend with whom he lives, his step-father and half-sister in Canada, and his mother in the United States. The Board considered his young daughter to whom he has access every second Sunday from 9:30 a.m. until 5:30 p.m.

[19] The Board found that Mr. Bosompem was genuinely interested in having a relationship with his daughter. It stated that while it is usually in the best interests of a child to have both parents close by, it is not always possible. The weight awarded by this factor was diminished as the Board found that Mr. Bosompem "still has an anger management problem which does not bode well for a role model." Moreover, the Board was satisfied that the applicant's daughter would have support in Canada, notwithstanding her father's deportation. The Board noted that no evidence was adduced as to why Mr. Bosompem's daughter could not travel to visit her father in Ghana later in life. Accordingly, only minimal weight was awarded to the presence of family members in Canada.

Hardship on the applicant and family members

[20] The Board noted that Mr. Bosompem contributes financially to his child's support, but said that no evidence was led as to the possibility of him obtaining employment and sending money from Ghana. While the Board realized that Ghana's economy does not equate to Canada's, it was not in the position to take judicial notice of the fact that Mr. Bosompem would be unable to send money. Nonetheless, some weight was given in his favour because of the financial hardship his former girlfriend would endure if he is removed.

[21] The Board noted that Mr. Bosompem testified that he sometimes gives rides and money to his sister. Although the sister and the stepfather were not present at the hearing and they did not provide letters in support of his testimony, the Board accepted that his removal from Canada would have some adverse affect on his family. Accordingly, minimal weight was attributed to this factor.

[22] As for Mr. Bosompem's mother living in the United States, the Board stated that no evidence was tendered as to why his mother could not visit him in Ghana. Although it was accepted that Mr. Bosompem used to send some money to his 75 year-old grandmother in Ghana, no reasonable explanation was given to establish that he could not provide for her from Ghana. Moreover, the Board found that his personal hardship would be diminished since his grandmother lives in Ghana and he lived with her for the six years prior to his immigration to Canada. Similarly, the Board noted that a list of family members submitted in evidence suggested he has a 19 year old sister in Ghana which could also diminish his hardship. Although the record contains a document that indicates that Mr. Bosompem has a sister in Ghana, that was clearly in error as the immediately preceding document indicates that the very same named sister lives in Canada and he testified that he drives that sister occasionally. Further, this issue was specifically addressed at the hearing:

> COUNSEL: What about your family back home?
>
> APPELLANT: My family back home is only my grandma that's there.

The Board erred in its assessment of the evidence in this regard. This is of some importance as the Board relied on the applicant having a sister in Ghana when considering his ability to reintegrate to society in Ghana.

[23] Mr. Bosompem's 11 year stay in Canada was found to not be particularly long. The Board found that apart from his years in high school in Canada, he was educated in Ghana. "He is familiar with the culture and at the very least, his grandmother and sister [live] there." The Board found no evidence as to why he would not be able to work and live in Ghana.

[24] Although the Board was persuaded that Mr. Bosompem and his family would face some hardship from his removal, it was not persuaded that any hardship was undue. As such, minimal weight was attributed to this factor.

[25] The Board concluded that Mr. Bosompem was given a chance to demonstrate that his behaviour would change but he chose to breach the conditions granted in 2008. The seriousness of his convictions and his diminished prospects of rehabilitation were found to outweigh the humanitarian and compassionate considerations. The stay of the removal order was set aside and Mr. Bosompem's appeal was dismissed.

Issues

[26] The applicant in his written submission raised a number of issues. At the hearing, Mr. Waldman, counsel for Mr. Bosompem, candidly acknowledged that if the Court was of the view, as argued by the respondent, that the applicant's submissions amounted to a dispute as to the weight the Board gave to the evidence, then this application could not succeed. His position was that the Board based its decision on findings of fact that were not supported by the evidence.

Analysis

[27] Having carefully read the complete record as well as the decision under review, I have concluded that some of the concerns raised by the applicant do not constitute a mere reweighing of evidence; they amount to mischaracterizing or ignoring of evidence that could have materially affected the result. Accordingly, while the appropriate standard of review for all the substantive issues is reasonableness, and while this is a deferential standard and the Court ought not to substitute its own view for that of the Board, in the unique facts before the Court, the decision under review, must be set aside.

[28] In its decision, the Board Member stated: "I agree with counsel for the Minister that a threat of harm and/or murder from a person, who has in the past displayed a propensity towards violence by virtue of having a firearm in the commission of an offence, would be frightening and in my view makes the offense even more serious." The Board observed in a footnote to that passage that it "acknowledges that the appellant was convicted of robbery and not armed robbery; however, it was the appellant's own testimony that revealed that there was a firearm during the robbery." While it is true that Mr. Bosompem was found guilty of robbery, it is important to note, which the Board did not, that he was also found not guilty of armed robbery.

[29] It is clear from the passage above, as well as from an earlier statement of the Board when reciting the facts behind the first conviction, namely that "he testified that he had a sawed off shotgun that belonged to the friend he was with at the time [of the robbery]," that the Board believed that Mr. Bosompem was armed during the robbery; he was not. Mr. Bosompem's testimony quite clearly shows that it was his friend, not he, who was armed.

