Federal Court  Cour fédérale

Date: 20180424

Docket: IMM-3809-17

Citation: 2018 FC 441

Ottawa, Ontario, April 24, 2018

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

IAN DEREK HUTCHINSON

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Mr. Hutchinson is a citizen of the United Kingdom [UK] who seeks review of the decision of the Overseas Visa Officer [the Officer] denying his application for criminal rehabilitation and entry into Canada pursuant to s. 36(3)(c) of the *Immigration and Refugee Protection Act* [IRPA].

[2] For the reasons that follow this judicial review is granted.

I. Background

[3] Mr. Hutchinson moved from the UK to the United States [US] as a teenager. In 2002, while working as a truck driver in the US, he was convicted of drug trafficking and sentenced to 33 months in prison. His sentence was reduced when he cooperated with US authorities.

[4] Following his release from prison in 2005, he was deported back to the UK.

[5] Mr. Hutchinson came to Canada in 2009 and applied for a visitor visa. Subsequently, he applied for and was issued several visitor visa extensions. The last extension was refused in March 2011. Mr. Hutchinson remained in Canada.

[6] In 2011 while in Canada, Mr. Hutchinson was charged with uttering threats. However, that charge was later withdrawn.

[7] In 2013, an exclusion order was issued against Mr. Hutchinson as he stayed in Canada beyond the term of his visitor visa. Mr. Hutchinson claims that his passport was taken by the Canada Border Services Agency, but he claims he was told he could stay in Canada, subject to certain conditions, pending the processing of a spousal sponsorship application by his then-common law spouse. This sponsorship application was withdrawn in 2016 when the relationship ended.

[8] Mr. Hutchinson entered a new relationship and was married on October 23, 2016. However, on October 25, 2016, on the basis of the exclusion order, Mr. Hutchinson was removed to the UK.

[9] In 2017, Mr. Hutchinson filed the criminal rehabilitation application to allow his spouse to sponsor him to Canada.

II. Statutory Provisions

[10] The relevant provisions of the IRPA are as follows:

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;
[…]	[…]
(3) The following provisions govern subsections (1) and (2):	**(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	**c)** les faits visés aux alinéas (1)b) ou c) et (2)b) ou c) n'emportent pas

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;	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;

III. Decision Under Review

[11] The decision under review consists of the decision letter dated July 5, 2017 and the Officer's Global Case Management System [GCMS] notes.

[12] In the decision letter, the Officer noted that Mr. Hutchinson is inadmissible to Canada pursuant to s.36(1)(b) of the IRPA.

[13] In the GCMS notes, the Officer noted that Mr. Hutchinson had "brushes with authority" in reference to the withdrawn charge in 2011. He further noted that Mr. Hutchinson failed to disclose his criminality in an application for visitor extension in 2005, which the Officer concluded induced an error in the administration of the IRPA.

[14] The Officer took note of Mr. Hutchinson's claim that he took responsibility for his crimes and showed remorse, and that the seriousness of the offence is mitigated by his cooperation with American authorities. However, the Officer doubted this claim.

[15] The Officer noted Mr. Hutchinson's argument that he led a stable life with his family. However, the Officer doubted these submissions, noting that Mr. Hutchinson's previous spousal sponsorship was withdrawn, and that he had children from another relationship.

[16] Further the Officer pointed to the fact that Mr. Hutchinson was deported from the US in 2005 and deported from Canada in 2016. The Officer noted that he was in Canada without legal status from 2011-2016 and was working illegally in Canada from 2009-2016.

[17] The Officer had "concerns" with Mr. Hutchinson's rehabilitation because of his lack of status and lack of "respect" for immigration laws. The Officer considered Mr. Hutchinson's claim that he was permitted to remain in Canada on terms and conditions during that period. However, the Officer concluded that this "does not confer any legal status or permission to work" and that it is an "important fact" that Mr. Hutchinson remained in Canada without status because it reflects on whether he is a law-abiding individual.

[18] While the Officer considered good character evidence and support letters, he ultimately concluded that Mr. Hutchinson was not rehabilitated, given his transgression of immigration laws, failure to disclose prior convictions, and previous deportations.

IV. Issues

[19] Although Mr. Hutchinson has raised a number of issues, the following are dispositive of this application:

A. Did the Officer rely on a withdrawn criminal charge?

B. Did the Officer make findings in absence of evidence?

V. Standard of review

[20] The standard of review on criminal rehabilitation applications is reasonableness (*Tejada v Canada (Citizenship and Immigration)*, 2017 FC 933 at para 7).

