Date: 20050715

Docket: IMM-10013-03

Citation: 2005 FC 990

BETWEEN:

STEVE KUBBY, MICHELE KUBBY

BROOKE KUBBY and CRYSTAL KUBBY

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

SIMPSON J.

[1] This application is for judicial review of a decision of a member of the Immigration and Refugee Protection Board (the "Board"), dated November 17, 2003 in which the Board determined that the applicants are not Convention refugees or persons in need of protection (the "Decision").

[2] Steve Wynn Kubby, aged 57 years, Michele Renee Kubby, aged 38 years and their two minor children, Brooke Kona Kubby, aged 8 years and Crystal Bay Kubby, aged 4 years are all citizens of the United States. They all rely on the claim of Steve Kubby (the "Applicant"). He claims refugee status and protection on the basis of his use of marijuana for medical reasons.

THE APPLICANT'S MEDICAL HISTORY

[3] The Applicant was diagnosed with a rare adrenal cancer in 1968 and was then given three to five years to live. That prognosis proved wrong and the Applicant was treated with surgery to remove an aggressive tumor and also received chemotherapy, radiation and medications for his cancer and related symptoms. The symptoms include rapid and irregular heartbeat and dangerous rises in blood pressure (the "Symptoms"). If not controlled, the Symptoms could lead to a heart attack or a stroke.

[4] In the early 1980's the Applicant replaced his conventional treatment with marijuana. It has not been shown to cure his cancer but it controls the Symptoms and, in the opinion of Dr. Connors and Dr. DeQuattro, it is the most effective treatment option at this time because it suppresses the Applicant's Symptoms better than traditional medications.

[5] Since his arrival in Canada in April 2001, the Applicant has resumed radiation treatment. He has also been granted permission by Health Canada to grow 117 marijuana plants for his medical use.

[6] The evidence before the Board showed that, although marijuana is the best treatment, it is not the only treatment to address the Symptoms. Other medications are available and the evidence did not support Mr. Kubby's assertion that, without marijuana, he will die.

THE APPLICANT'S PROCEDURAL HISTORY

[7] In July of 1998, following receipt of an anonymous letter alleging that the Applicant was growing 1500 plants and selling his crop, law enforcement officials in California executed a search warrant at the Applicant's residence. They found an indoor marijuana grow operation which involved 265 plants. They also found the banned substances mescaline and psilocin.

[8] The Applicant was subsequently charged under California law with a number of marijuana offences, as well as with possession of mescaline and psilocin.

[9] In response to the charges, the Applicant said that he was growing and using marijuana for medical purposes. The California *Compassionate Use Act, 1996* provides that it is not an offence under state law for a person to cultivate or possess marijuana for personal medical purposes with the approval of a physician. Mr. Kubby had such approval.

[10] The Applicant was allowed to smoke marijuana during recesses in his trial. The prosecution on the marijuana charges ended in a mistrial because one juror wanted to convict the Applicant. However, on December 21, 2000, the Applicant was convicted of possession of both mescaline and psilocin contrary to the California Health and Safety Code. Both matters were treated as misdemeanors at trial. However, on appeal, the mescaline conviction was held to have been a conviction for a felony.

[11] In March of 2001, the Court sentenced the Applicant to 120 days of house arrest, a fine and three years probation (the "Sentence"). The Applicant consented to the Sentence. The Court directed that the Applicant could continue to use marijuana while under house arrest and during probation in accordance with the *Compassionate Use Act*. The Applicant subsequently changed his mind and decided that he would prefer to go to jail rather than face probation. It is noteworthy that he decided to ask for a jail sentence at a time when it was not certain that he would be allowed to smoke marijuana in jail. However, his motion to vary his sentence was denied.

[12] The Applicant was required to surrender to authorities in July of 2001 to begin serving his house arrest. However in April of 2001, at a time when his probation had begun, he left the United States and came to Canada.

[13] Approximately one year after his arrival in Canada, the Applicant filed a refugee claim on the basis that he had been persecuted and feared future

persecution by the California and federal authorities because of his pro-marijuana beliefs. The Applicant also claimed to be a person in need of protection because, if returned to the U.S., he would be denied marijuana while incarcerated.

