Federal Court Cour fédérale

Date: 20210211

Docket: IMM-5235-19

Citation: 2021 FC 141

Ottawa, Ontario, February 11, 2021

PRESENT: Mr. Justice McHaffie

BETWEEN:

LOREBETH GARCIA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Lorebeth Garcia's application for permanent residence as a member of the live-in caregiver class was refused because her husband, Joresce Ballesteros, was found criminally inadmissible to Canada. That inadmissibility was based on a bar fight in the Philippines in 2006 that resulted in charges against Mr. Ballesteros that were later withdrawn when the complainant filed an Affidavit of Desistance stating that the accused parties, including Mr. Ballesteros, had no

intention to kill or injure him and that if called to testify, his testimony would completely exonerate the accused. A visa officer concluded that Mr. Ballesteros' acts amounted to assault causing bodily harm under sections 265 and 267 of the *Criminal Code*, RSC 1985, c C-46, and that despite the withdrawal of the charges there were reasonable grounds to believe that the offence had occurred. They therefore concluded Mr. Ballesteros was inadmissible pursuant to paragraph 36(1)(*c*) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] For the reasons given below, I agree with Ms. Garcia that the visa officer's decision was unreasonable and unfair. The visa officer did not undertake the requisite assessment of the elements of the Canadian offence, and in particular the defence of self-defence that Mr. Ballesteros had maintained since the charges were filed. Nor did the visa officer adequately assess the evidence as a whole, set out why they did not accept Mr. Ballesteros' evidence, or explain why the evidence continued to provide reasonable grounds to believe an offence was committed notwithstanding the complainant's Affidavit of Desistance. Finally, it was unreasonable for the visa officer to assume the Affidavit of Desistance and subsequent withdrawal of the charges resulted from a settlement in the absence of evidence to that effect. It was also unfair to have done so without giving Ms. Garcia notice of this issue and an opportunity to respond thereto.

[3] The application for judicial review is therefore allowed.

II. Issues and Standard of Review

[4] While phrased somewhat differently, the primary issues raised by Ms. Garcia on this application for judicial review are the following:

A. Did the visa officer err in finding that Mr. Ballesteros was inadmissible pursuant to paragraph 36(1)(*c*) of the *IRPA* by failing to undertake the required analysis of the offence and/or unreasonably assessing the evidentiary record?

B. Did the visa officer breach the duty of procedural fairness in reaching their decision?

[5] The parties agree that the first of these issues goes to the merits of the visa officer's decision and is reviewable on the reasonableness standard: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25. To assess the reasonableness of a decision, the Court considers "the outcome of the administrative decision in light of its underlying rationale, in order to ensure that the decision as a whole is transparent, intelligible and justified": *Vavilov* at paras 15. In doing so, the Court considers the administrative context of the decision, including the institutional setting and the evidence and submissions before the decision maker: *Vavilov* at paras 89–96, 125–128. A reasonable decision has an "internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker": *Vavilov* at paras 85, 90, 99, 105–107. While reasonableness review is "robust," the Court will not set aside a decision unless satisfied there are "sufficiently serious shortcomings such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency": *Vavilov* at paras 12–13, 99–100.

[6] The second issue goes to the process leading to the decision, rather than the substance of the decision itself. On such issues, the Court asks whether a fair and just process was followed, having regard to all of the circumstances: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54. Such review is "best reflected in the correctness standard," although no standard of review is actually being applied: *Canadian Pacific* at para 54, quoting *Eagle's Nest Youth Ranch Inc v Corman Park (Rural Municipality #344)*, 2016 SKCA 20 at para 20.

[7] I note for completeness that Ms. Garcia's application for judicial review also raised an issue regarding the visa officer's failure to consider deemed rehabilitation. That argument was withdrawn at the hearing.

III. Analysis

A. *The Visa Officer's Decision was Not Reasonable*

(1) Relevant statutory and regulatory provisions

[8] Ms. Garcia has worked in Canada as a live-in caregiver since 2009. She applied for permanent residence in 2011 as a member of the then "live-in caregiver class" and added her husband, Mr. Ballesteros, as an accompanying dependent in the application in 2014. Ms. Garcia's application was governed by, among other provisions, subparagraph 72(1)(*e*)(i) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, which requires a foreign national in Canada seeking to become a permanent resident to establish that "they and their family members, whether accompanying or not, are not inadmissible."

