Federal Court  Cour fédérale

Date: 20200331

Docket: IMM-3552-19

Citation: 2020 FC 455

Ottawa, Ontario, March 31, 2020

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

CHRISTOPHER BACANI CRUZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision by a migration officer ("Migration Officer") in the Permanent Resident Unit of Immigration, Refugees and Citizenship Canada at the Embassy of Canada in Manila, which rejected the Applicant's application for permanent residence because his spouse was criminally inadmissible to Canada pursuant to s 36(1)(c) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA"). As a result, the Migration Officer found that the Applicant was also inadmissible to Canada pursuant to s 42(1)(a) of IRPA.

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

Background

[3] The Applicant, Christopher Bacani Cruz, is a Filipino national. He came to Canada in 2008 as a temporary worker. In 2013, he applied for a permanent resident visa through the provincial nominee class. On his application, the Applicant listed his wife and two children as non-accompanying dependents.

[4] In July 2013, the Applicant's wife submitted a request to have her name voluntarily withdrawn from the Applicant's application for permanent residency because she could not provide required documents, including her passport or police clearance, as a result of charges pending against her in the Philippines. The Applicant was asked to provide information regarding charges against his wife and was informed that she could not be removed from his application.

[5] The subsequent documentary submissions made by the Applicant indicated that his wife has been charged with multiple counts of "Estafa through Falsification of Commercial Documents" arising from an allegation that, between 2004-2005 and while she was employed as a New Accounts Clerk and Marketing Assistant of the Producers Rural Banking Corporation, she used client deposits for her own purposes instead of remitting the deposits to the bank. She was accused of misappropriating approximately CDN $28,000. The submissions also included a document signed by the Applicant's wife acknowledging that she was responsible for the

acceptance of specified client deposits, which she did not deposit but instead used for her own benefit. To date, the charges against her have not been resolved.

Decision under review

[6] By letter dated April 25, 2019, the Migration Officer informed the Applicant that he did not meet the requirements for a permanent resident visa because his wife is a person described in s 36(1)(c) of the IRPA and was, therefore, criminally inadmissible to Canada.

[7] The Migration Officer found that the commission by the Applicant's wife of Estafa or "swindling" through Falsification of Commercial Documents (6 counts) would be punishable in Canada under s 332(1) of the *Criminal Code*, RSC, 1985, c C-46. That is, the misappropriation of money held under direction. Further, that the offence would be punishable by a term not exceeding ten years in Canada, where the value of what was stolen exceeded five thousand dollars. The Migration Officer determined that the offence was committed on a balance of probabilities because of the written admission of the Applicant's wife.

[8] Pursuant to s 42(1)(a) of IRPA, the Migration Officer found that the Applicant was also inadmissible because his wife was inadmissible. The Migration Officer was therefore not satisfied that the Applicant met the requirements of IRPA and refused his application pursuant to ss 11 and 42(1)(a) of IRPA.

[9] The Global Case Management notes ("GCMS Notes") found in the certified tribunal record ("CTR") contain an entry dated April 24, 2019, in which the Migration Officer noted that

the Applicant had submitted a letter from his wife's lawyer stating that the 6 counts of criminal cases remained pending and under mediation. Further, that there was a possibility of having the civil aspect of the cases amicably settled as she had submitted a settlement proposal detailing how she would pay off the monies taken from the bank. The Migration Officer also noted that the Applicant had written asking to be given a chance and not to refuse his application, as it was his only bread and butter to support his family and that if his application was refused, he would lose everything. The Migration Officer's entry indicates that, even if the Applicant's wife's case was settled by repayment to the bank of the stolen funds, the fact remained that she committed the offences for which she had been charged. Her written admission was conclusive proof of this. A similar entry was made on December 27, 2018.

Issues and standard of review

[10] The Applicant identifies the following issues to be addressed in this application for judicial review:

i. Did the Migration Officer err in finding the Applicant's wife criminally inadmissible?

ii. Did the Migration Officer err in failing to consider humanitarian and compassionate ("H&C") factors in the Applicant's application?

iii. Did the Migration Officer err in failing to provide the Applicant's wife with an opportunity for Criminal Rehabilitation application?

iv. Did the Migration Officer fetter their discretion?

