Federal Court Cour fédérale

Date: 20200708

Docket: IMM-4254-19

Citation: 2020 FC 748

Ottawa, Ontario, July 8, 2020

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

ISABEL MARIA DE CAMPOS GREGORIO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Isabel Maria De Campos Gregorio is a citizen of Portugal. In 2013, she was convicted in Portugal of an offence that is the equivalent of the Canadian offence of forgery. While working as a bank teller in 2011, she helped two other individuals conduct fraudulent bank transfers in a

total amount exceeding €10,000. A court in Portugal found she had committed the crime knowingly, and had personally profited from the scheme. Her co-accused were convicted of various offences and given lengthy prison terms. Ms. De Campos Gregorio received a fine of €1,000.

[2] Ms. De Campos Gregorio was dismissed from her job at the bank. She continued to work in Portugal as a financial advisor and salesperson. She came to Canada in 2015 and married a Canadian permanent resident in 2017.

[3] Ms. De Campos Gregorio entered Canada on a visitor's visa. She requested extensions of her visa on four occasions between 2016 and 2017, but was refused each time. She obtained a work permit that was valid from July 4, 2018 to July 4, 2020. She has been working in Canada as a kitchen helper in a restaurant.

[4] In March 2018, Ms. De Campos Gregorio and her husband applied for her to become a permanent resident of Canada as a member of the spousal class.

[5] Ms. De Campos Gregorio's criminal conviction was disclosed to Canadian immigration authorities for the first time in July 2018, when she submitted a "Schedule A" and Portuguese Certificate of Criminal Record in connection with her application for permanent residence. According to Ms. De Campos Gregorio:

> I had not known that I had to communicate this information to my previous representative when we were submitting the spousal sponsorship application until she explained all the requirements. I

> was submitting my police clearance so I was not trying to hide anything.

[6] Ms. De Campos Gregorio is currently inadmissible to Canada for serious criminality under s 36(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. In November 2018, she applied for a declaration of criminal rehabilitation pursuant to s 36(3)(c) of the IRPA.

[7] An Immigration Officer [Officer] refused Ms. De Campos Gregorio's application on June 24, 2019. The Officer concluded that a finding of rehabilitation was not warranted, and humanitarian and compassionate [H&C] considerations did not justify special relief.

[8] Ms. De Campos Gregorio seeks judicial review of the Officer's decision.

[9] The Officer failed to consider the most important factor in an application for criminal rehabilitation, which is whether the foreign national will reoffend. The application for judicial review is therefore allowed, and the matter is remitted to a different immigration officer for redetermination.

II. Decision under Review

[10] The Officer found that Ms. De Campos Gregorio is inadmissible to Canada for serious criminality pursuant to s 36(1)(b) of the IRPA. Ms. De Campos Gregorio conceded that she had been convicted in Portugal of a crime that rendered her inadmissible to Canada, but she denied

having been a conscious and willing participant. The Officer remarked that the application for criminal rehabilitation was “not an opportunity to revisit the guilty finding rendered by the competent authorities in Portugal.”

[11] The Officer noted that the Portuguese court had found the impact of the crime on the victim to be severe. He was defrauded of all of his savings and had to borrow money to eat. The value of the fraudulent transactions exceeded €10,000. They occurred in numerous installments over several days. The Portuguese court found that Ms. De Campos Gregorio had personally profited from the crime by accepting illicit payments from one of the co-accused. The co-accused were charged with numerous other offences, some of which involved activities resembling organized crime. The conviction dated from 2013, and was relatively recent.

[12] The Officer concluded that a finding of criminal rehabilitation was not warranted.

[13] Ms. De Campos Gregorio does not challenge the Officer’s assessment of H&C factors, and it is therefore unnecessary to review this aspect of the Officer’s decision.

III. Issue

[14] The sole issued raised by this application for judicial review is whether the Officer’s refusal of Ms. De Campos Gregorio’s application for criminal rehabilitation was reasonable.

IV. Analysis

[15] The Officer's decision is subject to review by this Court against the standard of reasonableness. The Court will intervene only if it is satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 100).

[16] The Court must look respectfully at both the decision maker's reasoning process and the outcome, and must put the reasons first (*Vavilov* at paras 83-84). A reasonable decision is one that is based on an internally coherent and rational chain of analysis, and that is justified in relation to the facts and law that constrain the decision maker (*Vavilov* at para 85).

[17] Ms. De Campos Gregorio says that the Officer did not consider the likelihood that she will reoffend, and therefore failed to address the most important factor in an application for criminal rehabilitation. She relies on *Lau v Canada (Citizenship and Immigration)*, 2016 FC 1184 [*Lau*], where Justice Richard Mosley granted an application for judicial review for the following reasons (at para 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 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.

[18] Ms. De Campos Gregorio argues that the Officer also failed to recognize that her circumstances have changed significantly since she committed the crime in question, again relying on *Lau* (at para 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 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.

