Federal Court  Cour fédérale

Date: 20160712

Docket: IMM-5693-15

Citation: 2016 FC 794

Ottawa, Ontario, July 12, 2016

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

MABEL SABULAO GACHO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision rendered by an immigration officer (the Officer), dated December 3, 2015, which refused to grant the Applicant's application for permanent residence as a member of the Live-in Caregiver Class on the ground that her husband, as an accompanying family member, has been found inadmissible to Canada pursuant to

subparagraphs 34(1)(b) and (f) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for being a member of an organization that engaged in or instigated the subversion by force of a government.

II. Background

[2] The Applicant is a citizen of the Philippines. Her husband, Peter Jr. Calucer Gacho (Mr. Gacho), who was a member of the Armed Forces of the Philippines (AFP) from 1987 to 1998, volunteered to join the AFP at the age of 18 and began training on May 1, 1987. He completed his basic training on July 31, 1987 and became a Private of the AFP on the next day.

[3] Mr. Gacho subsequently began training under the Scout Ranger Orientation Course in the mountains of Bulacan. On the night of August 27, 1987, Mr. Gacho and others in his training class were ordered by their commanding officer, Captain Redemto Taiza, to board a truck which brought the training class to Camp Aguinaldo in Manila. Mr. Gacho claims that at no time he was advised of the purpose of deployment.

[4] On the morning of August 28, 1987, while inside the camp, Captain Taiza ordered Mr. Gacho and his class to stand near a golf course. The class heard gunfire in the distance. It was at that time that they discovered that there was a combat occurring. However, Mr. Gacho claimed that he and his class had no knowledge of who was fighting or who the enemy was.

[5] Mr. Gacho claimed that although he was fearful for his life, he could not escape because he was afraid that he would be subjected to court martial proceedings and severe sanctions, including death, for disobeying an order. In 1990, Mr. Gacho was convicted and imprisoned for his involvement in the August 28, 1987 coup attempt. He was granted amnesty in 1996 and was able to complete his military service term. Mr. Gacho was discharged from military service on March 1, 1998.

[6] The Applicant argues that the Officer committed a reviewable error by relying on the inadmissibility determination made by the overseas visa officer in Manila instead of conducting his own independent assessment of whether Mr. Gacho is inadmissible to Canada.

[7] The Applicant also argues that the Officer's decision is unreasonable since the Officer failed to consider the proper definition of "membership" and by failing to consider the defence of duress and that of superior orders.

III. Issue and Standard of Review

[8] The issue to be determined in this case is whether the Officer, in concluding as he did and in the manner in which he did, committed a reviewable error as contemplated by subsection 18.1(4) of the *Federal Courts Act*, RSC, 1985 c F-7.

[9] The question of whether a person is a "member" of an organization referred to in subsection 34(1)(f) of the Act is a question of mixed fact and law. The applicable standard of review is therefore the reasonableness standard (*Ismeal v Canada (Public Safety and Emergency*

Preparedness), 2010 FC 198, at para 15; *Karakachian v Canada (Citizenship and Immigration)*, 2009 FC 948, at para 29, 364 FTR 1).

IV. Analysis

A. *The Officer's reliance on the determination of the overseas visa officer*

[10] The Officer's Global Case Management System (GCMS) notes state the following:

> As part of the processing of this Application for Permanent Residence, the Visa office in Manila was engaged in assessing the overseas dependents, which included the PA's spouse and her other dependants and a Visa officer found her spouse inadmissible under A34(1)(f) by being part of an organization outlined in A34(1)(b). CPCV's assessment is that of the PA and as her spouse is inadmissible under A34(1)(f), it makes her inadmissible A42(1)(a).

[11] It is clear from the above that the Officer did not conduct an independent assessment of Mr. Gacho's inadmissibility as the Officer held the view that it was not his function to do so.

[12] The Applicant relies on authorities such as *Yang v Canada (Public Safety and Emergency Preparedness)*, 2008 FC 158, 324 FTR 22, and *Burgin v Canada (Minister of Citizenship and Immigration)*, 68 ACWS (3d) 723, to argue that the Officer committed a reviewable error by failing to render an independent assessment of the evidence against Mr. Gacho. In my view, this argument must fail since these decisions were not rendered in the context of applications for permanent residence under the Live-in Caregivers Program (LCP), which has a particular method for assessing applications.

[13] Further to a review of the evidence submitted by the Respondent, including the IP 4 Processing Live-in Caregivers in Canada manual (IP 4), the OP 14 Processing Applicants for the Live-In Caregiver Program (OP 14) and the OP 24 Overseas Processing of Family Members of In-Canada Applicants for Permanent Residence (OP 24), I am of the view that it was not unreasonable for the Officer to rely on the findings of the overseas visa officer.