[11] The Respondent raises a preliminary issue, being that parts of the Applicant's Further Affidavit, sworn on December 30, 2019, including Exhibit A, being an Affidavit of Explanation

of his wife sworn on October 24, 2019, are inadmissible. The Respondent responds to the issues identified by the Applicant.

[12] When appearing before me, counsel for the Applicant conceded that there was no basis upon which it could reasonably be argued that the challenged paragraphs and Exhibit A are admissible. In that regard, I note that the jurisprudence is clear that, as a general rule, the evidentiary record before a Court on judicial review is restricted to the evidentiary record that was before the decision-maker. Evidence that was not before the decision-maker and that goes to the merits of the matter is, with certain limited exceptions, not admissible (*Association of Universities and Colleges of Canada v Canadian Copyrights Licensing Agency*, 2012 FCA 22 at para 20; also see *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at paras 19-25; *Delios v Canada (Attorney General)*, 2015 FCA 117 at para 45 ("*Delios*"). Having reviewed the challenged evidence myself, I agree that it is not admissible. Accordingly, the preliminary issue is disposed of, paragraphs 4 and 5 of the Applicant's Further Affidavit and Exhibit A appended to the affidavit are inadmissible.

[13] In my view, this leaves one issue for judicial review, which is whether the Migration Officer's decision reasonable. The parties submit, and I agree, that the standard of reasonableness applies to the issue of whether the Migration Officer's decision was reasonable (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*")). *Vavilov* held that the standard of reasonableness presumptively applies whenever a court reviews an administrative decision (*Vavilov* at paras 16, 23, 25).

[14] The Supreme Court in *Vavilov* also addressed how a reasonableness review is to be conducted by a reviewing court (at paras 73-145). In that regard, it held that a reviewing court must develop an understanding of the decision-maker's reasoning process in order to determine whether the decision as a whole is reasonable, and to make that determination, the reviewing court "asks whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at paras 15, 99). When a decision is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and the law that constrain the decision-maker it is reasonable and is to be afforded deference by a reviewing court (*Vavilov* at para 85).

Was the Migration Officer's decision reasonable?

i. Was the Migration Officer's failure to address H&C grounds a reviewable error?

Applicant's position

[15] The Applicant submits that the GCMS Notes acknowledge that the Applicant "wrote asking to give them a chance and not to refuse his application because this is his only bread and butter to support his family and if he loses the application he will lose everything." The Applicant submits that the GCMS Notes reflect that the Applicant asked the Migration Officer to consider H&C grounds. While the Applicant is not entitled to a specific outcome, he is entitled to a procedure and the Migration Officer breached procedural fairness by denying the Applicant "a substantive right" under IRPA.

[16] Alternatively, the Applicant submits that the Migration Officer's decision is unreasonable because of its lack of analysis of H&C grounds. The Applicant submits that the Migration Officer was asked to consider the Applicant's circumstances and those of his family, but did not do so. Although a formal application under s 25 of IRPA was not made, the Applicant submits that, in effect, he invoked section 25, and despite his request, the Officer did not consider H&C or provided some reasoning in response to the request.

Respondent's position

[17] The Respondent submits that the Applicant's plea that his status in Canada was his "bread and butter" was not a formal H&C request. An H&C application must clearly indicate that an H&C exemption is being sought pursuant to s 25(1) of IRPA. It cannot be invoked by vague statements and must be supported by evidence. An officer can consider H&C exemptions on their own initiative, but it is not a reviewable error not to do so, nor does it amount to a breach of procedural fairness (*Farenas v Canada (Citizenship and Immigration)*, 2011 FC 660 at paras 29-32 ("*Farenas*")). The Applicant was not entitled to a decision with respect to relief that he did not apply for (*Veizaj v Canada (Citizenship and Immigration)*, 2016 FC 1070 at paras 12-14 ("*Veizaj*")).

Analysis

[18] As a preliminary point, although the Applicant attempts to frame this issue as one of procedural fairness, this Court has previously held that it is a question of mixed fact and law, and as such, is to be reviewed on the standard of reasonableness (*Kuhathasan v Canada (Citizenship*

and Immigration), 2008 FC 457 at para 17). Therefore, the analysis that is required is whether it was reasonable for the Migration Officer not to assess H&C grounds in these circumstances.

[19] *Veizaj* and *Farenas* both concerned inadmissibility on the grounds of criminality. In both cases, as in the matter before me, the applicants also argued that the officer erred by failing to consider H&C grounds. In *Veizaj*, Justice Shore held:

> [12] As for humanitarian and compassionate considerations, the officer was not required to take them into account because this is not an application based on humanitarian and compassionate considerations under subsection 25(1) of the IRPA (*Pizarro Gutierrez v. Canada (Citizenship and Immigration)*, 2013 FC 623, at paragraph 40; *Farenas v. Canada (Citizenship and Immigration)*, 2011 FC 660, at paragraphs 29-33; *Rafat v. Canada (Citizenship and Immigration)*, 2010 FC 702).

[20] Similarly, in *Farenas*, Justice Near stated:

> [29] Although, I am allowing this application for judicial review, I would nonetheless like to comment on the second reviewable error raised by the Applicant. The Applicant submits that the Officer erred by failing to consider H&C grounds. Although the Applicant did not expressly seek H&C consideration, she submits that her letter dated October 27, 2009 was a plea for consideration on H&C grounds. The Applicant cites *Rogers v Canada (Minister of Citizenship and Immigration)*, 2009 FC 26, 339 FTR 191 for the proposition that the Officer was obliged to consider whether there were sufficient H&C grounds to warrant granting an exemption since the Applicant was unrepresented and made the equivalent of an H&C plea.
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> [30] The Respondent contends that the letter was not a "plea" for H&C consideration and that an applicant bears the responsibility of providing all the information to demonstrate that his or her personal circumstances warrant exemption. The Respondent argues that while an Officer may put forward a case for an exemption on H&C grounds of his own initiative, but it is not a reviewable error for him not to do so.

> [31] I share the review of the Respondent. In *Rogers*, above, Justice Yves de Montigny wrote at para 41:
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> > [41] The respondent is no doubt correct in stating that no breach of procedural fairness is established on the mere basis that the immigration officer did not put the applicant's case forward for consideration for an exemption on his own initiative. Although the Bulletin contemplates situations in which an immigration officer may consider putting an applicant's case forward for an exemption in the absence of a request from an applicant, it cannot mandate an officer to do so.
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> [32] Furthermore, *Rogers*, above, was decided in a specific factual context. The applicant in that case filled out an application form that contained no information on making an H&C claim. Due to a policy change, the application form and guide for H&C applicants now tells applicants that they must clearly indicate that they wish to be considered for exemption to overcome an inadmissibility. In fact, CIC's IP-5 Processing Manual for in-land H&C applications now states at section 5.12:
>
> > However, if the client did not specifically request an exemption and the inadmissibility was discovered during the application process, the officer is not obliged to counsel the client and can refuse the application.
>
> [33] I do not find that the Officer erred in not considering H&C factors.

[21] Here, the CTR contains no evidence the Applicant requested an exemption pursuant to s 25(1) of IRPA in relation to his wife's criminal inadmissibility when submitting his application. Indeed, in the Applicant's written submissions acknowledges that he did not formally request an exemption under s 25(1) of IRPA. I also note that the January 28, 2019 email, which the Applicant now claims amounts to such a request, was made in response to the procedural fairness letter sent by the Migration Officer.

[22] That email states "… I am begging please give us a chance or option what to do.. please don't refuse my application as this is my only bread and butter to support my family if I lose this application I will lose everything.. Please give us a chance this is for my children."

[23] In my view, it was not obvious from the email that the Applicant was asking for a s 25 H&C exemption from criminal inadmissibility. Accordingly, it was not unreasonable for the Officer to not treat the Applicant's email as such, and on that basis, not to explain why they failed to do so. Nor does the Applicant provide any jurisprudence, IRPA provision or policy to support that the Migration Officer was required to raise H&C grounds on their own initiative and that a failure to do so amounts to a reviewable error. I acknowledge that the Applicant was self-represented when he sent the email. However, the fact remains that the Applicant also has the burden of adducing the information necessary to put forward a case for exemption under s 25(1) of IRPA (*Farenas* at paras 30-31). In these circumstances, I see no error in the Migration Officer's failure to address H&C grounds.

ii. Did the Migration Officer err in failing to provide the Applicant's wife with an opportunity to apply for criminal rehabilitation?