[19] Ms. De Campos Gregorio asserts that the Officer neglected to consider that:

(a) the events that gave rise to her criminal conviction in Portugal occurred in 2011;

(b) she was required to pay a fine of only €1,000, while her co-accused were sentenced to lengthy prison sentences or probationary periods;

(c) she paid the fine in full;

(d) she expressed remorse for the impact of the crime on the victim, despite insisting that she did not knowingly participate;

(e) she has no other convictions, either before or since; and

(f) her friends and family, all of whom are aware of her criminal conviction, have vouched for her good character.

[20] The Respondent replies that the Officer considered all the documents submitted by Ms. De Campos Gregorio, including the letters expressing support and confirming her good character. According to the Respondent, the Officer reasonably found that the crime was serious, its impact on the victim was severe, the amount of funds involved in the fraud was significant, the crime was not a single isolated event, and Ms. De Campos Gregorio had "colluded with individuals that are closely and directly involved in activities resembling organized criminality."

[21] The Respondent maintains that *Lau* is no longer good law, because the guideline it refers to, "ENF 2/OP 18 – Evaluating Inadmissibility", has been replaced by "Instruction Guide IMM 5312".

[22] The Respondent argues that the period during which a person has been crime-free is relevant only as a precondition to making an application for rehabilitation, citing Regulation 17 of the *Immigration and Refugee Protection Regulations*, (SOR/2002-227). The effect of Regulation 17, combined with s 36(3)(c) of the IRPA, is that a person may make an application for rehabilitation only if five years have elapsed since the sentence was completed, and no further crimes have been committed. Those who have not committed a crime within the preceding ten years are "deemed rehabilitated".

[23] According to Instruction Guide IMM 5312, "[r]ehabilitation means that you lead a stable lifestyle and that you are unlikely to be involved in any further criminal activity" [emphasis added]. The instructions to applicants published on the website of the Government of Canada's Help Centre state that "[a] rehabilitated person is someone who satisfies an immigration officer that they are not likely to become involved in any new criminal activity" [emphasis added].

[24] Notwithstanding the change in the applicable guideline and instructions, I am satisfied that *Lau* remains good law. The current guideline and instructions continue to be forward-looking, and focus on whether someone is "unlikely to be involved in any further criminal activity", or "not likely to become involved in any new criminal activity". This is consistent with the common meaning of "rehabilitation".

[25] This principle has continued to be applied by this Court in its recent jurisprudence. In *Tahhan v Canada (Citizenship and Immigration)*, 2018 FC 1279, Justice Alan Diner allowed an application for judicial review on the following grounds (at para 21):

> […] 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.

[26] Justice James O'Reilly granted an application for judicial review for similar reasons in *Ramirez Velasco v Canada (Citizenship and Immigration)*, 2019 FC 543 [*Ramirez Velasco*] at paragraphs 8 and 9:

> In my view, while the delegate mentioned a number of relevant factors, the delegate did not employ those factors to arrive at a conclusion regarding Mr. Ramirez's likelihood of committing further crimes, the essential question before him *(Tahhan v Canada (Minister of Citizenship and Immigration)*, 2018 FC 1279 at para 21). The negative factors mentioned by the delegate could easily point to a conclusion that Mr. Ramirez had made a significant, but singular, error in judgment in creating a false identity to enter and remain in Canada. That finding would not necessarily indicate a likelihood of committing more crimes in the future.
>
> In my view, it is insufficient for the delegate simply to balance mitigating and aggravating factors, as one might do, for example, in an application for humanitarian and compassionate relief. On a rehabilitation application, the delegate must go on to assess what those factors reveal about the person's tendency to commit additional offences. Here, the delegate failed to perform that assessment and, as a result, the delegate's conclusion was unreasonable.

[27] In this case, the Officer committed the same error that caused the application in *Ramirez Velasco* to be granted. The Officer listed a number of factors, some positive and some negative, and then stated a conclusion without any intervening analysis. Ms. De Campos Gregorio was entitled to an explanation for the Officer's conclusion that her circumstances did not warrant a finding of criminal rehabilitation (*Asong Alem v Canada (Citizenship and Immigration)*, 2010 FC 148 at para 14). This necessitated an evaluation of the different factors, and an assessment of whether Ms. De Campos Gregorio is likely to reoffend.

[28] As Justice Diner held in *Yu v Canada (Citizenship and Immigration)*, 2018 FC 1280 at paragraph 11, “[a]ny consideration of recidivism necessarily takes into account the nature of the past criminal history, and considers what has happened since that time, and whether there are any indicators that such conduct will recur”. The latter considerations are conspicuously absent from the Officer’s decision.

V. Conclusion

[29] The application for judicial review is allowed, and the matter is remitted to a different immigration officer for redetermination. Neither party proposed that a question be certified for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, and the matter is remitted to a different immigration officer for redetermination.

"Simon Fothergill"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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