Federal Court Cour fédérale

Date: 20171019

Docket: IMM-675-17

Citation: 2017 FC 933

Ottawa, Ontario, October 19, 2017

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

JOSE FRANKLIN GONZALEZ TEJADA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision by an immigration officer not to approve the Applicant's application for criminal rehabilitation under section 36(3)(c) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], the result of which was that he was found inadmissible to Canada due to criminality and was denied permanent residency.

[2] As explained in greater detail below, this application is dismissed, because I have concluded that the decision is reasonable, demonstrating transparency, justification and intelligibility, and falling within the range of acceptable outcomes defensible in respect of the facts and the law.

II. Background

[3] The Applicant, Mr. Jose Gonzales Tejada [Mr. Gonzales], was born on July 4, 1969 and is a citizen of the Dominican Republic. He moved to the United States in approximately 1987 with his grandparents. In 1989, Mr. Gonzales was convicted in the United States of trafficking cocaine. He served 5 years in custody, after which he was deported to the Dominican Republic in 1994. Mr. Gonzales subsequently re-entered the United States illegally. He was charged with driving under the influence of alcohol in October 2001. There is no record of a finding of guilt or a conviction arising from this charge, which it is thought was perhaps dealt with through a diversion program. Mr. Gonzales was arrested in October 2004 and charged for illegal entry into the United States. After 1 year and 4 months in detention, he was once again deported to the Dominican Republic in December 2006. He has no criminal record in the Dominican Republic.

[4] Mr. Gonzales met his current common law spouse, Nancy Kim Ternyik, in February 2009 in the Dominican Republic, where they were coworkers. Ms. Ternyik is a Canadian citizen. Mr. Gonzales was granted a Canadian visitor’s visa, and the couple came to Canada for 3 weeks in 2012. They returned in July 2013 and again in November 2013, remaining in Canada since that date.

[5] Mr. Gonzales applied for permanent residence under the family class with Ms. Ternyik as his sponsor in February 2014. He failed to include information concerning his criminal record in this application or in his prior visa applications. He did provide such information in 2016 when Citizenship and Immigration Canada learned of his criminal history and made requests concerning same. Shortly thereafter, he submitted an application for criminal rehabilitation, the negative decision in which is the subject of this application for judicial review.

III. Issues and Standard of Review

[6] The Applicant submits that the issue for the Court's consideration is whether the decision to deny his application for rehabilitation was reasonable, looking at the totality of the evidence. In advancing this submission, he argues that the immigration officer:

A. Failed to properly consider all relevant information;

B. Took irrelevant information into consideration; and

C. Applied the incorrect test in making the decision.

[7] The parties agree, and I concur, that the standard of review applicable to a decision on criminal rehabilitation is reasonableness (see *Thamber v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 177 [*Thamber*] at para 9).

IV. Analysis

A. *Whether the immigration officer failed to properly consider all relevant information*

[8] Mr. Gonzales submits that the immigration officer's decision demonstrates consideration of only the negative factors applicable to his rehabilitation request. He argues that the officer failed to consider the evidence and submissions favourable to his application. In that respect, he refers to the strength of his relationship with his common-law spouse and members of her family and the extent to which he has been successful in his employment since arriving in Canada. He also emphasizes his acceptance of responsibility for his offence and the fact that the offence occurred approximately 30 years ago, when he was 18 years old.

[9] Mr. Gonzales relies on authorities of this Court which overturned negative decisions on rehabilitation applications in circumstances where the decision-maker failed to consider positive factors relevant to the application(see *Kok v Canada (Citizenship and Immigration)*, 2005 FC 77 [*Kok*]; *Malicia v Canada (Citizenship and Immigration)*, 2003 FCT 170). He also submitted, and I accept, that rehabilitation is forward-looking and that the question the decision-maker is required to consider is the likelihood of continuing criminal conduct (see *Hadad v Canada (Citizenship, Immigration and Multiculturalism)*, 2011 FC 1503).

[10] In response, the Respondent refers to the deferential standard of review to which the officer's decision is subject and emphasizes in particular need for to the Court, in considering the reasonableness of the decision, to examine whether the decision is intelligible and falls within the range of possible, acceptable outcomes (see *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[11] At the hearing of this application, counsel assisted the Court by explaining that the Certified Tribunal Record [CTR] demonstrates the involvement of two immigration officers in the process leading to the decision on Mr. Gonzales' rehabilitation request. One officer [the Recommending Officer] analysed the application for rehabilitation and provided a recommendation that it not be approved. That recommendation was considered by another officer, described as a reviewing officer [the Reviewing Officer], who concurred with the Recommending Officer's negative recommendation, stating that he or she was not satisfied that Mr. Gonzales was rehabilitated and that the application was refused.

[12] The CTR includes a document, bearing the title "Spouse or Common Law Partner in Canada Class," which appears to have been generated by the Recommending Officer and sets out the background to the rehabilitation application, including references to Mr. Gonzales' criminal and immigration history and the development of his relationship with Ms. Ternyik. This portion of the document includes the following text:

> Rehab application states ;
> established- work
> Support system wife and family
> Passage of time

[13] The next portion of this document is entitled "Rehab application reviewed:" and provides the Reviewing Officer's analysis, resulting in the negative recommendation. The analysis portion of the document focuses upon Mr. Gonzales' criminal and immigration history, culminating with his misrepresenting information to the Canadian government as recently as 2013 in applying for

his visitor visa and 2014 in his application for permanent residence. The Reviewing Officer concludes that this repeated pattern of behaviour supports a lack of respect for the law which is not in keeping with the principles of rehabilitation. Noting that the latter conduct may not be criminal in nature, the Recommending Officer concludes that it demonstrates that a clear understanding of his past behaviour has not been achieved and equally supports a possible continuance of total disrespect and similar conduct.

[14] The CTR also includes a document bearing the title "Application for Criminal Rehabilitation" which, under the heading "Reasons for recommendation," sets out essentially the same language as in the analysis by the Recommending Officer described above but culminating with the statement that, for these reasons, the Recommending Officer is not satisfied that Mr. Gonzales is rehabilitated in spite of his now relatively stable living conditions.

[15] The next section of the Application for Criminal Rehabilitation, which sets out the comments of the Reviewing Officer, reads as follows:

> I concur w/ Officer's negative recommendation. Although I note the passage of time since conviction, as well as the applicant's stable lifestyle, I am not satisfied that he is rehabilitated. He has misrepresented his criminal (and travel) histories to the Canadian gov't on his TRV and APR applications, only coming forward after learning that we have information on his history in the USA. This suggests that he does not fully take responsibility for his actions. I am therefore not satisfied that he is rehabilitated. Refused.

[16] My conclusion is that the record does not demonstrate a failure to consider all relevant information that was before the decision-maker. The Spouse or Common Law Partner in Canada

Class document refers to the positive factors upon which Mr. Gonzales' application was based. While the subsequent analysis portion of that document does not expressly refer to those factors, the Recommending Officer's analysis set out in the Application for Criminal Rehabilitation does refer to his now relatively stable living conditions. That document demonstrates that the Recommending Officer arrived at the negative recommendation, notwithstanding Mr. Gonzales' current stability, because of his pattern of behaviour including relatively recent misrepresentations to Canadian immigration authorities.

[17] Similarly, the Reviewing Officer expressly notes Mr. Gonzales' stable lifestyle and the passage of time since his conviction but concludes, based on his misrepresentations, that he does not fully take response ability for his actions and is not rehabilitated.

[18] The record demonstrates that both officers involved in the decision making process were aware of the positive factors and took them into account but concluded that they were outweighed by the dishonesty associated with Mr. Gonzales' misrepresentations to immigration authorities. The question whether those misrepresentations were an appropriate consideration to be taken into account is the subject of the next issue addressed below. However, for purposes of the first issue raised by Mr. Gonzales, I find no basis to conclude that all relevant information was not taken into account in arriving at the decision to refuse his rehabilitation application.

B. *Whether the immigration officer took irrelevant information into consideration*

[19] Mr. Gonzales' argument on this issue is that it was inappropriate for the decision maker to take into account either his illegal entry into the USA or the omissions in his Canadian immigration applications, because these events relate to disregard of immigration law, not criminal law. His position is that consideration of his application for criminal rehabilitation should be limited to whether or not he is likely to reoffend under a provision of criminal law.

[20] I find little merit to this submission. I find nothing unreasonable in the logic employed by both the Recommending Officer and the Reviewing Officer, to the effect that willingness to disregard provisions of immigration law are indicative of a lack of respect for the law in general, failure to take responsibility for past criminal activity, and inconsistent with a conclusion of rehabilitation. Moreover, this issue has been expressly addressed by this Court in *Cheung v Canada (Citizenship and Immigration)*, 2003 FCT 710 [*Cheung*], at para 20, in which Justice Russell held that the immigration officer considering a rehabilitation application did not rely upon an irrelevant consideration by taking into account the applicant's past dealings with Citizenship and Immigration Canada [CIC]. Rather, when evaluating whether the applicant was likely to commit a criminal offense in Canada in the future, it was reasonable for the officer to draw a negative inference from his past disrespect for Canada's immigration laws and his provision of false information to CIC.

[21] Mr. Gonzales attempts to distinguish *Cheung* on the basis that the credibility of the applicant in that case was considered questionable, while he submits that his own credibility has not been impugned. I find no basis to distinguish *Cheung*. I note that Justice Russell's analysis of the Officer's credibility finding in that case was conducted in addressing an issue separate from the argument as to whether the Officer relied upon in a relevant consideration in considering the applicant's past dealings with CIC. Moreover, in conducting his analysis of the credibility issue, Justice Russell characterized the assessment of whether an applicant has accepted responsibility as largely a matter of credibility and concluded that the immigration officer acted reasonably in negatively assessing the applicant's credibility based on his vague and unsatisfactory answers to the officer's questions. In the present case, while the immigration officers involved in the decision-making process did not expressly characterize their analysis as one of credibility, the Reviewing Officer concluded, based on Mr. Gonzales' misrepresentations to Canadian immigration officials, that he does not fully take responsibility for his actions. Therefore, in both *Cheung* and in the case at hand, the applicant's lack of candour with immigration officials resulted in the conclusion that the applicant had not taken responsibility for past criminal conduct. In my view, the analysis in *Cheung* is directly applicable to the present case.

[22] Mr. Gonzales also referred the Court to the decisions in *Kok* and *Thamber* as demonstrating negative rehabilitation decisions being set aside in the context of administrative, as opposed to criminal, offences. Again, I find that this argument does not assist the Applicant. I do not read *Thamber* as turning in any way on the relevance of administrative offences to a rehabilitation decision. In *Kok*, the decision was set aside because the officer failed to consider highly material evidence. While the negative rehabilitation decision in that case turned on

deceptions practised on Canadian immigration authorities, the Court found that there were strong mitigating factors associated with those deceptions, in that the evidence was that the applicant was attempting to escape human rights violations in China. No comparable mitigating factors apply in the case at hand.

[23] I therefore find that the analysis based on Mr. Gonzales' disregard of immigration laws is reasonable and does not represent a basis for the Court to interfere with the negative rehabilitation decision.

C. *Whether the immigration officer applied the incorrect test in making the decision*

[24] Mr. Gonzales argues that the negative decision resulted from application of the wrong test to the assessment of whether he was rehabilitated. He submits that the applicable test is whether the risk of criminal activity is "highly unlikely", referring to *Thamber*, at para 16, and *Lau v Canada (Citizenship and Immigration)*, 2016 FC 1184 [*Lau*], at para 24. *Lau* does describe the test in this manner, relying on language in the applicable CIC Operation Manual. *Thamber* refers to what appears to be an older version of the manual in describing rehabilitation as meaning that the risk of further criminal activity is assessed to be "unlikely".

[25] Regardless of whether the applicable threshold is "likely" or "highly unlikely", Mr. Gonzales submits that the decision employs language which suggests the application of an even more stringent test. He notes that, in the analysis leading to the negative recommendation, the

Recommending Officer states: “The submissions provided in support of rehabilitation do not completely satisfy me that the applicant is rehabilitated” [emphasis added.] Also, after referring to Mr. Gonzales’ misrepresentations to Canadian immigration authorities, the Recommending Officer states that this “equally supports a possible continuance of total respect and similar conduct.” [emphasis added.]

[26] Mr. Gonzales argues that the Recommending Officer’s requirement that he be completely satisfied of his rehabilitation is inconsistent with the applicable test, which does not require certainty, only probability or even high probability that he will not reoffend. Similarly, he submits that the officer’s concern about the possibility of future criminal conduct suggests a misunderstanding of the test as, even if the risk of reoffending is highly unlikely, there is still a possibility that further offences will occur.

[27] I follow the logic of these submissions and, if the decision to refuse Mr. Gonzales’ rehabilitation application had been made by the Recommending Officer, this might have represented a basis to set aside the decision. However, as argued by the Respondent, the decision was made by the Reviewing Officer, and there is no indication in that analysis that the Reviewing Officer misunderstood the applicable test. While the Reviewing Officer indicates concurrence with the Recommending Officer’s negative recommendation, the Reviewing Officer sets out his or her own analysis (reproduced earlier in these Reasons) and states that he or she is not satisfied that Mr. Gonzales is rehabilitated.

[28] Mr. Gonzales points out that, in arriving at this conclusion, the Reviewing Officer refers to Mr. Gonzales' misrepresentations and states: "This suggests that he does not fully take responsibility for his actions" [emphasis added.] Mr. Gonzales argues that the use of the term "fully" indicates that the Reviewing Officer's analysis is tainted by the Reviewing Officer's misunderstanding of the applicable test. I disagree with this argument, as the use of the term "fully" by the Reviewing Officer relates to whether Mr. Gonzales has taken responsibility for his actions, not the assessment of the likelihood of him reoffending.

[29] As such, the record does not support a conclusion that the Reviewing Officer, who was the actual decision-maker, applied an incorrect test in making the negative rehabilitation decision. The Reviewing Officer's analysis is transparent, justified and intelligible, falls within the range of possible, acceptable outcomes in respect of the facts and the law, and is therefore reasonable.

V. Proposed Certified Question

[30] Mr. Gonzales proposed the following question for the Court's consideration for certification for appeal:

> What is the role of public administrative offences in determining the time frame of whether the applicant re-offended?

[31] Mr. Gonzales emphasizes that this Court has explained, at paragraph 17 of *Thamber*, that the time frame since the last offense is the most important factor to consider in assessing a rehabilitation application. The Respondent took the position that, unless a decision to allow this

judicial review turned on this issue, this question should not be certified, because the answer is obvious and well-established through applicable case law (see *Cheung*).

[32] I agree with the Respondent's position. As there is no uncertainty in the case law, this question does not rise to the level of a question of general importance (see *Nacsa v Canada (Minister of Citizenship and Immigration)*, 2004 FC 91at paras 40-41). It is therefore not an appropriate question for certification for appeal.

JUDGMENT IN IMM-675-17

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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