Applicant's Position

[24] In his written submissions, the Applicant points out that his wife's alleged offence took place in or before 2005, and therefore, more than ten years have passed since the alleged commission of the offence. Further, that there is no conviction date. As a result, the Applicant submits that the Migration Officer was required to give the Applicant's wife an opportunity to apply for criminal rehabilitation pursuant to s 36(3)(c) of IRPA. Further, that the Migration

Officer failed to consider the Applicant's criminal rehabilitation, even though the 5 year prescribed period set out in s 17 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 ("IRP Regs") has passed. The Officer could not make a finding of inadmissibility, based on a 2005 offence, without offering a criminal rehabilitation application to his wife. The Migration Officer's "outright refusal to offer this substantive right" to his wife is a breach of procedural fairness or, alternatively, was not reasonable, particularly as the Applicant was not represented during the application process.

Respondent's position

[25] The Respondent submits that the Migration Officer was not required to consider the Applicant's wife's rehabilitation in the absence of an application asking that the Officer do so (*Veizaj at para 11; Pena v Canada (Citizenship and Immigration)*, 2015 FC 1310 at para 13 ("*Pena*")). The Applicant's wife could not be deemed rehabilitated. She was required to apply and request that rehabilitation be considered. Having failed to do so, the Applicant cannot reverse the onus on to the Migration Officer.

Analysis

[26] Again, as a preliminary point, I note that while the Applicant attempts to frame this question as one of procedural fairness, this Court has previously held that whether an Officer was required to consider criminal rehabilitation is a question of mixed fact and law, and as such, is reviewable on the reasonableness standard (*Pena* at para 11).

[27] Section 36(3)(c) of IRPA states:

> (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.

[28] Section 17 of the IRP Regs defines the prescribed period:

> 17 For the purposes of paragraph 36(3)(c) of the Act, the prescribed period is five years
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> (a) after the completion of an imposed sentence, in the case of matters referred to in paragraphs 36(1)(b) and (2)(b) of the Act, if the person has not been convicted of a subsequent offence other than an offence designated as a contravention under the *Contraventions Act* or an offence under the *Young Offenders Act*; and
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> (b) after committing an offence, in the case of matters referred to in paragraphs 36(1)(c) and (2)(c) of the Act, if the person has not been convicted of a subsequent offence other than an offence designated as a contravention under the *Contraventions Act* or an offence under the *Young Offenders Act*.

[29] For the purposes of s 36(3)(c) of the IRPA, s 18(2) of the IRP Regs defines those people who are deemed to be rehabilitated. Subsections 18(2)(a) and (b) refer to those people who have been convicted of offences outside Canada. The Applicant's wife has never been convicted and therefore she would not fall under either of those subsections. Subsection 18(2)(c) lists the requirements of deemed rehabilitation for "persons who have committed no more than one act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an indictable offence under an Act of Parliament…". The Applicant wife's was charged with six counts of Estafa through Falsification of Commercial Documents.

Therefore, ss 18(2)(a)-(c) of the IRP Regs, which lists those individuals who are deemed rehabilitated, are inapplicable to the Applicant's wife.

[30] Accordingly, as she does not fall within the class of persons deemed to have been rehabilitated, she was required to apply and satisfy the Minister that she was criminally rehabilitated.

[31] In *Pena*, Justice Gagné stated:

> [13] Section 18 of the IRPR provides two rehabilitation scenarios: (i) a person is deemed to have been rehabilitated if more than 10 years have elapsed since the sentence was completed; or (ii) a person can convince the Minister of his rehabilitation if more than five years have elapsed since the time that the sentence has been completed, by submitting the documents required and by paying the fees provided for in paragraph 309(b) of the IRPR. The applicant never submitted an application to the Minister to convince him of his rehabilitation: he did not present the documents required and did not pay the fees for processing his application.
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> [14] Nevertheless, the officer considered the applicant's affidavit and the submissions of his counsel. She gave them little weight and pointed out that the applicant had pleaded guilty, fully understanding the nature of the alleged facts, proceedings and impacts of his guilty plea on his precarious status in the United States.
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> ...
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> [17] Given that the officer had no duty to consider the applicant's alleged rehabilitation, I find that his decision is reasonable.

