Federal Court  Cour fédérale

Date: 20181218

Docket: IMM-1520-18

Citation: 2018 FC 1279

Toronto, Ontario, December 18, 2018

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

ABDOULAH TAHHAN

Applicant

and

THE MINISTER CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This case is about rehabilitation. That term is not defined in Canada's immigration law. Rather, rehabilitation refers to two tools within the legislation: first, it refers to a class of persons deemed to have been rehabilitated through a combination of the type of offence(s), and the passage of time elapsed since the offence(s). Second, it refers to an application that a person can submit to overcome criminal inadmissibility. Thus, if that individual is not deemed to have been

rehabilitated, s/he must satisfy the Minister, or his delegate (henceforth referred to as an "officer"), that s/he has been rehabilitated. A positive outcome clears the rehabilitee of the inadmissibility, and thus of one major obstacle to entry or residence.

[2] In this case, Mr. Tahhan [the Applicant], not benefiting from deemed rehabilitation, applied for rehabilitation. His application was denied. These reasons explain why the officer's Decision was unreasonable.

II. Background

[3] The Applicant, a citizen of Syria, moved to the United States with his family in 1996, when he was ten years old. His father claimed asylum on behalf of the family, which was ultimately denied.

[4] The Applicant's trouble with the law started during his teenage years when he began, as he put it, "hanging out with a bad crowd". Initially, he committed petty thefts. But in his 20s, he committed several serious crimes. From 2004 to 2008, the Applicant committed offences, which resulted in jail sentences, including: (i) theft between $50-$500, for stealing the radio from a car; (ii) driving without a valid licence; (iii) theft between $1,500-$20,000 for having a stolen car in his possession; (iv) theft between $1,500-$20,000, including forgery, for running a car smuggling ring, and having forged vehicle registration documents.

[5] Upon serving his criminal sentence, American immigration authorities detained the Applicant, placed him in immigration detention, and deported him to Syria in December 2009.

Upon arriving in Syria, he claims Syrian authorities detained him, believing him to be an American spy. An aunt in Syria made payment to Syrian authorities, and the Applicant was released. He then went to live with that aunt.

[6] It was the eve of the Syrian civil war. The Applicant also found life difficult there for a number of personal reasons, including his broken Arabic, which made him easily identifiable as a foreigner. Furthermore, he identified as a Jew, which he had to hide in order to fit in, and abide by Muslim customs such as attending prayer services at a mosque. He constantly censored himself and could not question Syria's repressive regime. These were marked departures from the freedoms he became accustomed to in the United States.

[7] In January 2011, the Applicant applied for and received a Canadian study permit, but did not disclose his convictions. The Applicant arrived in Canada on January 24, 2011, settling in the Niagara region where he attended Niagara College, completing a Bachelor's of Business Administration. He has been employed at a large corporation since 2015, where he has been promoted several times. Since coming to Canada seven years ago, there is no evidence that he has engaged in any criminal or untoward behaviour in Canada.

[8] In August 2017, the Applicant applied for permanent residence on Humanitarian and Compassionate [H&C] grounds, at which time he revealed his prior convictions in the United States to Canadian authorities. His H&C application was accompanied by a separate application for criminal rehabilitation. The latter is the subject of this judicial review.

III. Decision

[9] This Decision for criminal rehabilitation involved a two stage review process. A first stage officer reviewed the application and made a negative recommendation. A second officer [the Minister's Delegate] then made a final, negative Decision.

[10] In his recommendation, the first stage officer highlighted the Applicant's:

- six temporary residence applications (study permits, work permits, and temporary resident permits, etc.) from 2012 to 2016, none of which disclosed his criminal record;
- reason for lying, namely that he believed Canada would not have granted him a study permit;
- willingness to take "shortcuts" in failing to be truthful; and
- failure to accept responsibility, e.g. discussing his friends' roles in the crimes.

[11] At the second stage review, the reviewing officer agreed, finding that the Applicant has "put himself in this position" by lying on his applications. The Applicant concealed to immigration authorities that he had theft and forgery convictions in the United States. As a result, the officer refused the application for criminal rehabilitation under paragraph 36(3)(c) of the *Immigration and Refugee Protection Act,* SC 2001, c 27 [IRPA], finding that the Applicant was not rehabilitated and remained inadmissible due to serious criminality.

IV. Analysis

[12] The dispositive issue is whether the officer's Decision that the Applicant had not been criminally rehabilitated was reasonable based on the totality of the evidence. Counsel agreed that the reasonableness standard applies in the context of a criminal rehabilitation review (*Tejada v Canada (Citizenship and Immigration)*, 2017 FC 933 at para 7).

[13] The Applicant submits that he concealed his criminal record in order to save his life: had he revealed his record, he would not have been allowed entry to Canada. He also argues that the officer failed to account for the key factor – his future likelihood to reoffend.

[14] The Respondent rejects both arguments, stating that the finding was open to the officer given that the Applicant's dishonest behaviour speaks for itself and demonstrates that he has not been rehabilitated.

[15] I am persuaded by the Applicant's position that the officer fettered his/her discretion by failing to weigh the primary assessment factor, namely the risk of reoffending. Failing to do so renders the Decision unreasonable.

[16] Why is this so? We turn to the statute to find out, more specifically, IRPA subsections 36(1) and 36(3), the provisions that govern inadmissibility for serious criminality, and rehabilitation, respectively (both which are reproduced in Annex A).

[17] This Court has acknowledged that officers have significant flexibility in conducting a section 36 analysis, noting that they may "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" (*Hadad v Canada (Citizenship, Immigration and Multiculturalism)*, 2011 FC 1503 at para 43). That said, the rehabilitation analysis must not omit the primary factor in an application for criminal rehabilitation: the risk of recidivism. Justice Mosley emphasizes this point in *Lau v Canada (Citizenship and Immigration)*, 2016 FC 1184, writing:

> [24] The officer failed to consider the most important factor in the context of a rehabilitation application, which is whether or not the foreign national will re-offend: *Thamber v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 177 (CanLII) at para 16. Rehabilitation does not mean that there is no risk of further criminal activity only that the risk is assessed as "highly unlikely": CIC Operational Manual "ENF-2/OP 18 18 – Evaluating Inadmissibility". The period for which the applicant has been crime free is a necessary consideration in a rehabilitation application: *Thamber*, above, at paras 14, 17-18.
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> …
>
> [26] In deciding a criminal rehabilitation application, it is important to consider key factors such as: the nature of the offence, the circumstances under which it was committed, the length of time which has lapsed and whether there have been previous or subsequent offences: *Aviles v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1369 (CanLII) at para 18. In my view, the officer did not give due consideration to any of these factors except for the history of re-offending.
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> [27] The officer's reasons disproportionately focus on the applicant's past conduct and do not properly consider the positive factors present in the application. As this Court found in *Hadad*, above, rehabilitation is forward looking. Therefore, the question is, is he likely to continue in this or similar conduct? To answer this question, it is necessary to consider the last ten years of the applicant's life where he has not been involved in any criminal activity. The officer noted that the applicant had found stable employment but neglected to consider that the applicant had in fact incorporated his own firm in 2009.

[Emphasis added]

[18] While Justice Mosley accordingly found the officer's analysis to be deficient, thus sending the rehabilitation application back for reconsideration, the officer in *Lau* had at least discussed the applicant's offence in relation to whether or not he would reoffend.

[19] In the Applicant's case, however, the officer never even got that far: there is no discussion whatsoever in the Decision of whether he would potentially reoffend. Instead, if I had to connect the dots and draw a line between the officer's rationale and the outcome, it would be that since the Applicant concealed his criminal history and did not express sufficient remorse when he came clean, he would therefore be likely to reoffend.

[20] This reasoning is problematic for two reasons. First, the original non-disclosure led the Applicant to proactively submit the rehabilitation request when he applied for permanent residence, where he had safely lived out of harm's way and far removed from the civil war that has continued to ravage Syria since shortly after his departure.

[21] Second, the fact that one has to speculate about the officer's views on recidivism fatally flaws the Decision. As Justice Mosley points out in *Lau*, the risk of reoffending is the key factor to weigh in an application for criminal rehabilitation. As mentioned above, while the legislation fails to define the term "rehabilitation", the common sense interpretation is that it is the likelihood of returning to those negative ways. In other words, while officers undoubtedly have wide discretion when it comes to rehabilitation applications, they must at minimum, and expressly, weigh whether the foreign national will likely reoffend. Just as occurred in *Lau*,

absent this consideration, the Decision cannot withstand judicial review, and must be sent back for redetermination.

[22] The Applicant also argues that the officer was unreasonable in drawing an adverse inference from the Applicant's prior misrepresentations, and this was akin to penalizing a refugee for a false visa application to facilitate travel to Canada. As the first issue (the failure to consider recidivism) is determinative, I will not rule on the second issue. However, I make one observation about the Applicant's conduct in this regard: it is better late than never to proactively disclose a prior misrepresentation. This applicant proactively admitted to his prior dishonesty in his rehabilitation application. Certainly, in my view, it is worse for applicants to be caught lying, and only admit their dishonesty in light of a challenge, procedural fairness letter, or the like from the immigration authorities: rather, it is always better to admit fault than to continue deceit, in the hope that time will somehow overcome it.

[23] Some refer to the phenomenon of repeated misrepresentations as "doubling-down". And the gambling analogy fits. An applicant ups the ante and goes all in when he does so, "gaming" the system. Taking this risk is very costly when discovered. It is always better to come clean, rather than add lie to deceit. That being said, one might understand when one initially lies to gain access to Canada – particularly in exigent circumstances – which is accepted in a limited way in the context of refugee law (*Denis v Canada (Citizenship and Immigration)*, 2018 FC 1182 at para 55). What is not tolerated, however, even in the refugee context, is building on the lie until it is discovered at some future juncture. Doubling down on the lie exacerbates non-compliance.

[24] Here, the Applicant explained why he felt he could not be honest before safely exiting Syria, and feeling somewhat stable in Canada. When the appropriate time came, he proffered the truth and explained why he had misrepresented. The officer certainly had the discretion to find him not yet rehabilitated. However, as a minimal duty, the officer had to apply the necessary legal considerations and owed an explanation as to why s/he reached that conclusion

V. Conclusion

[25] The application for judicial review is granted. The Decision will be set aside and remitted back to a different officer for reconsideration. No question for certification was raised by either party, and none arises.

JUDGMENT in IMM-1520-18

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted.
2. The decision is set aside, and the matter remitted for reconsideration by a different officer.
3. No questions for certification were argued, and none arise.
4. There is no award as to costs.

"Alan S. Diner"
Judge

ANNEX A

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 :
(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;	**a)** être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;
(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;
(c) committing an act outside Canada that is an offence in the place where it was committed and 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.	**c)** commettre, à l'extérieur du Canada, 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	**c)** les faits visés aux alinéas

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	(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;

FEDERAL COURT

SOLICITORS OF RECORD

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