Federal Court  Cour fédérale

Date: 20130319

Docket: IMM-7797-12

Citation: 2013 FC 284

Ottawa, Ontario, March 19, 2013

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

CHARLES KOKANAI MZITE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by Citizenship and Immigration Canada [CIC], dated July 13, 2012, whereby the Applicant was determined to represent a danger to the public in Canada pursuant to section 115 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] Having considered the decision under review, the written and oral submissions of counsel, the motion records filed by the parties, I have no hesitation in concluding that this application for judicial review should be dismissed. CIC's decision is well-written, meticulous and clearly answers the Applicant's submissions while applying the legal concepts required in such circumstances.

[3] The facts of this case speak for themselves. The Applicant had a private relationship with four different women and despite being asked by each of them whether he had HIV, he answered negatively and proceeded to have sexual relations with each one of them. One of these encounters even lead to him contaminating one of the women with the virus. He was convicted of four counts of aggravated sexual assault. It was CIC's opinion that he still constitutes a danger to the public in Canada. For the purposes of a judicial review, I see no reasons in law or in fact to disagree with this finding. In addition, CIC found that country conditions in Zimbabwe have changed considerably, that the Applicant's profile has changed over time and that his past political affiliations no longer exist. It was also determined that the quality of HIV medical care available in Zimbabwe was adequate. Therefore, CIC concluded that it is unlikely that the Applicant would face a risk to his life, a risk of cruel and unusual treatment or punishment, or a risk of torture upon his removal to his country of birth. I have identified no flaws in the analysis made by CIC to arrive at this conclusion. Finally, CIC also found that the Applicant did not demonstrate a degree of establishment in Canada, be it social or economic, that would cause a disproportionate hardship should he be ordered to return to Zimbabwe. Again, the analysis followed by CIC is in accordance with what is legally required in such a situation. There is no reason for this Court to intervene.

A. Summaries of the facts

[4] The Applicant was granted refugee protection in 2002 and has resided in Canada ever since. In 2009, he was convicted of serious criminal offences. CIC is now seeking to expel the Applicant from Canada on the basis of section 115 of the IRPA.

[5] The Applicant joined a dance troupe in Zimbabwe in 1992. In 1993, the Applicant married his first wife, they separated in 1997 and in 2000 she passed away and as indicated by the Applicant at his criminal trial for aggravated sexual assaults, HIV/AIDS may have been the cause of death.

[6] In May 2001, the Applicant came to Canada with the assistance of a Canadian woman he had met in Zimbabwe. He was initially planning on staying in Canada for six months. His relationship with this woman lasted two weeks. They formed a dance troupe in Victoria, B.C. His group acquired notoriety and it was invited to perform for Oprah Winfrey in 2007.

[7] In July 2001, the Applicant tested positive for HIV in Victoria, B.C. but never attended at the clinic for the results. The Applicant submits that he phoned the clinic and that they told him everything was fine and that he was asked to come in for post-test counselling, which he did not do.

[8] Six months after his arrival, the Applicant claimed refugee protection on the basis of his political opinion. The Applicant had refused to join the ruling political party in Zimbabwe, the Zimbabwe African National Union-Population Front [ZANU PF]. He stopped attending meetings of that political party and started to attend meetings of the opposition, the Movement for Democratic Change [MDC] party. He believed that his absence from the ZANU PF meetings was noticed as he

is well-known in Zimbabwe because of his membership in a popular dance troupe. The ruling party wanted him to publicly support it.

[9] In November 2001, the Applicant married a woman (Complainant #1) who he met at the airport in Canada in May 2001. He denied being HIV positive and had unprotected sexual intercourse with her. Their relationship ended in May 2002.

[10] In April 2002, the Applicant began a relationship with another woman (Complainant #2) who also asked him if he was HIV positive. He said that he was not.

[11] On October 7, 2002, the Refugee Protection Division determined that the Applicant was a Convention Refugee. On April 3, 2003, he applied for permanent residence.

[12] In the summer of 2003, the Applicant began a relationship with another woman (Complainant #3). Again, he was asked if he was HIV positive and he answered that he was tested for immigration and that he was not.

[13] In the summer of 2004, the Applicant began a relationship with yet another woman (Complainant #4), and again, he told her that he was HIV negative.

[14] In August 2004, Complainant #3 tested positive for HIV and told the Applicant the following month. In November 2004, the Applicant tested positive for HIV again.

[15] In July 2006, the Applicant apologized to Complainant #3 and told her that he had tested positive in 1995 when he had applied for a visa to China.

[16] On September 6, 2007, the Applicant was arrested and incarcerated and has remained incarcerated since then. When questioned by the officers, he admitted knowing to be HIV positive since 1995. He was charged with four counts of aggravated sexual assault to which he pleaded not guilty.

