Federal Court  Cour fédérale

Date: 20180126

Docket: IMM-2064-17

Citation: 2018 FC 78

Ottawa, Ontario, January 26, 2018

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

SEGUNDO ANIBAL MELLA PASTEN

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

[1] The Applicant has applied for judicial review of a decision of an immigration officer [the Officer] dated April 13, 2017 in which she refused the Applicant's application for permanent residence on humanitarian and compassionate [H&C] grounds. This application is brought pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA].

I. Background

[2] The Applicant is a 69 year-old male from Valparaiso, Chile. He came to Canada in 1990 as a sponsored refugee with his wife and three children. The Applicant's wife is 67 years-old. His adult children are aged 44, 40 and 36. The Applicant has seven Canadian-born grandchildren, who are between 7 and 15 years of age. He also has two brothers and two step-sisters in Chile.

[3] After his arrival in Canada, the Applicant was employed in the construction industry. From 1990 to 2003 he worked as a labourer, except for the period between 1993 and 1996, when he was incarcerated. From 2003 to 2006 the Applicant was employed except for an 18 month period in 2005 and 2006, when he was again incarcerated. In 2006, after his release from prison, the Applicant started his own carpentry company, which he operated until 2012, when his medical condition made it too difficult for him to continue working.

[4] A letter from the Applicant's doctor, dated March 20, 2011, states in part:

> Mr. Mella is a very sick patient. His lung disease is advanced and his diabetes is poorly controlled. His overall prognosis is poor. He requires ongoing medical treatment. He should continue with all medications as prescribed for an indefinite period of time.

[5] Between 1992 and 2015 the Applicant was convicted in Canada of the following five drug-related charges.

- On February 12, 1992, he was charged with possession of a narcotic for the purpose of trafficking and he was sentenced to prison for 4 years and 9 months.

- On June 6, 2003, he was charged with possession of a schedule 1 substance, contrary to section 4(1) of the *Controlled Drugs and Substances Act*, SC 1996, c 19 [the CDSA], and he was given a $2000 fine.

- On September 22, 2004 the Applicant was charged with two counts of trafficking a schedule 1 substance, contrary to section 5(1) of the CDSA and was sentenced to 18 months in prison.

- On September 28, 2015, he pled guilty to possession of cocaine in 2012 for the purpose of trafficking and was given a conditional sentence of 18 months.

[6] On November 19, 2007, the Applicant applied for permanent residence on H&C grounds [the H&C Application]. It is noteworthy that he engaged in cocaine trafficking in 2012 after his H&C Application had been filed.

[7] The Officer denied the H&C Application [the H&C Decision] and also concluded, in a separate decision, that the Applicant did not pose a danger to the public pursuant to section 115(2)(a) of the IRPA [the Danger Decision]. As a result, the Applicant remains a protected person and will not be removed from Canada.

II. The H&C Decision

[8] The Officer provided an overview of the Applicant's history of criminality in Canada, and found it to be "quite serious" and "a negative factor". The Officer attributed "significant concern" to the ease with which the Applicant returned to cocaine trafficking in 2012.

[9] The Officer recognized that the Applicant admitted to having addictions to both cocaine and alcohol. The Officer noted that due to his ill health, the Applicant no longer used these substances.

[10] The Officer acknowledged that the Applicant had to stop operating his own business in 2012 because of illness. At that time the Applicant was not eligible for health coverage because of his immigration status. The Officer accepted that in 2012 the Applicant returned to cocaine trafficking to pay for his medications.

[11] With regard to the Applicant's efforts to rehabilitate, the Officer stated in the H&C Decision that she was of the opinion that the Applicant has been forced to distance himself from his previous lifestyle due to his poor health. In the Danger Decision, the Officer spoke somewhat more about rehabilitation, saying:

> I am of the opinion that Mr. Mella Pasten is capable of leading a pro-social life and has demonstrated this capability for substantial periods of time in the past. I am cognizant that relapse into consuming alcohol or illicit drugs is often part of the recovery process for many addicts, and while not an excuse for Mr. Mella Pasten's behaviour, I do find that the evidence on file demonstrates he is unlikely to relapse given his very poor health and reliance on many medications. I believe that Mr. Mella Pasten has been somewhat forced to rehabilitate due to his health, and he has taken steps to be on the path towards rehabilitation, and removing him to Chile at this time would not be effective.
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> [my emphasis]

[12] The Officer noted the Applicant's wife, three children, and seven grandchildren reside in Canada and are Canadian citizens. The Officer acknowledged that the Applicant's wife, daughter, son-in-law, and members of his rowing club had submitted letters of support.