> MINISTER' COUNSEL: It's kind of scary to think someone that's capable of taking a shotgun and …
>
> APPELLANT: It wasn't me that was holding it.
>
> MINISTER' COUNSEL: … and holding up … holding up a convenience store … someone that's capable of that calling you and telling you that they're going to murder you, or telling you that they're gonna beat you down and cut your face, don't you think?
>
> APPELLANT: I know I threatened her, but in my head … and she knows, and in her head too she knows I'm not going to do that.

[30] In my view, this error by the Board is significant because it undercuts the finding that Mr. Bosompem has "in the past displayed a propensity towards violence," a finding that played a large role in the Board's finding that the recent offence involving his former girlfriend would have been seen by her to be "frightening" and "makes the offense even more serious."

[31] The Court does not discount the seriousness of the crime for which he was convicted, threatening death and bodily harm, but it was an error for the Board to give it increased weight based upon its false view of his previous record.

[32] Further, the Board failed to consider the timing of the report to the police by the former girlfriend of these threats when it considered the seriousness of the offence, her reaction, and Mr. Bosompem's testimony that he did not mean to harm her and she knew that.

[33] The former girlfriend reported the applicant's threats on May 7, 2010 – two weeks after the first telephone message was left and two days after the second. If she believed the applicant was serious and that her life was at risk, one would have expected her to have reported the first

call to the police immediately after receiving it. This evidence strongly supports the applicant when he testified that she knew that he would not harm her and that his comments were made out of frustration when he was denied access to his daughter.

[34] Moreover, it appears from the record that the police were of the same view. Although the report was made to them on May 7, 2010, they appear to have taken no steps to arrest the applicant. The record indicates that Mr. Bosompem voluntarily turned himself in to police on June 3, 2010, nearly a month after the offences were reported to the police. It is not evident from the record how the applicant learned of the charges, however, it is clear that he was working during this time and his former girlfriend knew his address at home and at work. There was therefore no impediment to arresting him if the police were of the view that these allegations placed the former girlfriend in imminent danger.

[35] The Board concluded that the applicant had not accepted responsibility for his offences because he "downplayed" the offenses. The Board made that assessment based on his evidence (i) that he did not mean the threats, (ii) that the former girlfriend knew he would never harm her, and (iii) that the threats were the result of him being prevented from seeing his daughter. In fact, there is ample evidence in the record to establish that each of these statements is factually accurate. If so, they cannot be a basis for finding that he failed to take responsibility for his actions. Further, the Board failed to consider evidence that did show that he did take responsibility for his actions, such as the fact that he pled guilty to the offences, that he voluntarily surrendered to the police, that he gave frank testimony to the Board regarding his

criminal offences, and that there was no action taken by him on either of the threats made – in fact there was no evidence that he ever approached the former girlfriend at all.

[36] I am also troubled that the Board made a negative inference from Mr. Bosompem's lack of taking rehabilitative courses on his own initiative. He says that there was nothing in the record to suggest that he needed such courses. He says that there was also no evidence that he had "anger problems." He submits that the fact that in difficult circumstances he threatened his former partner, does not support a finding of generalized anger problems.

[37] Mr. Bosompem does not have an extensive history of problems with the law. He had a serious conviction in 2003 and then kept out of trouble for seven years until 2010. The victim was not harmed and no violence was involved. Mr. Bosompem submits that in finding that he continued to be a threat, the Board ignored his general pattern of conduct, the context in which the incident occurred, and the post-offence conduct.

[38] In my view, the Board erred in its analysis of the applicant's alleged anger management problem and failed to properly consider the remedial action that had been taken to address any anger management concerns.

[39] With respect to the first point, the Board writes that the weight it would normally award the applicant relating to his child's interests in having him present "is diminished somewhat by the appellant's recent conviction which in my view displays that he <u>still</u> has an anger management problem [emphasis added]." There is no evidence at all that the applicant had any

issues controlling his anger prior to the events that gave rise to these recent convictions. If his recent actions prove that he has an “anger management problem” then it is one of recent origin.

[40] Further and addressing my second point, the Criminal Court as part of Mr. Bosompem’s sentence ordered him to undergo whatever anger management therapy the probation officer considered appropriate. He was told to take a one-day course, which he completed successfully. Apparently the probation officer, someone more experienced than the Member in assessing anger management problems and required therapy, was of the view that a one-day course was sufficient to address any problems the applicant had controlling his anger. While it is open to the Board to disagree with that assessment, it must explain the basis for any such disagreement and for its view that more was required. If no more was required, then it was unreasonable to fault the applicant for failing to voluntarily take unnecessary additional courses and programs of treatment.

[41] As a result of these errors, this decision must be quashed and remitted to a new panel for determination after a full hearing.

[42] Neither party proposed a question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is allowed, the decision is set aside and the applicant's appeal is remitted to a differently constituted panel for determination after a full hearing. No question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4865-11
STYLE OF CAUSE:	ATO BOSOMPEM v. THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	February 2, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	ZINN J.
DATED:	February 10, 2012

APPEARANCES:

Lorne Waldman	FOR THE APPLICANT
Marcia Pritzker Schmitt	FOR THE RESPONDENT

SOLICITORS OF RECORD:

WALDMAN & ASSOCIATES Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
MYLES J. KIRVAN Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT