

Federal Court



Cour fédérale

Date: 20200520

Docket: IMM-3830-19

Citation: 2020 FC 632

Ottawa, Ontario, May 20, 2020

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

DAMARDJI YUCEF OUANSA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

JUDGMENT AND REASONS

I. Background

[1] This is an application for judicial review pursuant to s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 of an April 12, 2019 decision [Decision] of the Deputy Program Manager [Officer] of the Canadian Embassy in Mexico. In the Decision, the Officer refused the Applicant's applications for a Temporary Residence Visa [TRV] and a Temporary Residence Permit [TRP].

[2] The Applicant requests that this Court quash the decision and remit it for redetermination.

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

II. Decision under Review

(1) Context

[4] The Applicant, Mr. Ouansa, is an Algerian National. According to the Applicant's memorandum, he came to Canada as a refugee at the age of six and has faced struggles in his developmental years and into his young adulthood. He was convicted of various criminal offences as an adult.

[5] Some time after these convictions, the Canadian Border Services Agency [CBSA] took notice, calling the Applicant for an admissibility hearing and issuing a deportation order shortly afterward. The Applicant attempted to appeal the order, but was unsuccessful. The CBSA arrested him in 2011, held him for a month, and then released him on conditions. In 2013, the CBSA advised him that they would not take action to remove him back to Algeria.

[6] In July 2013, the Applicant took a vacation to the Dominican Republic and became entangled in criminal activities. He was charged with various offences, held for three months, and then released. The Applicant says that the charges were subsequently dropped, despite the CBSA suggesting otherwise in their notes.

[7] By the time he was released, the Applicant's travel documents had expired. He attempted to obtain a TRP or other documents in 2015, but these efforts were unsuccessful. The Applicant claims that those applications contain factual errors that he has tried to rectify. He admits that, in March 2014, he tried to alter his expired travel documents in order to board a flight back to Canada. However, he was caught and now feels remorse.

[8] The Applicant says that his life has deteriorated significantly since he has now become stuck in the Dominican Republic.

(2) Decision under Review

[9] Around February 2019, the Applicant submitted an application for a TRV and a TRP. The Decision refusing the applications comprises a letter and the Officer's notes. The Officer's notes contain both a "case summary" and a "decision text" component.

[10] The Decision letter states that the Applicant is inadmissible to Canada due to his criminal record in Canada and alleged criminal acts in the Dominican Republic. The Decision letter does not directly specify the application to which the inadmissibility finding relates. The "decision text" component of the notes indicates that the TRV was rejected because the Officer found that the Applicant was inadmissible. The decision text also indicates that the TRP was rejected after considering several factors, including the Applicant's criminal history, that there was no indication his family in Canada included children, the Applicant's mental health, and there was no evidence that he was a dependent of his parents. The "case summary" provides an account of the Applicant's history in Canada and some other details about the basis for his application.

(3) Preliminary Issue

[11] At the outset of the hearing, I raised the fact that the application for judicial review required the Court to be clear as to what decision was under review. As stated, the Decision letter itself was not clear as to which application the inadmissibility finding referred. In addition, the notice of application itself also did not specify whether it challenged the TRP or the TRV application. Counsel for the Applicant indicated that he became involved after the notice of application was filed and was of the view that it is the TRP that is the subject of the application for judicial review.

[12] Counsel for the Respondent, in his written materials, also made reference to this lack of clarity.

[13] The Certified Tribunal Record [CTR], which was not extensive, contained only material related to the TRV application with references to the TRP as referenced above. The support for the application concerning the TRP came from the Applicant's Record (affidavit of the Applicant's father), which was not challenged by counsel for the Respondent, except to the extent that the Respondent pointed out the lack of clarity about the specific application being challenged in his written submission.

[14] After clarifying matters with counsel it was determined that the arguments would proceed in relation to the refused TRP application.

III. Issues and Standard of Review

[15] The Applicant submits that the Officer made his decision based on erroneous findings of fact without regard to the evidence, making it unreasonable. The Applicant also takes issue with the Officer's reasons, alleging that they do not meet the requirements of the Supreme Court of Canada. Finally, the Applicant claims that the Officer failed to apply Immigration, Refugees, and Citizenship Canada's own policies for evaluating TRPs, resulting in a breach of the Applicant's legitimate expectations and an error in the exercise of discretion.

