Date: 20080808

Docket: IMM-48-08

Citation: 2008 FC 938

Ottawa, Ontario, August 8, 2008

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

SAMUEL NATHANIEL BAILEY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] The applicant contests the legality of a decision rendered by the Immigration Appeal Division of the Immigration and Refugee Board (the Board), dated December 3, 2007, in which the Board cancelled the applicant's stay of removal and appeal rights pursuant to section 197 of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (the Act).

[2] The applicant, Samuel Nathaniel Bailey, is a citizen of Jamaica and a permanent resident of Canada. On November 20, 2000, the applicant was convicted of trafficking in cocaine contrary to paragraph 465(1)(*c*) of the *Criminal Code*, R.S.C. 1985, c. C-46. The applicant pled guilty and was sentenced to five years and three months of imprisonment. On June 12, 2001, an immigration

adjudicator determined the applicant was inadmissible to Canada as a result of criminality and issued a deportation order pursuant to paragraph 27(1)(*d*) of the former *Immigration Act*, R.S.C. 1985, c. I-2 (the Former Act). The applicant appealed the issuance of the removal order to the Board. With respect to the disposition of said appeal, counsel made a joint recommendation to stay the execution of the removal order upon a number of agreed terms and conditions. In May 2002, the Board stayed the applicant's removal order for a period of three years on a number of conditions which include that the applicant "[k]eep the peace and be of good behaviour". The Board advised that it would reconsider the applicant's case in or about the fourth week of May 2005. In the meantime, the Former Act was repealed and the new Act came into force on June 28, 2002. At that time, the applicant's case was pending before the Board. His treatment, therefore, comes under the transitional provisions of the Act.

[3] The general rule, set out in section 192 of the Act, provides that cases pending in the Appeal Division when the Act came into force are continued under the Former Act. Nevertheless, some exceptions to this rule of general application are provided in the Act. One such example is section 197 which states: "Despite section 192, if an appellant who has been granted a stay under the former Act breaches a condition of the stay, the appellant shall be subject to the provisions of section 64 and subsection 68(4) of this Act." Subsection 64(1) provides: "No appeal may be made to the Immigration Appeal Division by a foreign national or their sponsor or by a permanent resident if the foreign national or permanent resident has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or criminality." Further, according to subsection 68(4), if the Immigration Appeal Division has stayed a removal order against a

permanent resident or a foreign national who was found inadmissible on grounds of serious criminality or criminality, and they are convicted of another offence referred to in subsection 36(1), the stay is cancelled by operation of law and the appeal is terminated.

[4] On April 13, 2005, the Board gave notice to the parties that on May 24, 2005, it would conduct an in-chambers review of the stay. The respondent requested that the applicant's appeal be dismissed because of breaches to certain terms and conditions of the stay order which did not concern the particular condition that the applicant keep the peace and be of good behaviour. An oral review took place on July 28, 2006. At the outset, the respondent agreed to withdraw its allegations of previous breaches and the parties made joint recommendations, which were accepted by the Board, to extend the stay for another year on the same terms and conditions except for minor changes with respect to the reporting requirements. On May 2, 2007, the Board notified the parties that, pursuant to subsection 68(3) of the Act, it would reconsider the applicant's appeal without an oral hearing on June 13, 2007. This notification, pursuant to Rule 26 of the *Immigration Appeal Division Ru*les, SOR/2002-230, required each party to provide the Board with a written statement about whether the applicant had complied with the conditions of his stay of removal.

[5] By letter dated June 13, 2007, the respondent requested that the applicant's stay be cancelled and his appeal rights removed due to the triggering of section 197 of the Act. The respondent argued *inter alia* that the applicant had breached the requirement to keep the peace and be of good behaviour by driving without a valid driver's licence on two occasions, in 2002 and 2003, contrary to British Columbia's *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 (the Motor Vehicle Act).

Subsection 24(1) of the Motor Vehicle Act provides that a person must not drive or operate a motor vehicle on a highway unless he holds a subsisting driver's licence issued to him or her under this Act. According to subsection 24(2), a person who contravenes subsection (1) commits an offence. [Emphasis added]

[6] With respect to the allegations of breach to the Motor Vehicle Act, the respondent adduced a statutory declaration sworn by Leona H. Martin, Immigration Officer at CIC/CBSA in Yellowknife (Certified Tribunal Record, pages 94-95). In Ms. Martin's own words:

> 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.
>
> [Emphasis added]

[7] The following day, the applicant responded to the respondent's submissions and argued that the motor vehicle allegations were not brought before the Board at the oral hearing held on July 28, 2006. Given that the alleged breaches "occurred in 2002 and 2003 **prior** to the further year stay imposed by [the Board]", applicant's counsel argued the applicant "cannot breach conditions on his current stay retroactively before the stay was even issued." [Emphasis in original]. Additionally, it was submitted that it seems "vindictive in the extreme for the Minister to call for Mr. Bailey's stay

to be cancelled and his appeal rights removed because of trivial [Motor Vehicle Act] allegations from 2002 to 2003 […]."

[8] On June 18, 2007, the respondent responded to the applicant's submissions and conceded that one of its arguments, namely that the applicant had failed to report a change of address, was incorrect and withdrew its submissions in that regard. Nevertheless, the respondent maintained its position that the applicant had breached the condition to keep the peace and be of good behaviour as a result of the motor vehicle infractions. Moreover, on July 6, 2007, the respondent further noted that applicant's counsel "does not dispute the fact that the applicant was convicted in 2002 and 2003 of driving without a valid driver's licence contrary to the Motor Vehicle Act." [Emphasis added] The respondent stated that it was unaware of the motor vehicle violations until advised of them by Ms. Martin in June of that year. A statutory declaration to that effect was provided by David Macdonald, the Hearing Officer who was involved in the stay review in July 2006, attesting to the fact that had he known of these breaches at the time of the oral review, it would have influenced his conduct of the case. Further, Mr. Macdonald stated that he did not consider driving without a licence, twice over, to be a trivial or technical breach of a condition to keep the peace and be of good behaviour.

[9] Applicant's counsel filed its reply on July 16, 2007. Counsel admitted that the applicant was in fact issued two traffic tickets: "one in New Westminster, B.C. on November 9, 2002 and another in Burnaby, B.C. on January 13, 2003 for driving without a licence contrary to s. 24(1) of the [Motor Vehicle Act]." Counsel further acknowledged that breaches of the Motor Vehicle Act may

"technically violate" the condition of keeping the peace and being of good behaviour. However, it was argued that the following circumstances should persuade the Board to exercise its discretion and not deport the applicant based on the two traffic tickets he received:

- the applicant held a Saskatchewan Driver's licence that expired two months before he received the first ticket;
- the applicant had not received the letter reminding him to renew his licence (and had simply forgotten to do so);
- the applicant had no intent to keep his traffic violations hidden;
- the applicant did not understand the degree to which he was required to report any contact with the police and/or courts;
- the applicant volunteered the information that his licence had been revoked; and,
- the applicant's entire life is established in Canada (he came to Canada in 1985, he has two children, he lives with his sister and is currently taking care of his mother).

[10] In its decision dated December 3, 2007, the Board first emphasized the respondent's allegation that the applicant "was convicted in 2002 and 2003 of driving without a valid driver's licence contrary to the Motor Vehicle Act and the said conviction[s were] not contested by the [applicant]." The Board then reasoned that a breach of a federal, provincial, municipal or regulatory statute does not automatically lead to the conclusion that there has been a breach of a condition to keep the peace and be of good behaviour. The Board relied on the Board's decision in *Cao v. Canada (Minister of Citizenship and Immigration)*, [2006] I.A.D.D. No. 101 (QL) (*Cao*) and the Federal Court's decision in *Avalos v. Canada (Minister of Citizenship and Immigration)*, 2005 FC

830, [2005] F.C.J. No. 1035 (Q.L.) (*Avalos*). The Board therefore considered the applicant's explanations with respect to the two provincial offences.

[11] With regard to the first offence, the Board accepted the applicant's explanation that his licence expired two months before and that he had not received his notice of renewal and that he had inadvertently failed to renew his licence. However, turning to the second offence, the Board stated it would have expected the applicant, in 2003, to renew or to get a new driver's licence which he obviously chose not to do. Accordingly, the Board found that the applicant "did breach in 2003 a provincial statute, the Motor Vehicle Act knowingly or ought to have known by driving without a valid driver's licence for which he was put a notice on [*sic*] his prior conviction in 2002 for the same offence. Therefore, the [applicant] breached the condition of his stay to keep the peace and be of good behaviour." Accordingly, the Board determined that the applicant is subject to section 197 of the Act. As a result, the stay of the removal order was cancelled and the appeal was terminated by operation of the law.

[12] According to the applicant, in initiating the review of the stay, the respondent bore the burden of proving that the applicant had breached a condition of his stay. This means the respondent bore the burden of proving that the applicant failed to abide by federal, provincial, and municipal statutes and regulations. In this regard, the applicant submits that the respondent cannot tender allegations of an offence as proof of a conviction. This follows not only from the presumption of innocence enshrined in the Canadian Charter of Rights and Freedoms, but also the duty of fairness owed to the applicant. In the case at bar, the Board erred in finding that the applicant had been

"convicted" of certain motor vehicle offences in 2002 and 2003. First, there was no direct evidence on the record and no admission that the applicant was ever convicted of driving without a licence. Second, the statutory declaration of Leona H. Martin constituted inadmissible hearsay evidence as proof of a conviction to support the cancellation of the applicant's stay.