[13] The Officer recognized that the Applicant remains a protected person today and concluded the H&C Decision as follows:

> He has had ample opportunity to abide by the immigration and criminal laws of Canada, yet he has shown over the years that he is capable of turning to crime when his financial or emotional state becomes difficult. Mr. Mella Pasten was known to police for many years as an individual who sells cocaine to the general public. This is a dangerous, addictive and destructive drug that has caused many people physical and psychological harm. He did this with the help of his son.
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> I acknowledge that Mr. Mella Pasten's nuclear family is all in Canada and that he is in very poor medical health and this is very unlikely to improve. I also acknowledge that he remains a protected person and with my decision of finding he does not pose a danger to the public, he will not be removed from Canada at this time. I do not find, however, that there are sufficient humanitarian and compassionate considerations to warrant granting an exemption to Mr. Mella Pasten's criminal inadmissibility.
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> [my emphasis]

III. Issues

[14] The Applicant submits that the H&C Decision is unreasonable because i) the Officer did not consider the best interests of the Applicant's grandchildren and ii) the Officer failed to explain why the Applicant's criminal record outweighs the finding that he is rehabilitated and the other positive H&C factors, including his family ties, and work history.

IV. Discussion and Conclusions

[15] Regarding the grandchildren, the law is clear that on an H&C Application an officer is not required to discuss the potential hardship for an applicant on removal to a foreign country when, on the facts of the case, removal is not going to occur. In this regard see *Balathavarajan v Canada (MCI)*, 2006 FCA 340. In my view this case also applies, by analogy, to an analysis of

the best interests of children. There is no need for such an analysis when, as in this case, there will be no removal.

[16] Regarding the second issue, the Officer did not discuss the evidence of rehabilitation or make a finding that rehabilitation has been achieved. She only stated her conclusion that his criminal behaviour was halted by his ill health. Accordingly, the starting point is to consider what evidence of rehabilitation was before the Officer and whether it required mention in the H&C Decision.

[17] In my view if someone is rehabilitated it is because they have taken positive steps to achieve a situation in which reoffending is unlikely. Rehabilitation is the process of reaching that situation and it will be assisted by a variety of steps or activities depending on the circumstances of a particular case. Those steps could include a reliance on a supportive family, employment, attendance at counselling and feelings of remorse. Accordingly, a credible expression of remorse will be evidence of rehabilitation.

[18] The Applicant swore an affidavit on April 30, 2015 and had his family members and friends swear affidavits and write letters of support at about the same date. It is significant that, at the time these materials were written, the Applicant was denying that he had trafficked cocaine in 2012 even though 5 months later he pled guilty to the charge. Accordingly, the evidence described below must be considered in the context of his false assertions of innocence.

[19] The evidence about remorse consists of the following:

a) The Applicant's affidavit sworn on April 30, 2015. The relevant paragraphs read as follows:

> 15. My last conviction was in 2004, some 11 years ago. I have recent charges which I will face this fall. I am innocent of these offences. I was in the wrong place at the wrong time. Someone told police I was selling drugs. This is not true and I am contesting these charges.
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> 18. I have not committed a crime in over 12 years! What more do you need to understand that I have rehabilitated.
>
> 26. I am not a danger to anyone. I am a grandfather who has overcome a drug addiction. I am so sorry for the crimes I committed but I can assure you, I will not commit any others. I understand the cost to Canada, the danger of the drugs I sold and the lives I affected. I am ashamed and deeply regretful. I am too old, and too committed to remaining free from crime. In fact, it has been 12 years since my last offence. Twelve years! Please, find it in your heart to forgive me.

As noted above, by the time the Officer made the H&C Decision in April 2017, the Applicant had pled guilty to trafficking in 2012. This means that the affidavit was untrue when it repeatedly stated that the applicant had been crime free for over a decade and that he was sorry and ashamed. Given these untruths, the Officer was entitled to disbelieve and disregard the statements of remorse in paragraph 26 of the affidavit.

b) The Applicant's wife's letter of April 28, 2015 states that her husband is "finished with his past" however it nowhere mentions that he has expressed sorrow for his conduct. In these circumstances and given her husband's false statements about

trafficking in 2012, it was not necessary for the Officer to mention this letter in the H&C Decision.

c) The Applicant's wife also swore an affidavit dated April 30, 2015 in which she says the Applicant "realizes the errors of his past ways". In my view, this statement does not indicate remorse. It simply means that he knew what he did was wrong. Accordingly, the Officer was not required to mention this affidavit. This is especially so given that this affidavit was sworn on the same day that the Applicant untruthfully swore that he had been crime free for over a decade.

d) The Applicant's adult daughter wrote a letter dated April 26, 2015. It does not indicate that her father is sorry. It states that she thinks he is not a "criminal" notwithstanding what she describes as his "mistakes". This letter makes it clear that the Applicant had not acknowledged criminal behaviour to his daughter. There was therefore no need for the Officer to refer to this letter.