[32] Similarly, in *Veizaj*, Justice Shore held:

> [11] The Court agrees with the respondent that the officer was not required to consider the applicant's rehabilitation, given that no

> such application had been filed. Subsection 309(b) of the IRPR states that a foreign national, who is inadmissible within the meaning of paragraph 36(2)(b) of the IRPA must pay $200 to submit an application for approval of rehabilitation under paragraph 36(3)(c) of the IRPA. Moreover, since the fine was not paid until August 25, 2015, that is when his sentence was completed. Therefore, the applicant cannot avail himself of the rehabilitation measures provided in sections 17 and 18 of the IRPR. The officer was not required to take into account the applicant's rehabilitation (*Pena v. Canada (Citizenship and Immigration)*, 2015 FC 1310).

[33] While I do not agree, as stated in *Pena*, that s 18 of the IRP Regs speaks to the payment of fees, *Pena* and *Veizaj* both serve to illustrate that a rehabilitation application is to be accompanied by the payment of processing fees. Those fees are stipulated in the IRP Regs:

> 309 The following fees are payable for processing an application for a determination of rehabilitation under paragraph 36(3)(c) of the Act:
>
> (a) in the case of a foreign national inadmissible on grounds of serious criminality under paragraph 36(1)(b) or (c) of the Act, $1,000…

[34] There is no evidence in the record indicating that the Applicant applied for rehabilitation for his wife, submitted information to satisfy the Minister that she has been rehabilitated, or paid the requisite fee of $1000. In my view, in these circumstances, the Migration Officer did not err by failing to consider criminal rehabilitation. And, when appearing before me, counsel for the Applicant conceded that the Officer was under not duty to offer such an application.

iii. Was the Migration Officer's finding of inadmissibility reasonable?

Applicant's position

[35] The Applicant submits that a refusal under s 36(1)(c) of the IRPA required the Migration Officer to determine that events occurred which, if committed in Canada, would be a criminal offence. The Applicant takes the position that the Migration Officer's decision is devoid of the necessary equivalency analysis as between the acts of Estafa in the Philippines and s 332(1) of the *Criminal Code* (*Red v Canada (Citizenship and Immigration)*, 2018 FC 1271 ("*Red*")). He submits that the Migration Officer's entire analysis was based on the written admission from the Applicant's wife but it contains no analysis of how the essential elements, or textual requirements, of s 332 are satisfied by her actions and the admitted facts, thereby amounting to an offence in Canada. As a result, the Migration Officer's decision is opaque and unintelligible.

[36] The Applicant argues that reliance on police evidence alone, without supporting testimony or similar evidence, is an error (*Singh Dhadwar v Canada (Public Safety and Emergency Preparedness)*, 2008 FC 482 at para 29 ("*Dhadwar*"); *Bankole v Canada (Citizenship and Immigration)*, 2011 FC 373 ("*Bankole*")).

[37] The Applicant also submits that the Migration Officer's analysis fails to recognize that the Applicant's wife allegedly committed a series of criminal transactions, not merely one. Broken down into separate events, these transactions would fall under s 36(2)(c) (criminality) rather than s 36(1)(c) (serious criminality) of the IRPA.

Respondent's position

[38] The Respondent submits that it was reasonable for the Migration Officer to rely on the signed admission of the offence by the Applicant's wife in which she acknowledged full

responsibility for the missing deposits and stated that she used the money for her own personal reasons. Further, other court documents submitted by the Applicant also confirmed that the Applicant's wife admitted to the commission of an offence. Documents entitled "Resolution" state, "during the scheduling preliminary investigation, [the Applicant's wife] appeared and on the same occasion, she admitted to the undersigned having committed the acts complained of as alleged in the complaint." The Applicant also provided a statement from his wife indicating that she was in the process of settling her charges by paying restitution to her former employer. As to the Applicant's allegation that the Migration Officer failed to consider whether his wife's action would have amounted to the offence of misappropriation of money held under direction, specifically, that there was no analysis of how the admitted facts establish the essential elements of the offence, the Respondent submits that the GCMS Notes indicate how the Migration Officer concluded that the essential elements of the offence of misappropriations of money held under direction were established.

[39] The Respondent submits that considering the signed statement by the Applicant's wife along with the other court documents, it was reasonable for the Migration Officer to conclude that there were reasonable grounds to believe that the Applicant's wife had committed she acts she was charged with.