[9] Subsection 36(1) of the *IRPA* sets out grounds for inadmissibility for serious criminality. While the only applicable provision in the current case is paragraph 36(1)(*c*), I also reproduce paragraph 36(1)(*b*) as it is relevant to some of the discussion below:

Serious criminality	**Grande criminalité**
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 :
[…]	[…]
(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.

[10] Section 33 of the *IRPA* provides that the facts that constitute criminal inadmissibility include those for which there are "reasonable grounds to believe" have occurred:

Rules of interpretation	**Interprétation**
33 The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.	**33** Les faits — actes ou omissions — mentionnés aux articles 34 à 37 sont, sauf disposition contraire, appréciés sur la base de motifs raisonnables de croire qu'ils sont survenus, surviennent ou peuvent survenir.

[11] The Supreme Court of Canada has described this standard as being more than mere suspicion, but less than a balance of probabilities: *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at para 114. Reasonable grounds exist "where there is an objective basis for the belief which is based on compelling and credible information": *Mugesera* at para 114. The decision maker must be satisfied that these facts as found on the "reasonable grounds to believe" standard do constitute an offence, as a question of law: *Mugesera* at para 116.

[12] The relevant issue addressed by the visa officer was therefore whether there were reasonable grounds to believe Mr. Ballesteros, as a family member of Ms. Garcia, had committed an act in the Philippines that is an offence there and that, if committed in Canada, would constitute an offence punishable by a maximum term of imprisonment of at least 10 years.

(2) Evidence related to the charges against Mr. Ballesteros

[13] Mr. Ballesteros and four of his companions were charged in the Philippines with "frustrated homicide." The charge arose from an event in June 2006 in which Mr. Ballesteros' group was involved in a fight outside a karaoke bar in Echague with two other men, Joenard Humiwat and Jacinto Balisi. The complainant, Mr. Humiwat, alleged he was hit with a beer bottle by one of Mr. Ballesteros' friends, and was then severely beaten by Mr. Ballesteros' group. Mr. Humiwat suffered numerous injuries including traumatic brain injury, facial injuries, and a skull fracture.

[14] The five co-accused filed a joint affidavit in the Philippine criminal proceeding. They alleged that there had been earlier verbal altercations in the karaoke bar between the co-accused on the one hand and Mr. Humiwat and Mr. Balisi, on the other. After Mr. Ballesteros' group left the bar, Mr. Balisi stabbed one of them without warning. In the ensuing melee, Mr. Ballesteros was also stabbed when he tried to intervene. The co-accused agreed that there was a fistfight, but asserted that they were acting in self-defence and denied any of them hit Mr. Humiwat with a bottle. This directly contradicted Mr. Humiwat's story. Mr. Ballesteros in particular swore in the affidavit that it was physically impossible for him to have attacked Mr. Humiwat since he had already been injured from the stabbing.

[15] The prosecutor in the case concluded that despite the co-accused's assertions, these were matters of defence "best appreciated after a full-blown trial in court." He therefore signed a resolution recommending the filing of an information. Mr. Ballesteros and the other accused

filed a motion seeking reconsideration of that resolution. In an order dismissing the motion, the prosecutor found that there was "enough ground to believe that they committed the crime charged and they are probably guilty thereof and should be held for trial." At the same time, the prosecutor noted that there were matters of credibility and that the only issue for him was whether there was sufficient evidence to establish a belief that the crime had been committed. He also concluded that the defence of self-defence was something the accused had the burden of proving and that they "must be given the chance to prove their defense before the proper court." An Information was therefore laid in March 2007.

[16] In March 2009, the prosecutor filed a motion to dismiss the case. The motion was based on Mr. Humiwat's sworn "Affidavit of Desistance," in which he asserted that:

- what transpired was "but a product of misapprehension of facts and misunderstanding";
- the accused had no intention to kill or injure him;
- he was no longer interested in prosecuting the case or standing as witness; and
- should he be called to testify, he would "testify so as to completely exonerate [the accused] from any civil or criminal liability."

[17] The Information against Mr. Ballesteros and the others was dismissed by order of a judge on March 5, 2009.

