

Date: 20081124

Docket: IMM-2695-08

Citation: 2008 FC 1307

Toronto, Ontario, November 24, 2008

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

**SAMUEL KYAMBADDE
(A.K.A. KYAMBADDE SAMUEL)**

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Kyambadde was found not to be a Convention Refugee or Person in Need of Protection by the Refugee Protection Division of the Immigration and Refugee Protection Board. He alleges that the Board erred in its evaluation of his credibility and that the Board should have considered whether or not he is a refugee *sur place*. For the reasons that follow, I find that neither of these grounds has any merit and I dismiss this Application.

Background

[2] Mr. Kyambadde is a 37 year-old Ugandan national who has been in Canada since August 5, 2006. He alleges a risk of persecution by the Ugandan authorities on account of his homosexuality.

[3] The applicant claims that he began to engage in same-sex activities in 1987 while attending secondary school. He was suspended from school in 1988 when he and his lover, Godfrey, were suspected of engaging in homosexual activities. Because of family pressure, the applicant entered into a heterosexual relationship in 1992. This relationship continued until 2002, during which time he became the father of three sons, and also adopted two other children.

[4] He testified that his only homosexual lover in Uganda was Godfrey and that they continued their relationship for nearly 20 years until he left for Canada. On May 14, 2006, the applicant and Godfrey were engaging in sexual relations on a beach when they were physically attacked by "local police and thugs". When the applicant regained consciousness, he was under police guard in the hospital. With the assistance of a friend, John, the applicant was able to escape from the hospital on the evening of May 15, 2006, and travel to Buvuma Island where he stayed and received medical attention until June 11, 2006, when he was taken to Nairobi, Kenya. In Kenya, he completed an application for a visitor's visa to come to Canada in order to attend an AIDS conference in Toronto in August of 2006. He arrived in Canada on August 5, 2006, and requested refugee protection on August 9, 2006.

[5] The Board determined that the applicant had not established an objective basis for his fear of persecution because of the lack of credibility in pivotal areas of his testimony. Specifically, the Board found the applicant's evidence not to be credible with respect to his alleged relationship with Godfrey. It was not persuaded that Mr. Kyambadde had engaged in a long-term sexual relationship with Godfrey in Uganda. Further, the Board found that his evidence with respect to his friend John providing him with assistance to escape Uganda not to be credible and found it more likely that John was an agent hired by the applicant for the specific purpose of coming to Canada. The Board also questioned the truth of his claims to have received medical treatment and generally it drew a negative inference with respect to the totality of the applicant's evidence. On this basis it denied the Application.

Issues

[6] The applicant submits that the Board erred in two respects:

- i. That the Board erred in making its credibility and plausibility findings; and
- ii. That the Board erred in failing to consider whether the applicant had a *sur place* refugee claim because he had become a gay rights activist while in Canada.

[7] The applicant, relying on *Dunsmuir v. New Brunswick*, 2008 SCC 9, submits that the first issue is reviewable on the basis of reasonableness and the second issue, being an error of law, is to be reviewed on the basis of correctness.

[8] The respondent submits that the Board's assessment and decision on credibility is reasonable and thus not reviewable. The respondent further submits that even if the Board ought to have considered the *sur place* refugee claim, there was insufficient evidence adduced to substantiate the applicant's identity in Canada as a gay rights activist.

Analysis

Credibility and Plausibility Findings

[9] The Board found that the applicant's alleged homosexual relationship with Godfrey was not credible because he had no cards, letters, gifts or other memorabilia to indicate that such a relationship had occurred. The applicant testified that the only items which they had exchanged were items of clothing such as pants and shirts, and that they had not exchanged any other gifts. More critically, the applicant testified that after he and Godfrey were beaten, he only once tried to contact Godfrey to determine how he was doing. He testified that while in Uganda he tried once, unsuccessfully, to call him. The Board found that his evidence concerning his relationship with Godfrey did not have the "ring of truth", as an individual who is in a long-term relationship would have been concerned for the safety and welfare of his partner and made greater efforts to reach him. The applicant submits that the Board considered the applicant's conduct in his relationship through western eyes and that it was not at all implausible that he would make no attempt to contact Godfrey while in Uganda, as it would possibly have put Godfrey and any emissary at risk. It is also submitted that it was not at all implausible that he would decide, on reaching Canada, to put his former life behind him and make no contact with Godfrey.

[10] I am not at all convinced that the basic human emotions of love and compassion for another are widely different in Canada than in Uganda. In my view, it is reasonable for the Board to question whether this 20 year relationship existed when the applicant showed so little concern for his lover. The applicant's evidence was that he made only one attempt to contact his lover of 20 years after a beating that had left him unconscious. In those circumstances it is quite possible that Godfrey was severely injured or dead, yet the applicant made no efforts to find out his condition or even whether his long term lover was alive. I find that this lack of concern raises serious issues as to the credibility of the applicant and the Board's finding that there was no such relationship was reasonable.

[11] The Board also questioned the credibility of the applicant's evidence with respect to his treatment at the Buvuma Islands Health Centre because the note produced from that facility differed from the applicant's oral evidence. The treatment note indicates that he "appeared in clinic" for treatment. However, the applicant said that he had not been treated at the Health Centre but had received treatment at an old man's home on the island where he was staying. The note makes no reference to the applicant being treated at a residence or at any location other than the Health Centre. Accordingly, the Board questioned its genuineness. In my view, that was not unreasonable based on the evidence.

[12] The Board also found implausible the applicant's testimony that he was able to walk out of the hospital and travel an extended distance by boat to Buvuma Island, after having been beaten to the point of unconsciousness only a day earlier. Taken together with the other evidence as to

medical treatment following his arrival on the island, that determination of implausibility cannot be said to be unreasonable.

[13] The Board also questioned and found implausible the applicant's story with respect to his friend John and his assistance in obtaining the applicant's removal from the hospital and arranging for his travel to Canada. The applicant testified that John was the father of a former student whom Mr. Kyambadde had helped and that this accounted for his generosity in assisting him. His evidence was that while under police guard in hospital, someone at the hospital handed him his cell phone so that he could call John. John arrived and bribed the police officers to turn a blind eye to their escape. John then took him to the island and made the arrangements, presumably at his own expense, for the applicant to travel to Canada. In addition to purchasing airfare and arranging for a visa to come to Canada, John advised the applicant not to seek refugee protection at "the port of entry". The Board found, quite reasonably in my view, that it was implausible that someone not familiar with international immigration practice and refugee protection would use the term "port of entry". In my view, it was not at all unreasonable for the Board to conclude that John was not a friend, but was an agent hired by the applicant to assist him in his removal from Uganda.

[14] Accordingly, in my view, the Board's findings with respect to credibility and implausibility were based on the evidence, rationality and common sense.

Sur place claim

[15] The applicant submits that the Board erred in failing to consider the *sur place* claim that arose after he arrived in Canada and became an activist in the gay community. A person who is not a refugee when he left his country, but who becomes a refugee at a later date, is a refugee *sur place*. This may arise either because of some circumstance arising in the country of origin during the absence or because of some action of the individual while outside his country. The applicant submitted evidence that reveals that homosexuals face widespread discrimination and legal restrictions in Uganda. One of the documents indicates that the Government routinely threatens and vilifies homosexuals and that sexual rights activists are subjected to harassment. In light of this evidence, the applicant submits that as a gay activist, he will be at risk, if returned to Uganda.

[16] Justice Blanchard in *Mohajery v. Minister of Citizenship and Immigration*, 2007 FC 185, held that “a *sur place* refugee claim must be examined insofar as it perceptibly emerges from the evidence on the record that the activities liable to entail negative consequences in case of a return, took place in Canada. This must be done even though the applicants did not specifically ask the Board to proceed with such an analysis”.

[17] The applicant was represented by counsel before the Board and no *sur place* claim was made at the hearing. I agree with Justice Blanchard that notwithstanding the failure to advance such a claim, the Board is required by law to itself raise such a claim in appropriate circumstances. However, in this case, not only was such a claim not advanced by counsel, but he concurred with

the Board that the only issue was the refugee claim based on the homosexuality of the applicant.

The certified tribunal record at pages 157 and 158 discloses the following exchange:

MEMBER: ... What will happen this morning is I will start with questions.

And the issues I would like to learn more about -- you're claiming that because of your sexual orientation as a homosexual male, you have been persecuted in Uganda and you fear that you will be persecuted in the future. Now, I'm going to ask you specific questions about that.

When you came to Canada, there was a delay in claiming. You came to Canada, August 5th, 2006, and he did not request refugee protection until August 9th, 2006.

You, at some point, reavailed yourself. And what that means is that you left your country at a time when you felt fearful and you returned. And that was when you went to Kenya in order to get the visa for your trip to Canada.

And finally, as in every case that comes before me, your credibility is at issue. Okay.

So when you're answering questions, tell me if you don't understand the question or if you're guessing. And if you need a break or you need a glass of water or anything, just let me know. Okay?

You had to -- you always have to speak because we're being recorded.

CLAIMANT: Okay.

MEMBER: Do you understand?

CLAIMANT: I'll do that.

MEMBER. Thank you.

Counsel, are there any additional issues that I haven't covered or any other matters we should address?

COUNSEL FOR CLAIMANT: No, I believe you covered everything, thank you.