VI. Analysis

A. *Did the Officer rely on a withdrawn criminal charge?*

[21] Mr. Hutchinson argues that the Officer erred by relying upon a withdrawn criminal charge as a basis to deny his application.

[22] The Federal Court of Appeal has addressed this issue directly in *Sittampalam v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 326 at para 50 [*Sittampalam*], where the Court noted that although evidence underlying withdrawn or dismissed charges may be taken into consideration, such charges cannot be used as evidence in and of themselves of an individual's criminality.

[23] Here, the Officer's treatment of the withdrawn charge is problematic. The Officer did not consider the underlying facts or circumstances of the withdrawn charges, but rather noted that the charges are evidence of Mr. Hutchinson's "brushes with the law." This is clearly using the

withdrawn charges as evidence of Mr. Hutchinson's "criminality" and therefore contrary to *Sittampalam.*

[24] Furthermore, reliance on the withdrawn charge, in and of itself, is a reversible error (*Veerasingam v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1661 at para 5, under "Issue #1").

[25] The decision in *Thuraisingam v Canada (Minister of Citizenship and Immigration)*, 2004 FC 607 is distinguishable. There the officer had evidence of newspaper articles, affidavits, and summaries of intercepted telephone conversations. While the Court discounted the weight of some of the evidence, it concluded that the evidence supported the officer's conclusions that the applicant was a member of a criminal organization.

[26] Here the Officer did not consider the evidence underlying the withdrawn charge of uttering threats. The record only discloses a police report and the withdrawal of the charge. This is the extent of the evidence the Officer had before him to support his finding that Mr. Hutchinson's "brush with the law" was indicative of a likelihood to reoffend.

[27] The Officer's statement and finding with respect to the withdrawn charge is not supported by the evidence and is therefore a reversible error.

B. *Did the Officer make findings in absence of evidence?*

[28] Mr. Hutchinson argues that the Officer erroneously assumed that he was "criminally inadmissible" and was removed from Canada for that reason. Mr. Hutchinson submits that the Officer therefore failed to conduct a proper inadmissibility analysis.

[29] The Officer concluded that the Applicant was "removed out of Cda in October 2016 as he is, among others, criminally inadmissible to Canada…" However, no equivalency analysis of his conviction and sentence in the US based upon the laws of Canada was undertaken. Therefore no formal inadmissibility finding was made by the Officer.

[30] On this issue the following comments of the Court in *Lau v Canada (Citizenship and Immigration)*, 2016 FC 1184 are applicable:

> [21] I agree with the applicant that on the record before the Court, it is not clear that a formal inadmissibility finding was ever properly made – at least not before the decision under review was issued. There is no indication that the officer conducted a thorough equivalency assessment such as that described by the Federal Court of Appeal in *Hill v Canada (Minister of Employment and Immigration)*, [1987] FCJ No 47 at page 9. It is impossible to conclude from the record, for example, whether the officer considered that the comparable offences under Hong Kong and Canadian law had common essential elements.
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> [22] The officer in this instance may have assumed that an equivalency assessment was not required as the applicant appears to have submitted his application on the assumption that he would be found to be inadmissible. The respondent contends that an inadmissibility determination can be made either before or after a criminal rehabilitation finding is made. As Justice Shore noted in *Alabi v Canada (Minister of Public Safety and Emergency Preparedness)* 2008 FC 370 (CanLII) at para 46, that may not be consistent with the language of the statute. It would be preferable, in my view, for the inadmissibility determination to be made first

> before the question of rehabilitation is addressed. That does not appear to have been done in this instance. If it was necessary to deal with the issue, based on the record before me I would have found that the inadmissibility determination had been inadequate.

[31] Similarly here there is no indication that the Officer turned his mind to the assessment of Mr. Hutchinson's admissibility. However, the Officer used the alleged criminal inadmissibility against Mr. Hutchinson when considering his case for rehabilitation.

[32] The Officer's decision is therefore unreasonable as it is based upon findings that run contrary to the law and evidence.

JUDGMENT in IMM-3809-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted. The decision of the Officer is set aside and the matter is remitted for a full redetermination by a different officer; and
2. No question of general importance is proposed by the parties and none arises.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3809-17
STYLE OF CAUSE:	IAN DEREK HUTCHINSON v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 1, 2018
JUDGMENT AND REASONS:	MCDONALD J.
DATED:	APRIL 24, 2018

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