(3) The visa officer's decision

[18] The Global Case Management System (GCMS) notes show that in December 2018, a visa officer in Manila reviewed Mr. Ballesteros' criminal file from the Philippines. After referring to the charge laid against Mr. Ballesteros, the visa officer's analysis proceeded as follows:

> Said case was dismissed on 05 March 2009 following years of hearings that culminated in the complainant executing an affidavit of desistance stating that he was no longer interested in pursuing the case. On his written explanation, Joresce states that the physical injuries sustained by the complainant was a result of the complainant and his friend's attack on him and his friends. Meanwhile, in his affidavit, the complainant states that one of Joresce's companions hit him with a bottle of beer on the head which caused him to fall to the ground while the rest, Joresce included, started to beat him up. While the complainant executed an affidavit of desistance, based on the court documents on file including the medical cert of the complainant, I am satisfied that Joresce committed an act which, if committed in Canada can be equated to assault causing bodily harm as described in Section 265(1) of the Canadian Criminal Code […]
>
> [Emphasis added.]

[19] The remainder of the visa officer's analysis in the December 2018 entry simply reproduces portions of sections 265 and 267 of the *Criminal Code*, and concludes that Mr. Ballesteros is inadmissible pursuant to paragraph 36(1)(*c*) of the *IRPA*.

[20] Following this entry, a "fairness letter" was issued to Ms. Garcia, stating that Mr. Ballesteros had been found inadmissible pursuant to paragraph 36(1)(*c*) of the *IRPA* and providing an opportunity to make submissions on the issue. Ms. Garcia responded with submissions and a statutory declaration from Mr. Ballesteros, each of which underscored his

version of the events at the bar and his view that he was wrongly charged. Mr. Ballesteros also repeated that he and his companions were the first to have filed a complaint with the police against Mr. Balisi, and that the complaint against Mr. Ballesteros and his friends had been brought to respond to the complaint against Mr. Balisi. Ms. Garcia noted the dismissal of the charges and cited this Court's decision in *Arevalo Pineda* for the principle that dismissal of charges is *prima facie* evidence that the crimes were not committed: *Arevalo Pineda v Canada (Citizenship and Immigration)*, 2010 FC 454 at para 31.

[21] The file was again referred to Manila. The same officer considered the file and in further GCMS notes dated July 2019 focused on the withdrawal of the charge and the Affidavit of Desistance:

> I had already taken note of the dismissal of the case during the initial criminality review. Nonetheless, an affidavit of desistance executed by the complainant does not necessarily mean that the act Joresce was accused of was not committed by him. Given the lengthy process of trial in the Philippines, it is common practice to settle cases outside of the court. If all parties are amenable to the terms of the settlement, the workaround is for the complainant to execute an affidavit of desistance stating that they misunderstood the facts and that they are no longer willing to pursue with the case. This is in view of having the case dismissed for reason that there will no longer be a witness to testify in court and the accused's guilt can therefore not be established beyond reasonable doubt. Therefore, despite the dismissal, the officer must still thoroughly review the circumstances that led to the filing of the charge including the evidences that have been submitted in order to make an accurate admissibility assessment. I have considered the reply to the procedural fairness letter however the information included therein does not change my assessment on the criminality of PA-CDA's spouse. Based on the information before me, I am still satisfied that Joresce is criminally inadmissible to Canada under A36(1)(c).
>
> [Emphasis added.]

[22] Ms. Garcia’s file was referred to Edmonton, where a visa officer relied on the Manila officer’s conclusion in reaching the determination that Ms. Garcia was inadmissible and refusing her application for permanent residence. Although the Edmonton visa officer said their decision was made based on the information before them, they conducted no independent analysis of the matter. The reasons for the refusal are therefore effectively those of the officer in Manila as set out in the two GCMS notes of December 2018 and July 2019, and the parties argued the application on this basis.

(4) The visa officer’s decision was unreasonable

(a) *The visa officer did not reasonably assess the elements of the offence*

[23] The visa officer concluded there were reasonable grounds to believe Mr. Ballesteros committed acts that if committed in Canada, would constitute the offence of assault causing bodily harm. To reasonably reach this conclusion, the visa officer had to assess whether there were reasonable grounds to believe Mr. Ballesteros committed acts that would meet the elements of the Canadian offence. It is worth noting that in *Vavilov*, the Supreme Court used criminality findings in the immigration context as an example of the legal constraints imposed by precedent. The Court underscored that it would “clearly not be reasonable” for an immigration tribunal considering whether an applicant’s act constitutes a criminal offence under Canadian law to adopt an interpretation inconsistent with how Canadian criminal courts have interpreted it: *Vavilov* at para 112. While the evidentiary standard applicable in the context of criminal inadmissibility is lower than the standard applicable in a criminal prosecution, the question of law as to what constitutes an offence remains the same: *Mugesera* at para 116.