[16] I characterize the issue as, "was the Decision reasonable?"

[17] The parties agree that the applicable standard of review is reasonableness, with the Respondent noting that these decisions long ago attracted a high degree of deference. I agree that the reasonableness standard is the applicable standard of review. Reasonableness is now the presumptive standard of review, and I see no exception here that would rebut it (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65).

IV. Parties' Positions

A. *Was the Decision reasonable?*

(1) Applicant's Position

[18] The Applicant agrees with the Respondent's remarks on the discretionary nature of TRP decisions. The Applicant cites *Cepeda-Gutierrez v Canada (Minister of Citizenship and*

Immigration), 1998 CanLII 8667 at para 17 (FC) [*Cepeda*] for the proposition that making conclusions without mentioning significant evidence against them may lead to the inference that an officer has ignored evidence.

[19] The Applicant submits the following:

1. The Officer wrongly found that the Applicant was not dependent on his parents, ignoring the evidence to the contrary;
2. The Officer's finding that the Applicant has a criminal record in Canada and has "evaded" enforcement authorities was not supported by the evidence;
3. The Officer's statement that he failed to comply with terms and conditions of his Canadian convictions was not supported by the evidence;
4. The Officer improperly discussed the Applicant's alleged criminal activities in the Dominican Republic, ignoring evidence and not stating the evidence upon which he relied; and
5. The Officer breached the Applicant's legitimate expectations by failing to adhere to policy and not considering his mental state or other H&C grounds.

(2) Respondent's Position

[20] The Respondent highlights the exceptional nature of TRPs. He cites *Farhat v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1275 at paras 2, 22-24, where Justice Shore mentioned that they are an "exceptional regime" and that the purpose of s 24 is to soften the sometimes harsh consequences that the strict application of *IRPA* may cause in certain cases. TRPs bestow significant privileges upon their bearers. Therefore, they must be issued cautiously.

[21] The Respondent then notes that the onus is on the Applicant to demonstrate a "compelling reason" for a TRP issuance and that considerable deference is owed to the Officer's decision in these circumstances, citing *Wu v Canada (Citizenship and Immigration)*, 2016 FC

621 at paras 14, 23. The Respondent submits that the Applicant has not demonstrated that there is a compelling reason here.

[22] For the balance of its arguments, the Respondent comments on a number of issues. It argues that the Officer was reviewing two applications—a TRV and a TRP. Regarding the Applicant’s arguments about the Officer missing “a huge chunk” of the documents accompanying the application, the Respondent submits that the Applicant has not submitted sufficient proof that these documents were actually submitted. It also argues that the Officer’s assessment of the Applicant’s criminal history, both in Canada and abroad, was proper—the Officer had plenty of evidence of criminal activity upon which to refuse the Applications. The Respondent notes that a *conviction* of a crime is not necessary; rather, only the *commission* of one, citing *Magtibay v Canada (Minister of Citizenship and Immigration)*, 2005 FC 397 at paras 9-12.

[23] The Respondent argues that the Applicant cannot rely on the doctrine of legitimate expectations. It cites *Agraira v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 95, where the Supreme Court held that the doctrine is to be applied narrowly—only when the “practice or conduct” from which the expectation arises is “clear, unambiguous, and unqualified”. Further, the Respondent argues that policies and guidelines are not binding, citing *Lee v Canada (Citizenship and Immigration)*, 2008 FC 1152 at para 29.

[24] The Respondent also makes some arguments about the apparent strength of the Applicant's mental health evidence. It highlights some evidence that allegedly shows that the Applicant's mental state is not as clear as the Applicant contends. It states that the Applicant's issues, as gleaned from the medical letters, are a direct result of his own behaviours related to substance abuse issues.

V. Analysis

A. *Was the Decision reasonable?*

[25] As stated above, the Applicant and the Respondent focused their oral submissions on the TRP application. I find that the TRP decision favours allowing the judicial review. The reason is that the CTR is deficient. I am unable to assess the merits of the Applicant's complaints regarding evidence, as I am unable to see what evidence was actually before the Officer.