[14] Section 5.1 of the IP 4 manual states that:

> Visa offices are also responsible for processing permanent residence applications overseas for family members of live-in caregivers who have applied for permanent residence from within Canada.

[15] Section 9.7 of the OP 14 manual describes the division of tasks between overseas visa officers and officers working out of the Case Processing Centre in Vegreville (CPC), where an overseas permanent residence application is refused:

> The visa office:
>
> informs the CPC of negative results for accompanying and non-accompanying family members;
>
> informs the CPC if family members have not undergone examination within the allocated period of time or could not be located (see section 9.3 above); and
>
> shows the final disposition of its LC 2 file as "refused" for accompanying family members and as "withdrawn" for non-accompanying family members.

> The CPC:
>
> informs the applicant regarding the status of their case. Additional time may be allowed for response; and
>
> refuses the case. The refusal letter to the live-in caregiver applicant will state that both the applicant and all family members, in Canada or abroad, are refused.

[16] Section 9.1 of the OP 24 manual provides greater details about the processing of permanent residency applications from the CPC and overseas visa offices under the Live-In Caregiver Program:

> Persons who come to Canada under the Live-In Caregiver Program (LCP) may qualify to apply for permanent residence from within Canada, once they have completed all the requirements to be a member of the class. These requirements include proof of having worked full time as a live-in caregiver for a cumulative period of two years within the first three years of arriving in Canada under the program.
>
> […]
>
> Live-in caregivers must submit their application for permanent residence, including all supporting documents and the appropriate fees, to the CPC-V. (Information regarding the required forms and processing fees is available on CIC's Internet site at www.cic.gc.ca.)
>
> The CPC-V is responsible for processing and assessing all LCP applications for permanent residence. Once the CPC has made the initial determination for membership in this class, the appropriate visa office is contacted for the processing of any overseas family members.
>
> Concurrent processing of family members living abroad may be requested by the principal applicant.

[17] As is well-settled, such manuals are not law and, as a result, are neither binding on the Minister or his agents and cannot fetter the discretion of a visa officer (*Lee v Canada (Citizenship and Immigration)*, 2008 FC 1152, at para 29; *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 [*Legault*]; *Vaguedano Alvarez v Canada, (Citizenship and Immigration)*, 2011 FC 667, at para 35). Yet, while not legally binding, ministerial guidelines can be of "great assistance" to the Court in determining the reasonableness of an officer's decision (*Legault*, at para 20; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at para 72).

[18] In my view, the above excerpts demonstrate the Minister's interest in dividing the task of reviewing permanent residence applications originating from the LCP between overseas visa officers and CPC officers. Overseas visa officers process permanent residence applications overseas for family members of live-in caregivers who have applied for permanent residence from within Canada. CPC officers process and assess the applications of live-in caregivers themselves. Given the scheme set out in the manuals, I am of the opinion that the Officer reasonably found that it was not his role to reassess the overseas officer's inadmissibility finding against Mr. Gacho.

[19] The Applicant also contends that the Officer's treatment of Mr. Gacho's inadmissibility is inconsistent with Justice Elizabeth Heneghan's ruling of August 31, 2015. In this ruling, Justice Heneghan refused to grant the application for leave of the overseas officer's inadmissibility determination because the application was premature and stated that the "ultimate determination about Mr. Gacho depends upon final processing of the Principal Applicant's

application" (*Gacho and Gacho v Canada (Minister of Citizenship and Immigration)*, Ottawa, IMM-2627-14 (FC)). In my view, this argument must fail since the Applicant's inadmissibility hearing was indeed dealt with finality in the Officer's decision. I do not interpret Justice Heneghan's ruling to mean that the Officer was held to conduct an independent assessment of Mr. Gacho's inadmissibility to Canada.

[20] In other words, the overseas visa officer's inadmissibility finding is of course not immune from judicial review. It is reviewable as part and parcel of the final decision denying the Applicant's permanent residence application.

B. ***The reasonableness of the inadmissibility finding***

[21] In this regard, I find that the overseas officer committed no reviewable error in finding Mr. Gacho inadmissible.

[22] While the Act does not define the term "member," this Court has stated that the term is to be interpreted broadly given the context of the legislative scheme (*Krishnamoorthy v Canada (Citizenship and Immigration)*, 2011 FC 1342, at para 22, 400 FTR 267 [*Krishnamoorthy*]; see also *Poshteh v Canada (Minister of Citizenship & Immigration)*, 2005 FCA 85, at paras 27-29 [*Poshteh*]; *Chiau v Canada (Minister of Citizenship & Immigration)* (2000), [2001] 2 FC 297, at para 25, 193 FTR 159 (FCA) [*Chiau*]).

[23] In this regard, this Court has consistently found that the term "member" does not require actual or formal membership coupled with active participation. Instead, being a "member" simply means "belonging" to a group (*Chiau*, at para 57; see also *Denton-James v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1548, at para 13; *Ismael v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 198, at paras 19-20).

[24] Generally, the factors relevant for deciding whether or not an applicant is a member of an organization for the purposes of section 34 of the Act are an applicant's intentions, degree of involvement and degree of commitment (*Krishnamoorthy*, at para 23). In *Sinnaiah v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1576, Justice O'Reilly stated that to "establish "membership" in an organization, there must at least be evidence of an "institutional link" with, or "knowing participation" in, the group's activities" (at para 6).

[25] A foreign national's "membership" in an organization that subverted a government is assessed on the "reasonable grounds to believe" standard of proof pursuant to section 33 of the Act. This standard "requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities" (*Mugasera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 SCR 100, at para 114).

[26] Moreover, given that section 33 of the Act states that the facts giving rise to inadmissibility include facts that "have occurred, are occurring or may occur," this Court has interpreted this to mean that "membership" is without temporal constraints. This means that an officer need only ask "whether the person is or has been a member of that organization" (*Yamani*

v Canada (Public Safety and Emergency Preparedness), 2006 FC 1457, at para 12, 304 FTR 222 [*Yamani*]). Officers need not match a person's active membership to when the organization carried out the subversive acts (*Yamani*, at para 12).

[27] Further to a review of the record, including the overseas visa officer's reasons, I am of the opinion that the overseas officer in Manila conducted a thorough assessment of the facts and reasonably found Mr. Gacho to be inadmissible pursuant to paragraph 34(1)(f) of the Act. Notably, the overseas visa officer found that:

1) it is irrelevant whether an individual personally engages, has engaged or will engage, in acts referred to in paragraph 34(1)(a), (b) or (c) of the Act. What matters is that the organization falls within the ambit of paragraph 34(1)(a), (b) or (c) of the Act, and that the individual is a member of that organization;

2) open source information indicates that the regiment that Mr. Gacho was enlisted in, the First Scout Ranger Regiment, was involved in the coup. News articles state that on August 28, 1987, Colonel Gregorio Honasan led rebel soldiers to launch an attack against Malacanang, that the rebel soldiers seized portions of Camp Aguinaldo, including the Department of National Defence headquarters and left 53 people dead and over 200 people wounded;

3) Mr. Gacho confirmed during his interview with the overseas officer that he was present during the coup and that people were fired on and died during the coup attempt;

4) Mr. Gacho also confirmed in his application that he was assigned to a military unit that was involved in the 1987 coup attempt against the government and that members of the unit, including himself, were charged under general court martial number 9 and were convicted and imprisoned for three years;

5) the certification issued by the National Bureau of Investigation (NBI), dated May 13, 2010, and the Notice of Resolution of the National Amnesty Commission, dated October 25, 1995, both indicate that Mr. Gacho was a member of the Reform the Armed Forces Movement-Soldiers of the Filipino People-Young Officer's Union (RAM-SFP-YOU);

6) Mr. Gacho's explanation for being labeled as a member of the RAM-SFP-YOU was not plausible. Mr. Gacho signed a letter stating that he was not a member of RAM-SFP-YOU and explained that his support for these organizations may have been concluded because he belonged to a unit in the armed forces whose commanding officer may have been a member of these organizations. The overseas officer rejected this explanation, stating "the fact remains that the NBI certification states that the NBI record show you as a member of the RAM-SFP-YOU. Even if you claim not to have been a member of the above mentioned organizations, you admit to and there is evidence […] that you have been an enlisted member of the 1st Scout Rangers Regiment of the Philippine Army"; and

7) the fact that Mr. Gacho was only a trainee at the time of the coup does not exclude him from being a member since he was called to participate in action while still in training and since Mr. Gacho referred himself to be a member of the group.

[28] The overseas visa officer further found that while Mr. Gacho claimed not to have known what was going on during the coup of August 28, 1987, "it is not unreasonable to conclude given the nature of your regiment's specialized duties and your duties described as a rifle man with an active role, that you would not have been aware of your regiment's purpose and objectives."

[29] In my opinion, the overseas visa officer reasonably found that Mr. Gacho was aware that the First Scout Ranger Regiment was planning a coup against the government. Given the strong evidence against Mr. Gacho, including his conviction for having participated in the coup, it was reasonably open for the overseas visa officer to prefer the documentary evidence describing Mr. Gacho as a member of the RAM-SFP-YOU rather than Mr. Gacho's explanation for being linked to the organization. In my view, the overseas visa officer's decision falls within a reasonable range of outcomes, which are defensible in respect of the fact and law (*Dunsmuir*, at para 47).

[30] The overseas visa officer conducted a thorough assessment of Mr. Gacho's membership within the First Scout Ranger Regiment, including Mr. Gacho's role in the organization and his knowledge of the regiment's purpose and objectives. As indicated above, these factors need only be proven on the "reasonable grounds to believe" standard. The role of the Court is not to determine whether Mr. Gacho was a member of the organization that carried out the coup, but only to find if there is evidence of this fact upon which the Officer could reasonably conclude that Mr. Gacho was a member (*Re Suresh* (1997), 140 FTR 8, at para 18, 75 ACWS (3d) 887). In my view, there is sufficient evidence on the record for the overseas officer to reasonably make this finding.

[31] The Applicant's contention that Mr. Gacho's actions must be excused because he lacked intention and was acting under duress must also fail.

[32] In this regard, the overseas visa officer assessed Mr. Gacho's intention and noted he never mentioned during the interview that he followed orders unwillingly on the day of the coup. Instead, Mr. Gacho stated that it is expected in the military to follow the orders from your commanding officers. The overseas visa officer found that Mr. Gacho did not leave the premises of the coup attempt and did not mention being coerced to stay. He also stated during the interview that it was his "dream" to join the army. Moreover, the overseas officer noted that after serving his prison sentence, Mr. Gacho returned to serve in the military and that his application form states that he was a member of the 1st Scout Rangers Regiment until 1996.

[33] Regarding the Applicant's argument that Mr. Gacho was acting under duress, the overseas officer found that he did not see how the argument "fits the current case at hand" since "Mr. Gacho willingly enrolled in the military and willingly followed orders […]. Moreover, the Applicant has never mentioned that he was threatened in any way during the events or coerced into doing any of his actions that day, or into staying."

[34] It is firmly established that for an individual to successfully argue the defence of duress, they must demonstrate that (i) they have been compelled to commit a specific offence under threats of death or bodily harm; (ii) they reasonably believed that the threat would be carried out; (iii) there was no safe avenue of escape; (iv) there was proportionality between the harm threatened and the harm inflicted; and (v) they are not a party to a conspiracy or association whereby the accused is subject to compulsion and actually knew that threats and coercion to commit an offence were a possible result of this criminal activity, conspiracy or association (*R v Ryan*, 2013 SCC 3, [2013] 1 SCR 14, at paras 29, 55).

[35] In my opinion, the excerpts of the overseas visa officer's GCMS notes replicated above do not demonstrate that Mr. Gacho acted under duress or faced an imminent and grave threat if he failed to follow his commanding officer's orders on the day of the coup. It was therefore reasonably open for the overseas officer to find that the defence of duress had no application in Mr. Gacho's case.

[36] Lastly, the Applicant's contention that Mr. Gacho cannot be held culpable for his activity based on the doctrine of superior orders since he did not participate in any way in the planning or organization of the coup, must also fail.

[37] Generally, the defence of superior orders is available to military personnel who obey the orders of a superior so long as the act in question was not "so outrageous as to be manifestly unlawful" (*R v Finta*, [1994] 1 SCR 701, at p 778, 112 DLR (4th) 513; see also *Yassin v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1029, 117 ACWS (3d) 605, at para 19).

[38] As explained above, the overseas visa officer did not have to be satisfied that Mr. Gacho personally participated in the planning or organization of the coup, nor be satisfied that Mr. Gacho had personally participated in the coup itself for that matter to make a finding of inadmissibility under paragraph 34(1)(f) of the Act. It was therefore reasonably open for the overseas visa officer to find the defence of superior orders to be an irrelevant consideration under paragraph 34(1)(f) of the Act.

[39] As the Court indicated in *Yamani*, the result may seem harsh since section 34 of the Act seems to leave no option for changed circumstances by either the organization or the individual, and in this case, no relief for soldiers following the orders of their superiors. However, as stated too in *Yamani*, Parliament has provided for a comprehensive approach to inadmissibility determinations in order to balance national interests, such as maintaining the security of Canadian society, and denying access to our country to persons who are security risks (*Yamani*, at para 14). Thus, persons found inadmissible under section 34 of the Act may apply for ministerial relief pursuant to section 42.1 of the Act. This section indicates that the Minister may, on application by a foreign national, declare that the matters referred to in section 34 do not constitute inadmissibility in respect of the foreign national if they satisfy the Minister that it is not contrary to the national interest. On this point, I agree with the Respondent's submissions that the defence of superior orders is a claim that could be addressed in the context of ministerial relief pursuant to section 42.1 of the Act.

[40] For all these reasons, the application for judicial review is dismissed. No question of general importance has been proposed by the parties. None will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. No question is certified.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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