Analysis

[40] I agree with the Applicant it is an error for an officer to accept allegations or police reports as characterizing the facts in an accurate manner without pointing to further supporting testimony or evidence (*Dhadwar* at para 29), however, that is not the circumstance in this matter.

The Migration Officer did not rely solely on police reports or allegations. In that regard, *Dhadwar* was distinguished in *Bankole* on the basis that the officer did not only rely on police reports or her own suspicions in coming to the conclusion that the applicant had committed the offence of abetting personation (*Bankole* at para 48). Here, the Migration Officer's refusal letter states that the Migration Officer determined that the Applicant's wife committed the Estafa, and the s 332(1) Criminal Code equivalent offence, because of her written admission. This is also reflected in the GCMS Notes where the Officer indicated that even if the Applicant's wife settled the case by paying off all the money that she stole from her employer, the fact remained that she committed the offences that were charged against her and that her written admission was conclusive proof of this. Further, other documentation in the record, such as a "Resolution" prepared by the prosecutor, states that during a preliminary investigation the Applicant's wife admitted to committing the complained of allegations.

[41] It is significant to note that the written admission of Applicant's wife begins by listing the account holders and deposit amounts that she admits to diverting. She then states her name and acknowledges full responsibility for the deposits of the listed clients. She states that the deposits were not received by the bank, and that she took the money for her own personal reasons. She promises to settle the amounts listed upon receiving instructions from management at the bank. The admission is signed by the Applicant's wife and two witnesses. In my view, it was reasonable for the Migration Officer to rely on the hand written admission. It is a document signed by the Applicant's wife that acknowledges her responsibility for taking money at the bank where she worked. She acknowledges that she used the money for her own personal reasons.

Like *Bankole*, the Migration Officer's decision was based on more than suspicion (at para 48). Here, it was based on a confession.

[42] In *Singh v Canada (Citizenship and Immigration)*, 2019 FC 946, Justice Fothergill summarized the obligation of an officer to conduct an equivalency assessment when determining whether an applicant is inadmissible pursuant to s 36(1)(c) of IRPA:

> [16] A finding of inadmissibility under s 36(1)(c) of the IRPA requires that the act committed outside Canada constitute an offence in the place it was committed, and that the act, if committed in Canada, constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years. The inquiry involves a determination of the equivalency of the two offences. The essential elements of the offences must be compared in order to determine if they correspond. The names given to the offences or the words used to define them are immaterial, given that the wording of statutory offences may be expected to vary in different countries (*Pardhan v Canada (Citizenship and Immigration)*, 2007 FC 756 at paras 9-10 [*Pardhan*]).
>
> [17] Criminal equivalency may be determined in three ways (*Pardhan* at para 11):
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> > (1) by comparing the precise wording in each statute both through documents and, if available, through the evidence of experts in the foreign law in order to determine the essential elements of the respective offences;
> >
> > (2) by examining the evidence, both oral and documentary, to ascertain whether that evidence is sufficient to establish that the essential elements of the offence in Canada had been proven in the foreign proceedings, whether precisely described in the initiating documents or in the statutory provision in the same words or not;
> >
> > (3) a combination of the two.

(Also see *Hill v Canada (Employment and Immigration)*, 1 Imm LR (2d) 1, 1987 CarswellNat 15 (FCA) at para 16; *Lu v Canada (Citizenship and Immigration)*, 2011 FC 1476 at para 14; *Nshogoza v Canada (Citizenship and Immigration)*, 2015 FC 1211 at para 27 ("*Nshogoza*")).

[43] Similarly, as stated by Justice Gascon in *Nshogoza*:

> [28] The Court must further look at the similarity of definition of the two offences being compared and the criteria involved for establishing the offences (*Li v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 1060 (FCA) [*Li*] at para 18). As explained by Mr. Justice Strayer,"[a] comparison of the "essential elements" of the respective offences requires a comparison of the definitions of those offences including defences particular to those offences or those classes of offences" (*Li* at para 19). In *Brannson v Canada (Minister of Employment and Immigration)*, [1981] 2 FC 141 (FCA) at para 38, the Federal Court of Appeal further stated that the essential elements of the relevant offences must be compared, no matter what are the names given to the offences or the words used in defining them.