[20] The following material was also before the Officer:

i) A "good" friend of the Applicant from the Soccer Club said in an lettered dated April 29, 2015 that the last time he talked with the Applicant about his history he showed remorse.

ii) In a letter dated April 29, 2015, the Applicant's second son said that when his father's past is discussed, he thinks his father immensely regrets his behaviour.

iii) In a letter of April 30, 2015, his daughter in law (the wife of the Applicant's eldest son) says she knows the Applicant wants to be a better person and change his past mistakes.

iv) Two years earlier, in a letter dated June 30, 2013, the Applicant's eldest son states that he sees that his father "has remorse" for what occurred.

v) On the same date the Applicant's adult daughter wrote in a letter that in her view the Applicant is sorry about his past criminal record. This is inconsistent with her later letter which said that his conduct was not criminal.

[21] This evidence of remorse was all generated after the Applicant re-offended in 2012 and during the period when he was falsely swearing to his innocence and pursuing his H&C Application on the basis that he had been rehabilitated. In these circumstances, it was reasonable for the Officer not to refer to this material in the H&C Decision. It is obvious that even if the Applicant in fact felt remorse as described by others in 2013 and 2015 he had not in fact been rehabilitated. He had re-offended in 2012 and by the time this evidence was created he had not taken responsibility for his crime. In these circumstances the evidence of remorse was not credible.

[22] There was also the H&C Application in March 2008 in which the Applicant described himself as "fully rehabilitated" and expressed remorse. However, these statements were contradicted by his return to cocaine trafficking in 2012.

[23] Lastly, the Reasons for Sentence delivered by Hogan J. when he took the Applicant's guilty plea on September 28th, 2015 read in part as follows:

> In the present case, I find that significant mitigating circumstances exist. Mr. Mella has entered an early guilty plea showing remorse and has by doing so saved substantial court time and resources.
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> …
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> I find that Mr. Mella has learned his lesson, is remorseful, is no longer involved with the drug culture including being abstinent from using non-medically prescribed drugs and any further rehabilitative goals to be achieved will not be achieved in jail.

[24] The Officer did refer to these Reasons in the H&C Decision but did not discuss them. In my view this was reasonable because it is clear that the guilty plea was the basis for the Judge's conclusion about remorse. There was no other material from the sentencing hearing before the Officer.

[25] The Applicant also submits that because the Officer, in the Danger Decision, listed some factors favouring rehabilitation and concluded that he had taken "steps" on the path toward rehabilitation, those matters should have been mentioned in the H&C Decision. However, in my view, absent reliable evidence of remorse there was no need for the Officer to discuss the Applicant's family ties and work history in the H&C Decision. This is particularly the case since one of the Applicant's sons was also involved in drug trafficking at one time and because his daughter stated that she did not believe that the Applicant is a criminal notwithstanding his convictions. Further, his work history was not stable. It was interrupted by significant jail time.

[26] The Officer found that although he had led a prosocial life for periods in the past, the Applicant's present and future circumstances were dictated by his illness. She concluded that the

Applicant was no longer at risk to re-offend only as a result of his ill health. The Officer said "In terms of rehabilitative efforts, I am of the opinion that Mr. Mella Pasten has been forced to distance himself from the lifestyle he once lived due to his very poor health".

[27] In my view the Decision was reasonable, as that term is used in *Dunsmuir v New Brunswick*, 2008 SCC 9. Further, the Applicant's circumstances would not excite compassion among Canadians. I have reached this conclusion because:

1. He re-offended in 2012 while his H&C Application was pending.
2. He offended a total of 4 times.
3. His affidavit of April 30, 2015, which denied trafficking in 2012, was untruthful.
4. There is no reliable evidence of remorse.
5. His son was also involved in his criminal behaviour and his daughter did not acknowledge his actions were criminal
6. The fact that he is no longer likely to reoffend is the result of his ill health.

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

V. Certified Question

[29] No questions were posed for certification for appeal.

JUDGMENT IN IMM-2064-17

THIS COURT'S JUDGMENT is that this application is dismissed.

"Sandra J. Simpson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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