[17] From September 2007 to April 2009, while he was in provincial custody, the Applicant completed the following rehabilitation courses: Breaking Barriers, Respectful Relationships, Violence Prevention Program and the Sexual Abuse Management Program.

[18] The Applicant was found guilty of all four counts of aggravated sexual assault and on March 31, 2009, he was sentenced to ten years of incarceration with credit for the time he had spent in custody. The trial judge noted that the Applicant had been in relationships and thus in a position of trust with all of his victims, that he therefore deceived them and that he lacked empathy for them.

[19] On April 29, 2009, the Applicant was the subject of a report under section 44 of the IRPA as a result of his criminal convictions.

[20] On May 19, 2009, the Immigration Division issued a deportation order against the Applicant based on his inadmissibility for serious criminality.

[21] On June 12, 2009, a Correctional Services Canada Psychological Assessment Report was issued regarding the Applicant. On June 30, 2009, Parole Officer Leblanc made Criminal Profile and Correctional Plan reports regarding the Applicant. A second Psychological Assessment Report was issued on May 16, 2011 in anticipation of the Applicant's upcoming Parole Board review.

[22] On October 5, 2009, the Canada Border Services Agency issued a warrant for the Applicant's removal from Canada. The warrant was executed at the Mountain Institution, where the Applicant was serving his sentence.

[23] On September 7, 2006, the Applicant's application for permanent residence was refused due to non-compliance with multiple requests for a medical examination.

[24] On June 10, 2011, the British Columbia Court of Appeal unanimously dismissed the Applicant's appeal of his convictions.

[25] On October 21, 2011, the National Parole Board denied both full parole and day parole to the Applicant. It namely found that he is "an untreated sex offender, completely lacking in insight and who committed very serious crimes which he does not acknowledge or take responsibility for." The Parole Board concluded that the Applicant poses an undue risk of re-offending.

[26] On July 13, 2012, an Officer from CIC determined that the Applicant has committed a serious crime and constitutes a danger to the public in Canada, pursuant to paragraph 115(2)(*a*) of the IRPA.

[27] The Applicant is under treatment to reduce his viral load and his ability to transmit HIV.

B. Summary of CIC's decision

[28] CIC established that the Applicant was inadmissible for serious criminality under paragraph 36(1)(*a*) of the IPRA, having been convicted of four counts of aggravated sexual assault.

[29] As for the question of whether the Applicant poses an unacceptable risk to the public, CIC referred to *Williams v Canada (Minister of Citizenship and Immigration)*, (1997) 212 NR 63, 147 DLR (4th) 93 (FCA) [*Williams*], as a starting point of its analysis of the Applicant's situation.

[30] CIC first considered the decision in which the Applicant was convicted. It has been established that he withheld his HIV positive status when he was asked questions and engaged in unprotected sexual intercourse with his victims to the point where one of them was infected and this will have serious consequences for the rest of her life.

[31] CIC also considered the Correctional Services Canada's Criminal Profile Report in which it is stated that the Applicant's problem revolve around his attitude towards women and sex. Moreover, the Report spoke of the Applicant's irresponsibility in protesting to use the necessary precautions when he had sexual intercourse and in assuring the victims that there was no problem.

[32] Finally, CIC considered that the Applicant's offences occurred in the context of romantic relationships, and once, in the context of a marriage, and that the four women were deceived into putting themselves at risk.

[33] CIC determined that the Applicant's behaviour demonstrates that he has no regard for the well-being of others and that on more than one occasion, he has lied to his partners for selfish reasons. It considered that it would take more than the rehabilitation classes that he took while in detention to change his acceptance of his health condition and to become honest about it. CIC further considered that the Applicant had been the subject of an investigation prior to the one that led to his arrest, but that no accusation resulted from this as it could not be proven that the Applicant had unprotected sexual intercourse or tried to infect the alleged victim. CIC mentioned that the Applicant cannot be held accountable for an allegation for which he was not charged.

[34] CIC concluded that the Applicant had made a habit of hiding his health condition and that as long as he could not be open about it, he constitutes a danger to the public. CIC considered the opinion of Susan Craigie of the Positive Living Society, who describes the Applicant as an asset to Canada, considering his cultural talents and his position as a person from a country where HIV is pandemic. CIC, however, determined that the Applicant is not the person described by Susan Craigie as he keeps his condition secret in intimate relationships. CIC also considered that the Applicant filed an appeal of his convictions and that he does not seem to have fully taken responsibility for his actions.

[35] The Applicant had an evaluation for possible parole on October 21, 2011 and both full parole and day parole were denied. In the reasons for refusal, it was stated that the Applicant contradicted much of the evidence used to convict him, denied all charges and took the position that he did not know he was HIV positive until 2004 despite having told the police that he had known he

was HIV positive since 1995. The Board considered that the Applicant's presentation raises serious credibility issues and that he is an untreated sex-offender who lacks empathy for his victims.

[36] In the Applicant's Psychological Assessment Report, there was mention of his involvement in AIDS awareness in Zimbabwe and of his intention to become an HIV activist.

[37] CIC concluded that on a balance of probabilities, the Applicant poses a present and future danger to the Canadian public and that his presence in Canada poses an unacceptable risk.

[38] CIC then conducted a risk assessment analysis to determine whether the Applicant would be at risk if returned to Zimbabwe and came to the conclusion that his removal from Canada would not violate his rights protected by section 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. CIC considered a number of reports on the current human rights situation in Zimbabwe and determined that evidence shows that the situation has evolved over the past ten years. Moreover, a power-sharing agreement was signed in 2008 which diminished the rivalry between the main political parties.

[39] CIC considered that although articles have been published in Zimbabwean newspapers, the Applicant did not demonstrate that he would be of interest to the authorities. In his initial refugee claim, the Applicant indicated in his Personal Information Form that his family had been targeted. In the submissions made by his counsel, it is indicated that his family was recently subjected to

threats. However, the Applicant has not submitted any evidence to corroborate this statement, and even if it were the case, it would not be unreasonable for the Applicant to relocate to a different city.

[40] CIC further noted that despite the possibility that the Applicant be questioned upon arrival in Zimbabwe, he has not been supportive of the opposition since his arrival in Canada and he is therefore unlikely to be targeted as an opponent to ZANU PF or because of his criminality in Canada. Moreover, despite some violations of human rights in Zimbabwe, the evidence is not sufficient to establish that the Applicant would face torture upon his return.

[41] CIC also found that it appears that although freedom of expression is sometimes limited, the Applicant has access to legal mechanisms to claim his constitutional rights. Moreover, he has been away for over ten years, his band has been operating in Victoria, B.C. and any media coverage in Zimbabwe has been related to his criminal convictions, not his political affiliations.

[42] Finally, the Applicant failed to establish that he is a "person in need of protection" on the basis that he would not receive the necessary treatments for HIV in Zimbabwe. Indeed, the documentary evidence demonstrates that adequate treatment is available to the HIV positive population.

[43] In conclusion, CIC determined that the Applicant does not face a risk of persecution or inhumane treatments should he be returned to Zimbabwe and that any risk he could possibly face is greatly outweighed by the danger he poses to Canadian society.

[44] CIC assessed the Applicant's situation in light of Humanitarian and Compassionate considerations. It noted that the Applicant had different jobs while in Canada, that he is single, has no dependents and is not financially supporting anybody.

[45] As for the availability of antiretroviral treatment in Zimbabwe, CIC determined that it is available at an affordable cost and accessible through a number of sources: government hospitals, private clinics and a number of NGOs that provide the treatment. Therefore, the Applicant would receive adequate treatment if returned to Zimbabwe and he has not demonstrated that returning to Zimbabwe would amount to disproportionate hardship. The information is not sufficient to overcome, on a balance of probabilities, the danger posed by the Applicant to Canadian society.

C. Analysis

[46] Both parties agree that the standard of review in this matter is that of reasonableness given that the issues are CIC's conclusion that the Applicant presents a danger to the public in Canada and its risk assessment. I will proceed with the analysis by dealing with the arguments submitted by the Applicant. I do note that the Respondent's submissions were useful for the purposes of this analysis.

[47] The Applicant submits that CIC made three errors when it determined that the Applicant is a danger to the public in Canada.

[48] First, CIC erred by focusing on the Applicant's past conduct as an assessment of whether he poses a danger to the public is forward-looking. The Applicant submits that his past convictions are not evidence that he will be a danger to the public in Canada in the future. He takes issue with the

fact that CIC did not give any weight to the fact that he attended several rehabilitation courses while he was detained, nor to a statement by the psychologist for Correctional Services Canada that said that he has a low risk of re-offending. The Applicant further argues that in its assessment of his situation, CIC should have disregarded any inconclusive investigations on him that were inconclusive as they cannot demonstrate that he has a propensity to commit sexual offences. I disagree. The analysis performed by CIC is in conformity with the jurisprudence of this Court: in order to assess the danger in the future, CIC had to look at the Applicant's past conduct and attitude, as well as his behaviour at the time of the decision. This is precisely what was done. (See *Williams*, above, and *Randhawa v Canada (Minister of Citizenship and Immigration)*, 2009 FC 310, 79 Imm LR (3d) 44). CIC also took in consideration the pschychological assessments which include the Applicant's low risk of recidivism. While it is evident that the Applicant disagrees with CIC's conclusion on that point, this Court's role is not to reweigh the evidence but to determine the reasonableness of the decision.