THE DECISION

[14] The refugee hearing spanned nine days and the Board heard the testimony of eleven witnesses who included journalists, lawyers, medical experts, authors and a Judge of the California Superior Court. The Board canvassed the Applicant's medical history, his use of marijuana for medical purposes and the current state of U.S. federal and California legislation.

[15] In its seventy-one page Decision, the Board accepted that the Applicant has a history of treating his cancer with marijuana and concluded that this treatment has been effective.

[16] The Board commented on the current state of the law in the U.S. regarding the use of marijuana for medical purposes. The Board noted that, while the use of medicinal marijuana has been allowed in California (and other states), marijuana remains a banned substance at the federal level.

[17] The Board noted that, although in conflict with federal law, the state laws have great impact because 99% of marijuana arrests are made by state or local officers and not by the Federal Drug Enforcement Administration ("DEA"). Further, the Board noted that California's Bill 420, which came into effect on January 1, 2004, recognized the potential necessity for California inmates to have access to medicinal marijuana.

[18] With regard to the Applicant's refugee claim, the Board found that the Applicant had not demonstrated that his prosecution under the *California Health and Safety Code*, which is law of general application, amounted to persecution for a Convention reason. The Board did not accept the allegation that the Applicant had been prosecuted unjustly or because of his pro-marijuana political opinion. There was evidence, which the Board accepted, that he was prosecuted because he was found with two illegal substances in his possession and more marijuana plants than appeared necessary for personal use.

[19] The Board also noted that the Applicant had been given a fair trial in the U.S., with full access to procedural and substantive rights and that this fact supported the presumption of a fair and independent judicial process. The Board concluded that the Applicant became a "fugitive" from justice, as opposed to a refugee from injustice, when, while under probation, he left California to avoid house arrest.

[20] With regard to the Applicant's allegation that he would face federal prosecution were he to return to the U.S., the Board found that the Applicant had not shown that this was a serious possibility. Finally, the Board concluded that the Applicant failed to show that state protection was not available in the U.S.

[21] With regard to his claim for protection, the Applicant alleged that his life would be at risk if he were returned to the U.S. He said he would be incarcerated, would be denied marijuana while incarcerated and would, therefore, die.

[22] The Board did not accept these allegations. Firstly, the Applicant did not establish that he would be incarcerated on his return to the U.S. Further, the Applicant did not establish that his life would be at risk if he had to rely on conventional medical treatments instead of marijuana. The Board noted that, in the U.S., incarcerated individuals at both the state and federal levels have a constitutional right to conventional medical care.

THE ISSUES

[23] The Applicant alleged that the Board erred in the following respects:

1. The Board failed to focus on the Applicant's need for protection from the DEA;

2. The Board erred when it described the Applicant as a fugitive from justice;

3. The Board failed to consider the best interests of the Applicant's children.

Issue 1 B The DEA

[24] The Applicant's concern is the possibility of future prosecution by the DEA which might result in lengthy incarceration in a federal institution where marijuana would not be available for medical use.

[25] The Board squarely addressed this issue. It said:

> (g) Alleged Risk of Federal Prosecution
>
> [129] Mr. Kubby is alleging that he is at risk of a federal prosecution either for his past or future actions. Several witnesses gave their opinion that Mr. Kubby would be prosecuted by the federal authorities if he returned to the United States. Mr. Kubby argues that if he were prosecuted on federal drug charges, he would be denied the right to advance the "medical necessity" defence he is afforded under the *CUA* for state prosecutions. His fear is that his continued need for marihuana will cause him to eventually run afoul of federal laws by growing and cultivating marihuana. He fears he will expose himself inadvertently to a federal prosecution thereby inviting a lengthy sentence at the end of a successful prosecution.
>
> [131] However, the evidence on the whole indicates that the DEA's focus is on large scale drug trafficking. As we have heard repeatedly in this hearing, the DEA does not generally get involved in minor drug investigations

and prosecutions, largely because of limited resources. Mr. Satterberg testified:

> I spoke this morning with [DEA] chief criminal deputy there, and there are no specific guidelines. They are pretty flexible about what cases that they look at . . . they typically will not handle a case unless it's a least 500 plants or/and at least 50 pounds of processed marihuana. Those are kind of general guidelines that they follow . . . they are interested in getting drug traffickers.

[132] On the one hand several witnesses expressed their opinion that Mr, Kubby would likely be prosecuted by the federal authorities because he was a high profile marihuana advocate. Based on this evidence, Mr. Kubby alleges that he is at significant risk of being prosecuted by the federal authorities if he returns to the United States.

[134] The testimony of Mr. Satterberg directly contradicted the opinion expressed by some witnesses that Mr. Kubby would be prosecuted by the federal authorities because of his political opinions. It was his evidence that the federal government authorities do not have a policy on medicinal marihuana patients and it is not their practice or intent to try to prosecute a medicinal marihuana case simply to make some sort of political point. Of course, he was describing his relationship with federal prosecutors in Washington state and was not expressing an opinion on what the DEA's position might be in California.

[135] However, it is noteworthy that the DEA is a federal institution and one would assume that theirs is a national policy. What Mr. Satterberg was saying about Washington state would likely be their drug policy throughout the US.

[26] However, the Board did have evidence about the DEA's approach in California. At paragraph 178 of its Decision, the Board noted that California's deputy district attorney, Christopher Cattran, testified that the DEA would not use its limited resources to prosecute unless approximately 1,000 plants were at issue and that less than 500 plants would not result in a federal prosecution.

[27] At paragraph 69 of the Decision, the Board considered cases in which the DEA had prosecuted and concluded that "all of the federal prosecutions mentioned were connected with third party distribution at one point or another".

[28] The evidence also showed that the Applicant was not charged by the DEA in 1999 although it was aware of his 265 plant garden and his profile as an activist. There is no federal warrant outstanding for the Applicant and no evidence that the DEA is interested in him today.

[29] Notwithstanding these findings, the Board considered the Applicant's fear of death due to incarceration without access to marijuana and said at paragraph 194 of the Decision:

> […] I am not persuaded that the US correctional system will be unable or unwilling to ensure Mr. Kubby survives his penal incarceration, if indeed he is incarcerated in a prison, a fact that has not been established. It think it is fair to say that either the Department of Corrections (for state prisoners) or the Bureau of Prisons (for federal prisoners) are capable of taking care of Mr. Kubby's special needs, if he is in danger while in prison. They are charged with the duty to protect Mr. Kubby while he is in one of their institutions. Mr. Kubby has not established that they would fail to do so in his case.

[30] Based on this review of the Decision, I have not found that the Board disregarded the Applicant's fears as they related to potential prosecution by the U.S. government.

Issue 2 B A Fugitive from Justice

[31] In my view, the Board did not err when it described Mr. Kubby as a fugitive. The Deputy District Attorney for California testified before the Board that the California Appeals Court used that term when it refused to entertain Mr. Kubby's cross appeal. The Court found that he became a fugitive when he knowingly fled to Canada without serving his full sentence. As well, on July 30, 2001, a bench warrant was issued for his arrest because he violated his probation when he came to Canada. In these circumstances, it was open to the Board to describe Mr. Kubby as a fugitive.

Issue 3- The Best Interests of the Children

[32] The Board noted that Ms. Kubby expressed fear that the couple's daughters would be taken away from them and placed in care if they returned to the United States. However, there was no evidence to suggest that this was even a possibility. In these circumstances, the children's welfare was not at issue and, therefore, did not require assessment by the Board.

CONCLUSION

[33] For all these reasons the application will be dismissed.

CERTIFICATION

[34] The Applicant posed the following question:

> How do you reconcile Health Canada's position that Mr. Kubby needs medical marijuana and therefore needs protection from the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 in Canada with the Immigration and Refugee Board's position that the Applicant is not a person in need of protection?

[35] I have decided that this is not a question of general importance and that, in addition, the answer could not be dispositive in this case. Accordingly, certification is denied.

"Sandra J. Simpson"

JUDGE

Ottawa, Ontario

July 15, 2005

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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