[44] The Applicant argues that the Migration Officer erred when performing the equivalency assessment in two ways. First, by failing to provide an analysis of the facts underlying the offence, or how those facts constitute the essential elements of a Canadian offence. Second, by failing to consider whether the offences committed were separate transactions, rather than one theft totalling around $28,000.

[45] I do not agree with the Applicant that there was a complete absence of analysis by the Migration Officer (*Red* at para 25).

[46] In a December 27, 2018 entry in the GCMS Notes, the Migration Officer summarized the facts underlying the offence. The Migration Officer noted that the Applicant's wife was

formerly a bank clerk at the Producers Rural Bank Corporation and accepted deposits from bank clients without remitting those deposits to the bank teller or cashier. In total, she stole almost CDN $28,000 between 2004 and June 2005. The Officer noted the Applicant's wife's admission acknowledging her commission of the offences, stating that she used the money for her own personal reasons and that she promised to settle the amount upon instructions and terms form the bank's management. The Migration Officer stated that was the basis for their finding that the Applicant's wife committed the criminal offences charged against her. And, even if the cases are eventually dismissed through a court settlement, her written admission was conclusive proof that she committed the offences of Estafa through Falsification of Commercial Documents. The Migration Officer stated that her offences, if committed in Canada, would be equivalent to s 332(1) of the *Criminal Code*, the misappropriation of money held under direction. The Migration Officer was clearly aware of the facts underlying the offences.

[47] I also disagree with the Applicant that this case is similar to *Red*. In *Red*, the charge was withdrawn after the complainant swore to a misunderstanding of the facts, and the officer erred by failing to consider evidence that the applicant had not committed the offence (*Red* at paras 27-28). Further, the applicant had been charged in the Philippines with the offence of issuing a cheque she knew she did not have sufficient funds to cover (*Red* at para 11). The officer likened that to the offence of false pretence pursuant to s 361(1) of the *Criminal Code* even though the facts underlying the charge did not support that conclusion (see *Red* at para 31 for analysis of facts in relation to the offence).

[48] However, in my view, where the Migration Offer erred in this matter was in failing to conduct an appropriate equivalency assessment when determining if the Applicant's wife was inadmissible.

[49] The Migration Officer did not compare the precise wording of two statutes to perform their equivalency assessment. However, this was not fatal. It was also open to the Officer to instead examine the evidence, in this case being the admission of the Applicant's wife or other documentary evidence, to ascertain whether that evidence was sufficient to establish that the essential elements of the offence in Canada had been proven in the foreign proceedings.

[50] Although not set out by the Migration Officer in the reasons, s 332(1) of the *Criminal Code* states:

> 332(1) Every one commits theft who, having received, either solely or jointly with another person, money or valuable security or a power of attorney for the sale of real or personal property, with a direction that the money or a part of it, or the proceeds or a part of the proceeds of the security or the property shall be applied to a purpose or paid to a person specified in the direction, fraudulently and contrary to the direction applies to any other purpose or pays to any other person the money or proceeds or any part of it.

[51] Based on the admission of the Applicant's wife, which the Migration Officer considered, it was open to the Officer to find that she had committed the offences as charged in the Philippines. However, the Migration Officer did not identify the essential elements of s 332(1) *Criminal Code* offence of misappropriation of money under directions. Nor did the Migration Officer compare the essential elements of the offences or explain how the admission of the

offences in the Philippines satisfied the Officer that that the essential elements of the offence in Canada had been met.

[52] In *Pardhan v Canada (Citizenship & Immigration)*, 2007 FC 756 ("*Pardhan*"), Justice Blanchard found that the failure to do so is a reviewable error:

> [12] In her decision letter, the Officer indicated that the Applicant's wife had committed an offence under the section 471 of the Pakistan Penal Code, by using as genuine a forged document. The Officer cited that section of the Pakistan Penal Code and concluded that the act constituted an offence under the laws of the place where it occurred. She then concluded, without further analysis, that if committed in Canada, the offence would be punishable under subsection 368(1) of the Criminal Code of Canada by a maximum term of imprisonment of at least ten years. The Officer then cited that section of the Criminal Code of Canada. The Officer conducted no further equivalency analysis in her decision.
>
> [13] While the pertinent sections of the two offences were cited in the Officer's decision letter, no analysis was conducted in respect to the precise wording in each statute. The essential elements of the offences in play were not identified by the Officer and consequently not compared to assess whether they correspond. Further, no expert evidence on foreign law was adduced in this case, without which, one can only speculate as to whether all of the requisite elements have been met to conclude, as did the Officer, that an offence under the laws of Pakistan occurred. Further, no examination of the evidence was conducted by the Officer to ascertain whether or not the evidence adduced was sufficient to establish that the essential ingredients of the offence in Canada had been proven for the purpose of the foreign proceedings.
>
> [14] It may well have been open to the Officer to conclude as she did, but the Court is not in a position to speculate on that result absent a proper equivalency assessment as dictated by the above cited jurisprudence. The Officer's equivalency assessment is deficient and as a result, the Officer's finding of inadmissibility by reason of serious criminality cannot stand. In the circumstances, this constitutes a reviewable error.

[53] Similarly, Justice Gascon stated in in *Nshogoza* that it is an error for an officer to merely state that a foreign national committed a certain offence (see *Nshogoza* at para 32). The officer is required to compare the wording of both foreign and Canadian statutes, or to ascertain whether or not the evidence was sufficient to establish that the essential ingredients of the offence in Canada had been proven in the foreign proceedings (*Nshogoza* at paragraph 27; *Singh* at para 17). Here, the Migration Officer only stated that the offence of Estafa through Falsification of Commercial Documents was equivalent to s 332(1) of the *Criminal Code*. The Migration Officer did not identify what the elements of s 332(1) Criminal Code offence are and provide an analysis of why the admission to the offences in the Philippines satisfied those elements of the s 332(1) offence. Accordingly, the Migration Officer's equivalency assessment was unreasonable.

[54] As to the Applicant's second point, that the Officer failed to consider that his wife committed a series of criminal transactions and therefore, they would fall under s 36(2)(c), criminality, rather than s 36(1)(c), serious criminality, the Applicant does not cite any case law to support his position that the Migration Officer erred by failing to analyse each transaction as a separate offence.

[55] And, given my above conclusion that the Migration Officer erred by failing to conduct an equivalency analysis, I need not further address this point. However, in essence, the Applicant simply argues that his wife should be inadmissible pursuant to a different provision, which is an exercise in futility (see *Mun v Canada (Citizenship and Immigration)*, 2019 FC 246 at para 36).

iv. Did the Migration Officer err by fettering their discretion?

Applicant's position

[56] The Applicant submits that the Migration Officer's lack of analysis as to the equivalency issue and refusal to consider H&C factors or to provide his wife with a criminal rehabilitation application shows that the Migration Officer fettered their discretion (*Abusaninah v Canada (Citizenship and Immigration)*, 2015 FC 234 at para 45 ("*Abusaninah*")).

Respondent's Position

[57] The Respondent submits that the brevity of the Migration Officer's decision does not mean that the Migration Officer fettered their discretion and that the reasons were sufficient to allow the Court to understand how the Officer came to their conclusion. The Migration Officer was not required to address every argument or make an explicit finding on each constituent element leading to their conclusion (*Vavilov* at paras 91, 128). There is not indication that the Migration Officer ignored contradictory evidence or that the Officer's mind was closed to alternative outcomes. Rather, the decision and reasons indicate that the Migration Officer had regard to the material and came to a reasonable decision.

Analysis

[58] In my view, *Abusaninah* does not assist the Applicant. That case dealt with a pre-removal risk assessment, where the officer did not analyze the latest country condition evidence and thereby fettered their discretion (at paras 45, 48-49). Here, the Applicant has not pointed to any evidence that the Migration Officer failed to analyse or to any contradictory evidence in the

record that the Officer failed to assess. Nor am I persuaded that because the Migration Officer did not consider H&C grounds or rehabilitation when no specific request or application to do so was made that this demonstrates a closed mind or a fettering of discretion.

[59] In conclusion, this application for judicial review is granted, as the Migration Officer erred in the conduct of the equivalency analysis.

JUDGMENT IN IMM-3552-19

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted.

2. The matter is sent back for redetermination by a different migration officer.

3. No question of general importance for certification was proposed by the parties and none arises.

4. There will be no order as to costs.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	CALGARY, ALBERTA
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