Date: 20090911

Docket: IMM-4138-08

Citation: 2009 FC 899

Ottawa, Ontario, September 11, 2009

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

CESAR BENJAMIN GUZMAN

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) for judicial review of a decision of the Immigration Appeal Division (the IAD) of the Immigration and Refugee Board dated August 13, 2008, which dismissed the appeal of the applicant's deportation order.

[2] The applicant requests an order for redetermination of the applicant's appeal.

Background

[3] The applicant was sponsored, along with his wife, by his daughter and her husband in 1997. He has five children and ten grandchildren, with three of the children and seven of the grandchildren being Canadian citizens. All of his children and grandchildren appear to live in Canada.

[4] When the applicant arrived in Canada, his only revenue was his Peruvian pension, which was not sufficient, so he started to work. He had been a doctor in Peru but could not practice in Canada. He held various jobs and eventually worked at the Wentworth Manor as a resident assistant. He was convicted of sexually assaulting one of the residents at Wentworth Manor in 2005. She suffered from dementia and was 86 years old. In 2006, he pled guilty and was sentenced to 18 months plus 2 years probation. He served 11 months and was then paroled.

[5] The applicant was ordered deported because of the conviction on May 4, 2007. His appeal to the IAD was dismissed.

IAD's Reasons

[6] The IAD member began by comparing the sentencing judge's finding that the applicant was remorseful based on doctors' reports with the Crown's argument that he was not.

[7] The member concluded that a stay was not justified. The applicant received a lengthy sentence, considering that the Crown accepted to proceed by summary proceeding, as he received the maximum under that option. The member was not impressed by the expressions of remorse, finding them hollow and that the applicant minimized his actions. The same attitude was reflected by his family members.

[8] The close relationship of care over three years, the fact that the act was done at night when no visitors might happen upon them and the justifications he gave, (ongoing erectile issues and fear his wife was cheating) all brought into question the applicant's claim that this was an isolated event.

[9] While Dr. Sirota, Ph.D. in psychology, recommended he take part in counselling sessions, there was no evidence of such treatment, which one would expect if the applicant was ready to deal with this fully. There was also no evidence that he has addressed his issues in a substantial way.

[10] The member noted that the psychological and psychiatric assessments take it as a given that the assault was an isolated event and the opinions mainly rely on the information provided by the applicant. They do not address the connection between the sexual assault and the applicant's claims of sexual inadequacy, which would be important since the sense of sexual inadequacy has been going on for some time.

[11] The applicant chose to work in a place where he would find people with diminished mental capacity when he had no financial need to do so as he and his wife have pensions and their children support them. This left the member to question his motivation and whether he can be considered to have addressed his problems such that he can be considered rehabilitated.

[12] In terms of the hardship, the member noted that returning to Peru may actually be an element of rehabilitation, as the applicant could receive specialized medical treatment in his own language. The hypothesis that such assistance may not be available in Peru was not accepted as the applicant was a highly specialized medical practitioner in Peru himself.

[13] Parliament chose to deny those who were sentenced to two years the opportunity to appeal to the IAD. The member felt the applicant may have chosen to plead guilty on the summary offence to avoid the risk of a sentence over two years and to retain his appeal rights. As such, pleading guilty was not a reliable indicator of remorse, particularly since he was caught in the act.

[14] Contrary to the sentencing judge, the member was not convinced of the applicant's remorse, and in the end felt that the nature of the crime, the circumstances of the victim and other factors relevant to deterrence are such that the humanitarian and compassionate (H&C) grounds that did exist were insufficient to warrant relief.

Standard of Review

[15] The applicant finds that reasonableness is the applicable standard and the respondent agrees, noting that post-*Dunsmuir*, reasonableness requires greater deference than did the previous standard of reasonableness *simpliciter* (see *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190).

Issue

[16] The issue is as follows:

1. Did the IAD err in its treatment of the evidence by speculating or misapprehending or ignoring evidence?

Applicant's Submissions

[17] The applicant submitted that the AID member engaged in speculation on several critical matters:

- That this was not the first offence (an isolated event) despite the sentencing judge's remarks, psychological assessments and the testimony of the applicant and witnesses;
- That the applicant had pleaded guilty in exchange for proceeding by summary proceedings and to maintain his appeal rights without any evidence on the record;
- That the applicant is not remorseful despite the judge's and the psychologists' findings';

- That the psychological assessments are “kitchen sink psychology” and not comparing apples with apples.

[18] It is alleged that the member ignored the applicant’s relevant and contradictory evidence in engaging in such speculation. The applicant did partake in weekly counselling for six months, as noted in counsel’s disclosure. The sessions did not end when he went on probation, as the member concluded, and he also saw Dr. Baxter bi-monthly after that. Dr. Baxter and Ms. Farmer confirm this evidence.

[19] The applicant also alleges that the member put too much weight on the conviction rather than the circumstances giving rise to the offence and the applicant’s explanations. The member went beyond a subjective analysis of the facts and imputed behaviours that do not exist.

[20] The applicant submits that the IAD must be guided by the *Ribic* factors and that the member failed to balance them in a fair manner. There is considerable evidence that during and after his incarceration, the applicant participated in programs to address his problem but the member refused to accept expert findings and ignored all of the evidence which was almost entirely positive concerning his treatment and rehabilitation.

