Federal Court Cour fédérale

Date: 20151124

Docket: IMM-2503-15

Citation: 2015 FC 1310

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, November 24, 2015

Present: The Honourable Madam Justice Gagné

BETWEEN:

VASQUEZ PENA JULIAN RICARDO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] Vasquez Pena applied for the judicial review of a decision of an immigration officer of Citizenship and Immigration Canada (CIC), made on May 12, 2015, refusing his application for permanent residence submitted as a member of the “spouse or common-law partner in Canada”

class, for the reason that he is inadmissible on grounds of criminality under paragraph 36(2)(*b*) of the *Immigration and Refugee Protection Act, S.C. 2001, c. 27* (IRPA).

II. Facts

[2] The applicant is a citizen of the Dominican Republic. In October 2006, while he lived in New York State, he pleaded guilty to a charge described in the *New York State Penal Law* as "attempted criminal possession of a controlled substance". The applicant recognized that he attempted to buy cocaine. On February 2, 2007, he was sentenced to two years in prison, followed by two years of parole. This last period ended on June 20, 2010.

[3] The applicant then brought a motion to withdraw his guilty plea. He pleaded essentially that his lawyer had failed to advise him of the impact of this plea on his immigration file. This motion was denied on September 11, 2007, specifically on the ground that the applicant had been informed by the Court, at the time that he entered his guilty plea, that since he was not an American citizen, this plea could have an impact on his immigration file.

[4] The applicant arrived in Canada in 2010 and filed a refugee claim, which was denied on December 8, 2011.

[5] On February 2, 2012, he filed his application for permanent residence in the spouse or common-law partner class.

[6] On November 10, 2013, the immigration officer sent him a so-called procedural fairness letter advising him of the possibility that his request be refused for inadmissibility and invited him to make submissions in this regard. At the outset of the hearing before this Court, counsel for the applicant raised the fact that the Certified Tribunal Record contained two different versions of this letter. However, it was admitted and agreed that it was the one that was found at page 11 of the file that was sent to the applicant.

[7] On December 16, 2013, the applicant replied to the officer's letter by a letter from his counsel, to which was attached an affidavit of the applicant dated December 9, 2013. In this affidavit, the applicant explained the circumstances surrounding his arrest and stated that he then found himself in a [TRANSLATION] "unfortunate situation that led to his arrest", "that he did not know to what the sum of money that he was asked to transport was allocated … and that he was not aware of the criminal nature of the transaction". The applicant also pointed out that he has not been in trouble with the law since he served his sentence and that, since 2010, he has had a serious romantic relationship with his Canadian common-law partner.

III. Impugned decision

[8] The immigration officer denied the applicant's application for permanent residence. She concluded that he was inadmissible in accordance with paragraph 36(2)(*b*) of the IRPA, since the offence committed in the United States is equivalent to an offence under an Act of Parliament punishable by an indictable offence and a maximum term of imprisonment of at least 10 years. The officer noted that she read the documentation from the American authorities and the submissions made by the applicant.

[9] The officer noted that, during the hearing in which the applicant pleaded guilty, he admitted in clear terms that he attempted to buy cocaine. She added that the transcript of the hearing revealed that the applicant understood the nature of the proceedings, including the fact that he was not coerced to plead guilty. She placed considerable weight on this factor. The officer considered the fact that the applicant now lives a law abiding life, but she added that to "be a good citizen is expected of anyone and is not exceptional".

IV. Issues

[10] This application for judicial review raises the following questions:

A. Did the immigration officer err in finding that the applicant was inadmissible and in not considering the applicant's alleged rehabilitation?

B. Did the officer err in not holding an interview with the applicant?

V. Analysis

A. *Inadmissibility and rehabilitation*

[11] The applicable standard of review to this question mixed fact and law is that of reasonableness (*Mugesera v Canada (Minister of Citizenship and Immigration)*, [2005] 2 SCR 100).

[12] That said, the applicant did not dispute that he is a person under paragraph 36(2)(*b*) of the IRPA. However, he argued that the immigration officer erred in her analysis by not considering

his rehabilitation, in accordance with paragraph 36(3)(*c*) of the IRPA. The applicant argued that he meets the criteria set out in paragraph 17(*a*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (IRPR) that a period of more than five years have elapsed since he completed his sentence. Therefore, the immigration officer should have considered the nature of the offence, the circumstances under which it was committed, the length of time which has elapsed since the offence and any other previous or subsequent offences (*Gonzalez Aviles v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1369 at para 18 (*Gonzalez Aviles*)). Finally, she should have explained why she was not satisfied with the evidence of rehabilitation presented to her.

[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.

[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.

[15] I do not share the applicant's view that *Gonzalez Aviles* is determinative in this case. In this case, first, the officer did not consider the evidence and the submissions made by the applicant and, second, nearly 10 years had elapsed since she had finished serving her sentence.

[16] In this case, the applicant could not have submitted a rehabilitation application before 2015, since his sentence had not been served on October 6, 2008, but rather in 2010, at the end of the two years of probation. When a sentence includes incarceration and a period of parole, the waiting period of five years runs from the date that marks the end of parole. Therefore, the applicant could not have submitted a rehabilitation application at the time when he filed his application for permanent residence in 2010 and the immigration officer indeed had good reason not to consider the applicant's affidavit and his counsel's submissions as such.

[17] Given that the officer had no duty to consider the applicant's alleged rehabilitation, I find that his decision is reasonable.

B. *Failure to conduct an interview*

[18] The applicable standard of review to this question of procedural fairness is that of correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43).

[19] Page 33 of Operational Manual IP 2, cited by the applicant, indicates in fact that the immigration officers in the local CIC offices [TRANSLATION] "conduct interviews with sponsors and applicants, as required". Similarly, Operational Manual IP 8 at page 39 indicates that a "local CIC office may need to interview the applicant and/or the sponsor to assess concerns raised by

the CPC, including: … inadmissibility for reasons of serious criminality or security". These references apply to an applicant for permanent residence or his sponsor. In this case, I agree with the respondent that the officer had all the information required to find that the applicant was inadmissible. There was no need for her to hold an interview.

[20] Furthermore, the officer advised the applicant that he would possibly be inadmissible. She allowed him to make submissions in this regard and considered his submissions in her decision. In her fairness letter, the officer did not suggest that she would hold an interview and the applicant did not request one. Therefore, I am of the view that the immigration officer met her procedural fairness duties.

VI. Conclusion

[21] For all these reasons, the application for judicial review will be dismissed. The parties have proposed no question of general importance for certification and this case does not give rise to any.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The applicant's application for judicial review is dismissed;
2. No question of general importance is certified.

"Jocelyne Gagné"

Judge

Certified true translation

Catherine Jones, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Anthony Karkar	FOR THE APPLICANT
Sébastien Dasylva	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Anthony Karkar Counsel Montréal, Quebec	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT