Federal Court  Cour fédérale

Date: 20171017

Docket: IMM-515-17

Citation: 2017 FC 922

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Montréal, Quebec, October 17, 2017

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

ORTIZ RODRIGUEZ, HAROLD

Applicant

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

(judgment delivered from the bench)

I. Background

[1] The officer exercised her discretion by deciding to give significant weight to the factors arguing against the applicant's rehabilitation (namely the applicant's failure to disclose his criminal history to the Canadian authorities). However, the Court does not find that the officer

gave adequate consideration to all the evidence, or that she justified her decision in a specific way, with the reasons that led her to conclude that the applicant posed a risk of recidivism in Canada. The officer was required to provide brief or succinct reasons for her refusal, given that the applicant had already been recognized as being rehabilitated by Canada for the one same crime he committed in the United States.

II. Nature of the matter

[2] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], regarding the decision made on January 20, 2017, by an immigration officer of Citizenship and Immigration Canada [officer], in which she sets out the reasons why she does not consider the applicant to be rehabilitated. On January 26, 2017, a different immigration officer dismissed the applicant's rehabilitation application on the grounds that he is inadmissible in Canada for serious criminality pursuant to paragraph 36(1)(b) of the IRPA.

III. Facts

[3] The applicant, age 64, is of Colombian nationality.

[4] The applicant has been married since 1997 and has two daughters.

[5] The applicant, who is a painter, alleges that he travelled to Miami in August 1989 to attend an exhibition of his work. However, on January 16, 1990, he was arrested for possession

of cocaine for the purposes of trafficking and was sentenced to 70 months of incarceration and five years of probation.

[6] The applicant alleges that he was incited by a Colombian paramilitary group (also known as the *Nutibara*) to transport a certain quantity of drugs to the United States, with the promise that the group members would sell the applicant's paintings in Miami to make him rich.

[7] After serving his sentence, the applicant was deported to Colombia by U.S. authorities in October 1994. From October 1994 to June 2006, the applicant lived in Colombia.

[8] In the meantime, on December 12, 2002, the applicant was arrested again for possession of cocaine. Once again, the applicant alleges that the *Nutibara* paramilitary group forced him to smuggle drugs at the Bogotá airport.

[9] On March 10, 2003, the applicant was sentenced to 48 months of imprisonment. On August 10, 2004, he was released with a probation order until March 2006.

[10] In 2006, the applicant applied for a visitor's visa for Canada, which was approved. However, the applicant failed to mention his criminal convictions in the United States and Colombia.

[11] On June 10, 2006, the applicant entered Canada. One month later, his spouse and children, all Colombian citizens, followed him.

[12] On August 4, 2006, the applicant claimed refugee protection in Canada. In his personal information form, the applicant once again chose not to disclose his criminal record in the United States and Colombia to Canadian authorities. On July 11, 2007, his refugee claim was denied. On September 23, 2009, the Federal Court also dismissed the application for judicial review.

[13] On July 20, 2010, the applicant filed an application for permanent residence on humanitarian and compassionate grounds [HC application]. On January 8, 2013, his HC application was approved, noting, however, that the applicant did not mention his criminal conviction in Colombia.

[14] First, a removal order was issued against the applicant and his spouse. On December 19, 2011, a deportation order was issued, and the Immigration Division found that the applicant was inadmissible in Canada under paragraph 36(1)(b) of the IRPA.

[15] On March 2, 2011, the applicant submitted a first rehabilitation application for the offence he committed in the United States in 1990 (failing to reveal to Canadian authorities the crime committed in Colombia). On September 18, 2012, his rehabilitation application was approved.

[16] It was not until the Canadian government learned of the crime committed in Colombia through fingerprints that the applicant submitted a second rehabilitation application on August 12, 2014, this time for the crime that he committed in Colombia.

[17] Now, the applicant has been working for the Salvation Army since February 2007 in two departments: Direct Family Services and Emergency Disaster Services. He has two private companies, is involved in the community and lives in a house in Canada with his spouse and their two children.

IV. Decision

[18] On January 20, 2017, the officer found that the applicant did not present a low risk of recidivism and that, in her opinion, there was a chance that he would engage in further behaviour similar to the events that occurred in 1990 and 2001.

[19] The following factors were listed in favour of the applicant's rehabilitation:

- He acknowledges his crimes and expresses remorse;
- He is involved in the community, owns a house and has stable employment;
- He has not committed any offences since arriving in Canada, and his last criminal conviction was 14 years ago;
- He has a family in Canada and a minor child, and his two children have adjusted very well to the community.

[20] The following factors were listed as not being in favour of the applicant's rehabilitation:

- Although 12 years passed between the first and second offence, the fact remains that they were committed for the same reasons;
- He failed to report his criminal history to Canadian authorities on multiple occasions.

[21] On January 26, 2017, the officer denied the applicant's rehabilitation application under paragraph 36(3)(c) of the IRPA, based on the grounds presented by a different officer who was designated to assess the file. The applicant was declared inadmissible in Canada because, according to the officer, he is a person described in paragraph 36(1)(b) of the IRPA.

[22] It is the decision rendered on January 20, 2017, that is the subject of this application for judicial review.

V. Issue

[23] The Court considers only one issue to be important: is the officer's decision that the applicant is not rehabilitated reasonable, given all the evidence?

[24] The parties agree that the standard of review that applies to an officer's decision on rehabilitation is reasonableness (*Lau v. Canada (Citizenship and Immigration)*, 2016 FC 1184 at paragraph 20; *Hadad v. Canada (Citizenship, Immigration and Multiculturalism)*, 2011 FC 1503 at paragraph 40; *Thamber v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 177 at paragraph 9 [*Thamber*]). The Court reiterates that deference must be shown to decisions made by immigration officers, who have expertise and experience in criminal rehabilitation (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at paragraph 49 [*Dunsmuir*]).

VI. Relevant provisions

[25] The following provisions of the IRPA are relevant:

36 (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	**36** (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :
…	[…]
(b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or	b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;
…	[…]
36 (3) The following provisions govern subsections (1) and (2):	**36** (3) Les dispositions suivantes régissent l'application des paragraphes (1) et (2) :
…	[…]
(c) the matters referred to in paragraphs (1)(b) and (c) and (2)(b) and (c) do not constitute inadmissibility in respect of a permanent resident or foreign national who, after the prescribed period, satisfies the Minister that they have been rehabilitated or who is a member of a prescribed class that is deemed to have been rehabilitated;	c) les faits visés aux alinéas (1)b) ou c) et (2)b) ou c) n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui, à l'expiration du délai réglementaire, convainc le ministre de sa réadaptation ou qui appartient à une catégorie réglementaire de personnes présumées réadaptées;

VII. Submissions of the parties

A. *Submissions of the applicant*

[26] The applicant submits that the officer made an erroneous finding of fact because she allegedly failed to consider all of the evidence. The applicant explains that, in 2012, Canada

recognized that he was rehabilitated for the crime that he committed in the United States. The applicant also explains that the officer drew a negative inference about the possibility of recidivism in Canada by limiting herself mainly to the applicant's failures to disclose his criminal history. On this matter, he cites *Kok v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 77 at paragraph 47 [*Kok*], in which it was decided that all the factors in the applicant's favour ought to have been given more weight than the applicant's credibility with respect to rehabilitation.

[27] Since the applicant is presumed to be rehabilitated after 10 years under subsection 18(2) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR], the applicant considers that it was up to the officer to rebut that presumption. He refers this Court to *Aviles v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1369 at paragraph 18 [*Aviles*] to insist that the officer had to examine the applicant's situation as a whole, which would allow for said presumption to be rebutted.

[28] The applicant submits that the officer should not have prevented him from arguing a defence of compulsion, provided for in section 17 of the *Criminal Code*, RSC, 1985, c C-46, for a similar crime committed abroad. Since the defence of compulsion did not exist in Colombia at the time when the applicant committed the crime, then he would have been acquitted of that same crime in Canada.

[29] The applicant adds that the officer should have addressed the matter of humanitarian and compassionate considerations as part of his rehabilitation application. More specifically, the

officer should have taken into account the best interests of the two children affected. The applicant cites *Khatoon v. Canada (Citizenship and Immigration)*, 2008 FC 276 at paragraph 7.

[30] Lastly, the applicant argues that the officer did not follow the *Evaluating Inadmissibility* guideline (ENF 2/OP 18), since "[the officer] must be satisfied that it is highly unlikely that the person concerned will become involved in any further criminal activities."

B. *Submissions of the respondent*

[31] The respondent maintains that the officer made a reasonable decision. The officer considered the positive and negative factors in the rehabilitation application; however, she reached a negative conclusion by giving more probative value to the factors arguing against declaring the applicant to be rehabilitated.

[32] In the same vein, the respondent submits that the deciding officer has considerable discretion in determining the applicant's risk of recidivism, which must be minimal (*Thamber*, above, at paragraph 16). The respondent explains that it was therefore reasonable for the officer to draw a negative inference by considering the applicant's failure to comply with Canadian immigration laws. This is a relevant factor in a rehabilitation application (*Cheung v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 710 at paragraph 20).

[33] The respondent also finds that the applicant was obligated to provide truthful information to Canadian authorities in any application submitted under subsection 16(1) of the IRPA. It is important not to omit information and evidence that are relevant to the applicant's case (*Sinani v.*

Canada (Citizenship and Immigration), 2017 FC 106 at paragraph 16; *Kazzi v. Canada (Citizenship and Immigration)*, 2017 FC 153 at paragraph 26).

[34] Furthermore, the respondent argues that the applicant does not take any responsibility for his false statements, as the evidence reveals that the applicant often tends to blame others, including his former counsel, for his breaches. Such an allegation against the applicant's former counsel involves the *Procedural Protocol dated March 7, 2014, Re: Allegations Against Counsel or Other Authorized Representative in Citizenship, Immigration and Protected Person Cases before the Federal Court*. The applicant was responsible for making the appropriate statements and signing the required documents, regardless of the advice of his counsel.

[35] The respondent argues that it was completely unjustified for the applicant not to disclose his criminal convictions to Canadian authorities (especially since they involved the same type of crime) on the grounds that he is presumed to be part of the category of rehabilitated persons, in accordance with subsection 18(2) of the IRPR. The respondent adds that the applicant's behaviour of lying to Canadian authorities many times is not the behaviour of someone who says that he is rehabilitated and who says that he takes responsibility for his criminal past.

[36] Contrary to the applicant's allegations, the respondent submits that the officer was not required to review the judgment made by the Colombian authorities in order to assess the defence of compulsion, among other things, since the crime the applicant committed in the United States was directly related and is precisely the same as the crime committed in Colombia, which involved smuggling drugs into the United States. In fact, knowing that the applicant had

already been found guilty of the crime he committed in the United States, the officer was not required to hear the applicant's case again in order to assess a defence that was not raised before the Colombian courts.

VIII. Analysis

[37] For the reasons that follow, this application for judicial review is allowed.

A. *Is the officer's decision reasonable?*

[38] The officer decided not to recognize the applicant as being rehabilitated under paragraph 36(3)(c) of the IRPA, because he is inadmissible in Canada under subsection 36(1) of the IRPA. In *Aviles*, Justice Paul Rouleau states that "[t]he purpose of this provision is to allow the Minister to take into consideration the unique facts of each particular case and to consider whether the overall situation warrants a finding that the individual has been rehabilitated" (paragraph 18).

[39] As part of the rehabilitation application, the Court will therefore need to determine whether the officer's decision is reasonable, given all the evidence.

[40] The applicant submitted a rehabilitation application for the crime he committed in Colombia, after having been recognized as rehabilitated for that one same crime that he committed in the United States.

[41] The officer exercised her discretion by deciding to give significant weight to the factors arguing against the applicant's rehabilitation (namely, the applicant's failure to disclose his criminal history to the Canadian authorities). However, the Court does not find that the officer gave adequate consideration to all the evidence, or that she justified her decision in a specific way, with the reasons that led her to conclude that the applicant posed a risk of recidivism in Canada. The officer was required to provide brief or succinct reasons for her refusal, given that the applicant had already been recognized as being rehabilitated by Canada for the one same crime he committed in the United States.

[42] The Court reiterates that it cannot intervene in this application if it is to make a different finding (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at paragraph 59). The officer's mandate includes considering all the evidence regarding rehabilitation and justifying it in her reasons, even briefly or succinctly, but ensuring that the analysis is complete. The officer gave significant probative value to the similar crimes the applicant committed, in the United States and Colombia, without adequately considering all the documents specifying the relevant information concerning the applicant's rehabilitation. The officer must ensure that the applicant's reported rehabilitation was considered before making a negative finding.

[43] Consequently, the applicant was entitled to know the reasons that led the officer to draw a negative conclusion. Since this was a determinative factor in the applicant's rehabilitation application, the officer should have made explicit reference to it in her decision to deny that the applicant is rehabilitated (*Kok*, above, at paragraph 51).

[44] For these reasons, the Court is not convinced that the officer's decision is reasonable. The officer's decision does not fall within a "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at paragraph 47).

IX. Conclusion

[45] This application for judicial review is allowed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, the decision is set aside and the case is referred back for reconsideration by a different officer. There are no questions of general importance to be certified.

"Michel M.J. Shore"
Judge

Certified true translation
This 15th day of October 2019

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

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