[13] For the reasons that follow, this application for judicial review is dismissed

[14] In *Huynh v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1426, [2003] F.C.J. No. 1844 (QL) (*Huynh*), which is referred to by the Board in the impugned decision, Justice O'Reilly considered the meaning of a stay condition requiring the applicant to be of "good behaviour":

> I note that in the criminal law the requirement to "keep the peace and be of good behaviour" is a statutory condition in all probation orders: *Criminal Code*, R.S.C. 1985, c. C-46, s. 732.1(2)(a). To be of "good behaviour", one must abide by federal, provincial or municipal statutes and regulations: *R. v. R.(D.)* (1999), 138 C.C.C. (3d) 405 (Nfld. C.A.). I see no reason why the same approach should not apply in this context.
>
> [Emphasis added]

[15] *Huynh* was cited with approval by Justice Mactavish in *Cooper v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1253, [2005] F.C.J. No. 1519 (QL) (*Cooper*) at para. 15. In *Cooper*, which is also referred to by the Board in the impugned decision, the issue before the Court was whether the applicant's convictions in relation to provincial automobile offences constituted a breach of the condition of the stay of his deportation requiring him to "keep the peace and be of good behaviour and not commit further criminal offences". The answer is yes.

[16] However, in *Avalos*, also cited by the Board, at para. 34, Justice Blanchard found that section 197 does not prevent the Board from considering any reasonable explanation relating to the breach of condition:

> I am unable to accept the applicant's argument that section 197 allows no analysis of the circumstances surrounding the breach of condition and that in this case the applicant was unable to proffer an explanation. Section 197 does not prevent the Appeal Division from considering any reasonable explanation relating to the breach of condition. In my opinion, the Appeal Division has an obligation to consider the excuses provided by the applicant as an explanation of his failure, and it did so in this instance. The Appeal Division expressly considered the applicant's explanation for his failure and considered it insufficient. Accordingly, it is my opinion that the principles of natural justice were complied with in this case.

[17] In *Cao*, also cited by the Board, a panel of the Appeal Division took the *Avalos* line of reasoning one step further, finding at paras. 16 and 19 as follows:

> The panel is interested in this reference in both Cooper and Huynh to R. v. R. (D.) and the identical statements made by Justices Mactavish and O'Reilly in these decisions: "To be of good behaviour", one must abide by federal, provincial or municipal statutes and regulations. R. v. R. (D.)." The panel is of the opinion that the Minister has concluded that this phrase "To be of 'good behaviour' means one must abide by federal, provincial or municipal statutes and regulations" means that any conviction under a federal, provincial or municipal statute or regulation automatically means that a breach of the condition "to keep the peace and be of good behaviour" has occurred. The panel cannot agree based on its review of R. v. R. (D.) and further case law.
>
> […]
> The panel is satisfied, based on its review of R. v. R. (D.) that R. v. R. (D.) more accurately stands for the proposition <u>that a failure to be of good behaviour requires a failure to have abided by federal,</u>

> provincial and municipal statutes and regulatory provisions but that a failure to abide by a federal, provincial or municipal statute does not necessarily mean that there has been a failure to be of good behaviour.
>
> [Emphasis added]

[18] The panel in *Cao* ultimately concluded:

> The panel is firmly of the opinion that it is not appropriate to conclude, as the Minister would want, that a breach of this condition has occurred whenever an appellant has been convicted under any federal, provincial or municipal statute. In the panel's opinion, following Borland and Avalos, the appellant has the right to present evidence and provide an explanation in support of a contention that such a conviction does not necessarily mean that a breach has occurred and that a determination as to whether a breach has taken place must be made in the context of evidence and arguments on this specific issue. It is significant to the panel that the Federal Court in both Cooper and Huynh was reviewing IAD decisions in which the IAD ruled that breaches of the condition to keep the peace and be of good behaviour had occurred following provincial offences after the IAD had conducted an oral review in which the appellant was afforded the opportunity to argue this issue. The panel is of the opinion this is quite a different scenario than the IAD being asked to conclude that a breach has occurred simply based on evidence that a conviction had occurred.
>
> [Emphasis added]

[19] I note that Justice Campbell judicially affirmed the reasonableness of the approach taken by the Board in *Cao*: *Canada (Minister of Public Safety and Emergency Preparedness v. Ali*, 2008 FC 341, [2008] F.C.J. No. 518 QL. Moreover, Justice Campbell distinguished what had been said in *Canada (Minister of Citizenship and Immigration v. Stephenson*, 2008 FC 82, [2008] F.C.J. No. 97 (QL) (*Stephenson*), where Justice Dawson cautioned against following the *Cao* decision too closely.