(emphasis added)

[18] Counsel at the hearing was well aware of the documentary record, having submitted it himself. There was no evidence other than the documentary record that arguably supports the *sur place* claim. As such, I doubt that it can be said that the *sur place* claim emerged perceptibly from the record.

[19] Unlike the authorities cited by the applicant, in this instance counsel for the applicant, being fully aware of the evidence now relied on to support the *sur place* refugee claim, specifically advised the Board that there were no issues it need address other than the refugee claim based on the applicant's homosexuality. In my view, in such circumstances, there is no need for the Board to explore a *sur place* refugee claim unless there is clear and convincing evidence that supports such a claim such that it would be a miscarriage of justice for the Board not to consider the *sur place* claim. In this case there was no such evidence. In fact, it is my view that the evidence in support of the *sur place* claim is so weak that it would have been unreasonable for the Board to have found the applicant to be a *sur place* refugee based on that evidence.

[20] The applicant relies upon four letters in support of his *sur place* claim and as corroborative of his profile as a gay rights activist.

[21] The first letter, dated July 1, 2007, is a letter of appreciation from Pride Uganda Toronto. The letter expresses appreciation for the applicant's "volunteer efforts" at Pride Uganda. The letter notes that the applicant participated in the pride week preparations at The 519 Community Centre. The applicant is encouraged to continue to volunteer on behalf of Pride Uganda, and to continue his efforts to make the group known in the public.

[22] The second letter, dated March 27, 2008, is from The 519 Church Street Community Centre, confirming, to whom it may concern, that the applicant is a member of the Centre as well as a "volunteer facilitator for Pride Uganda". The letter explains that Pride Uganda is a social and support group for gays and lesbians who are newcomers to Canada from eastern African countries. The applicant is described as an active member of the "facilitation team" of Pride Uganda and states that "he has helped numerous newcomers to Canada become comfortable in an openly gay space in the community and that he took responsibility to keep Pride Uganda going when the original organizers left the group".

[23] The third letter, dated April 4, 2008, is from the AIDS Committee of Toronto. It notes the "volunteer commitment" of the applicant and states that since September of 2007 he has completed more than 60 hours of "volunteer training and outreach" and it concludes by indicating that the organization looks forward to "his continued participation in the AIDS Committee of Toronto's community outreach programs".

[24] The fourth and last letter, dated May 2, 2008, is another from Pride Uganda Toronto. It describes the applicant as the “volunteer chairperson of the group”. The letter describes Pride Uganda Toronto as “a social/peer support group established to bring together LGBTQ individuals in our community and to mobilize members to integrate into the Canadian community”. The applicant is described as a truly community-minded individual who assists in providing for the betterment of the community as a whole.

[25] In my view, this evidence is insufficient to support a finding that the applicant is a gay activist in need of refugee protection on a *sur place* basis. The facts here are similar to those before Justice von Finckenstein in *Contreras v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 603, where he found the facts were insufficient to ground a *sur place* refugee claim. He wrote:

16 ... The Applicant states he has transformed his life in Canada by becoming an AIDS/HIV activist and it would be impossible for him to continue to do this in Mexico. The Applicant relies on *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 that held an activist association which goes to one's inherent dignity, falls under the definition of being part of a particular social group. The Board failed to consider whether the Applicant could be considered a refugee *sur place* based on the right to live openly and promote human rights which are fundamental to his dignity.

17 This issue was not raised in the Applicant's PIF. There was also no evidence before the Board that the Applicant is an activist in Canada in a way that would attract public attention nor that his status as an activist would place him at risk in Mexico. His volunteer efforts have been that of a peer counsellor. No evidence has been provided to believe that role in Canada has created a *sur place* refugee claim. Although it appears the Applicant takes great pride and feels his activities are personally rewarding, that should not be the basis for granting refugee protection.

[26] It is my view that the comments of Justice von Finckenstein are apt here. The Board made no error in failing to consider a possible *sur place* refugee claim, based on the record before it.

[27] The applicant posed the following question for certification: Where the applicant is represented by counsel, is the Board obligated to consider an issue not raised during the hearing but where it emerges perceptibly from the record? The respondent opposes certification of the question on the basis that it is fact specific and not of general importance. I agree. Further, it would not be dispositive of an appeal of this matter as I have found that even if the *sur place* claim were considered by the Board, a finding that this applicant was entitled to that protection would have been an unreasonable decision on the record before it.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed and no question is certified.

“Russel W. Zinn”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2695-08

STYLE OF CAUSE: SAMUEL KYAMBADDE
(A.K.A. KYAMBADDE SAMUEL) v.
THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: November 19, 2008

**REASONS FOR JUDGMENT
AND JUDGMENT:** ZINN J.

DATED: November 24, 2008

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