[21] The applicant finally submits that the member erred in concluding that the applicant did not take part in specialized programs as recommended and erred in his hardship assessment, speculating that he had financial means and family ties.

Respondent's Submissions

Preliminary issue with respect to new evidence

[22] The respondent objects to the applicant submitting a letter dated September 9, 2008 from Ms. Baxter stating that the applicant attended treatment since January 2008 but she does not say when or how often. This new evidence is inadmissible and irrelevant. The applicant's parole ended in August 2007 and there is no evidence he attended sessions since beginning probation up to the time the hearing took place. What the applicant did after the IAD hearing is irrelevant.

Main Argument

[23] The respondent suggests that the applicant simply disagrees with the findings of the IAD and its interpretation of the evidence and credibility. The findings, however, are clear and supported by the evidence. The applicant must demonstrate that there was an erroneous finding of fact, that it was made capriciously and without regard for the evidence and that the decision was based on the erroneous finding. He has not satisfied any of these requirements. The inferences made were available to the member based on the evidence before him and are within the range of reasonable findings. Any positive factors in favour of the applicant were considered by the member. Given the testimony at the hearing which did not support claims of remorse and showed his failure to take advantage of therapy, it was not unreasonable to find that he was not remorseful or engaged in a

rehabilitation process. There was no evidence that his personal issues had been addressed since the conviction. The remorse focused more on himself and his family, not the victim.

[24] The respondent submits that the finding that this may not have been an isolated event was also reasonable since it was used only in assessing rehabilitation. His justifications, that he had grown close with the woman and that she encouraged him, point to a degree of planning, not a spur of the moment crime of opportunity. The member did not conclude that the applicant committed more than one crime, just that he was not reliable without corroborating evidence. Such evidence was unavailable because of the victim's diminished capacity.

[25] The respondent also submits that the weight given to the psychological reports was appropriate as they answered a different question than the one the IAD had to answer, they covered different time periods and they assume the facts as told to them by the applicant. The lack of rehabilitation efforts by the applicant spoke louder than the reports.

[26] The respondent finally notes that the request was for a highly discretionary grant of extraordinary relief and the IAD looked at the evidence in deciding to refuse it. The member made no reviewable error.

Applicant's Reply

[27] The applicant challenges the respondent's evidence about the applicant's attendance at therapy sessions. The February 8, 2008, disclosure package which was before the IAD included a letter from Dr. Baxter stating that the applicant had completed the Federal Sex Offender Program. In the same package, there was also a Final Program Performance Report from December 1, 2007. The applicant also provided testimony about his treatment, stating that it was ongoing. The evidence showed that the applicant had weekly sessions from June 11, 2007 to December 1, 2007 and then bi-monthly sessions. The September 9, 2008 letter from Dr. Baxter only clarifies the IAD member's mistaken belief that the applicant did not seek treatment after being incarcerated.

Analysis and Decision

[28] From a review of the decision, it would appear the IAD member did a thorough job of addressing the majority of the evidence, however, there is other important evidence that the member seems to have ignored.

[29] In relation to treatment, the member seems to have made a significant error in his finding of fact with respect to treatment. From the evidence it seems clear that the applicant was in weekly specialized therapy for a period of time and then continued with bi-monthly sessions since the therapist did not seem to think he required more.

[30] There also appeared to be a consensus by the mental health practitioners and the sentencing judge that the applicant was unlikely to re-offend which would imply that he has dealt with his issues. This implication was ignored.

[31] As well, the member appears to have formed speculative conclusions without sufficient supporting evidence and sometimes with reliable evidence to the contrary available. For example, the member appears to have concluded:

1. that [the assault] was not an isolated event;

2. that the applicant chose to work where he did to have access to those with lesser mental capacity;

3. that the applicant had no financial need to work;

4. that Peru would have specialized psychological services available because the applicant had been a specialized doctor in that country (in a completely different field); and

5. that the applicant pleaded guilty to protect his IAD appeal rights.

[32] For the above reasons, I am of the view that the decision of the IAD was unreasonable and therefore, the decision must be set aside and the matter referred to a different panel (member) of the IAD for redetermination.

[33] The applicant submitted the following questions for my consideration for certification:

> i. Does “deference” to Parliament and to the IAD member negate the tribunal’s obligation by law to not make erroneous findings of fact which were made without regard to the evidence before him?

> ii. Does “deference” to Parliament and to the IAD member negate the tribunal’s obligation by law to not draw mistaken conclusions of fact from the evidence in the record?
>
> iii. Does “deference” to Parliament and to the IAD member negate the tribunal’s obligation by law to properly consider evidence before it, in particular, a piece of relevant evidence?

[34] I am not prepared to certify these questions as they would not be determinative of the issues in this case.

[35] The application for judicial review is allowed and the matter is referred to a different member of the IAD for redetermination.

JUDGMENT

[36] **IT IS ORDERED that** the application for judicial review is allowed and the matter is referred to a different member of the IAD for redetermination.

"John A. O'Keefe"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4138-08
STYLE OF CAUSE:	CESAR BENJAMIN GUZMAN - and - THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	March 11, 2009
REASONS FOR JUDGMENT AND JUDGMENT OF:	O'KEEFE J.
DATED:	September 11, 2009

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