[20] That being said, the jurisprudence established by this Court in *Huynh* and *Cooper*, and more recently in *Stephenson*, has consistently held that to "be of good behaviour", a person must abide by federal, provincial, and municipal statutes and regulations [Emphasis added]. I pause here to note that according to paragraphs 175(1)(*b*) and (*c*) of the Act, the Board "is not bound by any legal or technical rules of evidence" and "may receive and base a decision on evidence adduced in the proceedings that it considers credible or trustworthy in the circumstances". Given this statutorily mandated flexible approach to evidentiary considerations, I am not persuaded by the applicant's contention that the Board erred in considering the declaration of Ms. Martin. For the purpose of the proceeding before the Board, the respondent could well assert that the applicant had breached subsection 24(1) of the Motor Vehicle Act. I am equally of the view that there was ample evidence before the Board, both direct and indirect, that would allow it to reasonably conclude that the applicant had failed to abide by the Motor Vehicle Act.

[21] In this case, the statutory declaration of Ms. Martin constitutes proof that the applicant had received two traffic tickets in 2002 and 2003 for driving without a licence contrary to the Motor Vehicle Act. Ms. Martin further attested to the fact that the applicant had not obtained a licence elsewhere in Canada. I note that the applicant never denied the fact that he was driving a motor vehicle without a valid B.C. driver's licence in either 2002 or in 2003. To the contrary, the applicant voluntarily admitted that he was issued tickets for the offences of driving without a licence on November 9, 2002 and January 13, 2003. Moreover, the applicant readily admitted that his licence expired two months before he had received the first ticket in New Westminster, B.C. on November 9, 2002. He also admitted that he was still driving without a licence when he received the second

ticket in Burnaby, B.C. on January 13, 2003. Moreover, applicant's counsel submitted to the Board that "[w]hile breaches of the [Motor Vehicle Act] may technically violate the condition of keeping the peace and being of good behaviour, given the circumstances of Mr. Bailey's case, the Board should not find that this breach is serious enough to dismiss Mr. Bailey's appeal." [Emphasis added]. Clearly, this is an admission on the part of the applicant that twice he committed the offence of driving without a licence and thereby failed to abide by the relevant provincial law in 2002 and 2003.

[22] The Federal Court of Appeal decided in 2005 that it is "the offence itself that constitutes the breach of the condition to keep peace and be of good behaviour". In this regard, a breach may be established without a conviction "where there is other clear evidence of the offensive behaviour": *Singh v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 417, [2005] F.C.J. No. 2046 (QL), at para. 28 (*Singh*). In this instance, and given the clear and convincing evidence that was before the Board, I do not think it was unreasonable for the Board to conclude, in the absence of proof of a conviction, that the applicant "did breach in 2003 a Provincial Statute, the Motor Vehicle Act knowingly or ought to have known by driving without a valid driver's licence for which he was put on notice…in 2002…" (that is, when the applicant was issued a prior traffic ticket on November 9, 2002). Given the specific factual context of this case, I am equally of the view that the Board's finding that the applicant breached the condition to be of good behaviour is not unreasonable. Accordingly, the present application must fail.

[23] The applicant has proposed two questions for certification:

> 1. Does section 175 of the Act permit the Board to consider allegations of a charge [made under a provincial statute] as proof of a breach of the condition to keep the peace and good behaviour, or must a breach [to the provincial statute] be proven by direct evidence of a conviction before a stay is cancelled by operation of section 197 of the Act?
>
> a. Is a conviction [under the provincial statute] required to trigger section 197 of the Act [where a breach to the condition of keeping the peace and being of good behaviour is alleged]?

[24] It is clear that the first question would not be determinative of an appeal in this case. With respect to the second question, the pronouncement made by the Federal Court of Appeal in *Singh*, at para. 15, is determinative, since in this case, in the absence of direct proof of a conviction, there is "other clear evidence of the offensive behaviour". Accordingly, no question shall be certified.

ORDER

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

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-48-08
STYLE OF CAUSE:	SAMUEL NATHANIEL BAILEY v. MCI
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	July 28, 2008
REASONS FOR ORDER AND ORDER:	MARTINEAU J.
DATED:	August 8, 2008

APPEARANCES:

Micah Rankin	FOR THE APPLICANT
Helen Park	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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