[49] Secondly, the Applicant submits that CIC erred by ignoring evidence relevant to the Applicant's behaviour in the future. CIC ignored the fact that he was in the community between 2004 and 2007 and that there is no evidence that he infected anyone or had non-consensual unprotected sexual intercourse with anyone during that period of time. The Applicant submits that this is a strong indicator of how he will behave in the future. He adds that CIC failed to give proper consideration to the fact that his viral load is almost undetectable, as a result of a treatment he is now undergoing, which reduces his capacity to transmit the virus. The Applicant relies on a recent decision by the Supreme Court of Canada, *R v Mabior*, 2012 SCC 47, 103 WCB (2d) 905 [*Mabior*] in which it was decided that a low viral load is likely to reduce the possibility of transmission of

HIV. The Applicant submits that therefore, CIC failed to refer to evidence that contradicts its conclusions. I disagree. As noted by CIC and as the evidence shows, the period between 2004 and 2007 was problematic. There is evidence that he was actively pursuing relationships with other women (some of which are referred to in CIC's decision). As for the argument related to his low viral load, while CIC did not specifically refer to it, there is long-standing jurisprudence of this Court that recognizes that there is a presumption that all of the evidence is given due consideration (see *Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ 598 (FCA)). Furthermore, it is evident from the analysis that CIC gave more weight to other types of evidence such as the criminal convictions, the Parole Board decision and the Applicant's ongoing denial of his actions. It should be underlined that one of the four women was contaminated by the Applicant. CIC's analysis is reasonable as it is focused on the Applicant's behaviour which bears more importance than his current viral load.

[50] Third, the Applicant submits that CIC erred by drawing a negative inference from the Applicant exercising his right to appeal his convictions. The Applicant argues that his decision to appeal his convictions does not indicate a lack of remorse or that he is a danger to the public but is in line with the political motive of de-criminalizing the non-disclosure of sexually transmitted infections. He submits that his political motives are apparent through his participation in a group that provides help to people living with HIV/AIDS. A reading of the decision does not support the Applicant's position as no negative inference was made from the appeal.

[51] The Applicant also submits that CIC erred in determining that the Applicant does not face a risk of persecution if returned to Zimbabwe. CIC's conclusion that the articles regarding the

Applicant are "local" and therefore do not demonstrate that he will be of interest to the authorities in Zimbabwe upon his return is unreasonable. He adds that a number of articles written about him were published in Zimbabwean newspapers namely in The Herald, a Zimbabwean government-owned newspaper and that articles on the Internet are available to the Zimbabwean authorities. The Applicant is of the view that the continued media coverage of his criminal proceedings in Canada has contributed to his notoriety in Zimbabwe. I disagree. A review of these articles shows that the media interest is solely related to his HIV trial in Canada and not to his political past. At no time did it refer to some political concern about the Applicant. CIC's conclusion that the impact of these articles was not as important as the Applicant suggests is reasonable.

[52] The Applicant argues that CIC's conclusion that he does not have notoriety in Zimbabwe is erroneous and leads to the unreasonable finding that he would not be identified at the airport upon arrival, that he would not be targeted in Zimbabwe and that circumstances in Zimbabwe do not pose a risk to him. Again, CIC's analysis is appropriate. The Applicant paints a picture of his notoriety that does not reflect reality, despite it suiting his needs in this judicial review. The Applicant is yet again asking this Court to re-weigh the evidence. As mentioned above, it is not the role of a Court to do so.

[53] At the hearing, counsel for the Applicant argued that the letter from Susan Craigie of the Positive Living Society was not in the Tribunal Record and that as such, this shows that it was not entirely taken into consideration. Counsel also argued that the reason the Applicant did not inform the Correctional Services that he had empathy towards the victims was because his lawyer told him not to discuss anything related to his criminal convictions. On the first point, the decision refers to

this letter and even quotes from the passage that was referred to by the Applicant's counsel in one of his submissions to CIC. Furthermore, the content of the letter as I read it is not determinative of any of the issues as it merely relates to the Applicant's cultural talents and his status as a person coming from a country where HIV is pandemic. On the second point made, it is noteworthy that the same attitude is described in the National Board Report. This report was issued after the appeals were dismissed. Therefore, I find that CIC's decision on these points is reasonable.

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[54] For all these reasons, I find that the determinations of CIC that the Applicant presents a danger to the public in Canada, its risk assessment of the Applicant's situation and its analysis of humanitarian and compassionate considerations are reasonable.

[55] The parties were invited to submit a question for certification but declined to do so.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed. No question is certified.

"Simon Noël"

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Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7797-12
STYLE OF CAUSE:	CHARLES KOKANAI MZITE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	February 27, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	NOËL J.
DATED:	March 19, 2013

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