[26] The documents attached to the affidavit of the Applicant's father include a cover letter from the Applicant's then-counsel, dated August 16, 2018, requesting that the Applicant be granted a permanent residence visa on human and compassionate grounds or a TRP. Included in this material is a statement of the Applicant discussing his mental health issues, his immigration history and his travel to the Dominican Republic. Respecting his mental health issues, there are materials from medical professionals referencing some treatment. This material is not included in the CTR.

[27] The Officer makes several references to the Applicant's submissions in support of his application, specifically related to his mental health issues, yet these documents cannot be found within the CTR. *Togtokh v Canada (Citizenship and Immigration)*, 2018 FC 581 (*Togtokh*) provides an overview of the three kinds of anomalies that sometimes occur with a CTR. I find that the present situation involves an example of the second type of CTR anomalies as set out in *Togtokh* at para 16:

A document is known to have been properly submitted by an applicant but is not in the CTR, and it is not clear whether that document, for reasons beyond an applicant's control, was before the decision-maker. In this situation, the case law suggests that the decision should be overturned (see *Parveen v Canada (Minister of Citizenship and Immigration)* (1999), 168 FTR 103 at para 8 to 9, 88 ACWS (3d) 452 (Fed TD) [*Parveen*]; *Vulevic* at para 6; *Agatha Jarvis v Canada (Citoyenneté et de l'Immigration)*, 2014 FC 405 at paras 18 to 24, 240 ACWS (3d) 955 [*Jarvis*]).

[Emphasis added.]

[28] While *Togtokh* dealt with a deficient CTR in relation to a breach of procedural fairness issue, no such argument was made by the Applicant even after I sought clarification at the beginning of the hearing. Nevertheless, *Togtokh* is helpful in assisting the Court in how to approach anomalies or deficiencies with a CTR. The above passage would seem to be applicable to this situation save for one difference – the Court does not *know* for certain if the Applicant's mental health evidence or submissions, as set out in the affidavit of the Applicant's father, were submitted to and received by the Officer. I am left with submissions on mental health issues in the Applicant's Record, which are not in the CTR, and the "decision text" that references that there was *some* submissions that were considered by the Officer.

[29] Similarly, in *Kong v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 101 [*Kong*] at para 21, the Court says this about a deficient CTR:

What is more, although the record which was sent to the Court is certified as a true copy of all the material which was before the Board, I can find no copy of the article from which the quote was taken included therein. Thus, I cannot consider the context from which the quote was taken. It would appear from one of the indexes on the file that there is more material than just this one article which is missing from the certified record. A certified record should include all the evidence which was before the Board. The absence of such can itself be grounds for a reversal of the decision.

[Emphasis added.]

[30] As stated above, the Decision letter is somewhat vague in terms of how each application is specifically dealt with. The Officer, in the “decision text”, commented that, “The information in support of the TRP indicates that he has some mental health issues that were a contributing factor”. This information may have come from the Applicant’s additional submissions as set out above. However, this is not certain. The CTR contains a “use of a representative” form that refers to a TRV/TRP/H&C application but the CTR appears to be missing information related to the TRP/H&C application. Adding more confusion to the matter is the choice of the wording used in the notice of application for judicial review prepared by the Applicant’s former counsel, which also was not clear as to what aspect of the decision was being judicially reviewed. Therefore, in accordance with *Togtohk* and *Kong* and in light of my finding that the CTR is deficient, it follows that the application for judicial review should be granted.

[31] I take no position on the Applicant’s other claimed errors. I am unable to assess what was actually before the Officer.

VI. Conclusion

[32] The application for judicial review is allowed. The matter is to be re-determined by a different officer.

[33] There is no question for certification and, in my view, none arises.

[34] There is no order for costs.

JUDGMENT in IMM-3830-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed and the matter is remitted back to a different officer for redetermination.
2. There is no question for certification.
3. There is no order for costs.

"Paul Favel"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3830-19

STYLE OF CAUSE: DAMARDJI YOUCEF OUANSA v THE MINISTER OF
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