[24] As stated above, the visa officer reproduced the definition of assault in subsection 265(1) of the *Criminal Code* and the language of subsection 267(*b*), which provides for a maximum ten-year sentence where an assault causes bodily harm. While the visa officer did not specifically enumerate the various elements of the offence, an administrative decision need not take the form of a jury charge or a criminal court decision: *Vavilov* at paras 91–92. Nonetheless, for reasons to be "justified," it must be clear that the analysis required by the applicable statutory provision has been undertaken in some form or other: *Vavilov* at paras 95–96, 108.

[25] Here, the visa officer clearly considered certain elements of the offence, including the existence of bodily harm (referring to the "medical cert of the complainant") and whether Mr. Ballesteros had been involved in the assault on Mr. Humiwat. Ms. Garcia argues, however, that the officer did not address the issues of whether Mr. Ballesteros himself caused Mr. Humiwat's injuries and whether his actions were undertaken in self-defence.

[26] I question whether the visa officer necessarily had to address whether Mr. Ballesteros himself caused the injuries, in light of section 21 of the *Criminal Code* and the principle of accessorial liability. However, I need not decide that issue since I agree it was unreasonable for the officer not to undertake any material assessment of the issue of self-defence.
Subsection 34(1) of the *Criminal Code* outlines a defence to an offence in Canada based on the use or threat of force:

Defence – use or threat of force	**Défense – emploi ou menace d'emploi de la force**
34 (1) A person is not guilty of an offence if	**34 (1)** N'est pas coupable d'une infraction la personne qui, à la fois :

(a) they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;	**a)** croit, pour des motifs raisonnables, que la force est employée contre elle ou une autre personne ou qu'on menace de l'employer contre elle ou une autre personne;
(b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and	**b)** commet l'acte constituant l'infraction dans le but de se défendre ou de se protéger — ou de défendre ou de protéger une autre personne — contre l'emploi ou la menace d'emploi de la force;
(c) the act committed is reasonable in the circumstances.	**c)** agit de façon raisonnable dans les circonstances

[27] Mr. Ballesteros' evidence, both before the criminal court in the Philippines and in his statutory declaration filed with the visa officer, was that force had been used against both the friend who had been stabbed and himself, and that all physical acts he took against Mr. Humiwat were undertaken for the purpose of defending himself and his friends from Mr. Humiwat and Mr. Balisi. While Ms. Garcia's submissions in response to the fairness letter (filed by her former counsel) could have been clearer on the subject, both those submissions and Mr. Ballesteros' statutory declaration raised the issue of self-defence, which was central to Mr. Ballesteros' response to the allegation that he had committed a crime.

[28] To assess whether an act constitutes an offence in Canada it is necessary to consider not only the elements of the offence but the applicable defences: *Li v Canada (Minister of Citizenship and Immigration)*, [1997] 1 FC 235 (CA) at para 19. While *Li* was decided in the

context of an equivalency assessment, discussed further below, in my view the principle applies equally whether the issue is equivalency or simply whether the acts constitute an offence in Canada. The Minister did not argue otherwise. Rather, the Minister argues that the visa officer effectively considered the issue of self-defence, since the Philippine prosecutor considered the self-defence argument and decided to nonetheless dismiss the co-accused's motion for reconsideration and lay an information.

[29] I cannot accept the Minister's arguments for a number of reasons. First and foremost, there is no indication in the GCMS notes that the visa officer materially considered the issue of self-defence or relied on the dismissal of the reconsideration motion as a basis for reaching a conclusion on self-defence. The only reference in the GCMS notes to the question of self-defence is the statement in the December 2018 notes that Mr. Ballesteros "states that the physical injuries sustained by the complainant was a result of the complainant and his friend's attack on him and his friends." Having summarized Mr. Ballesteros's evidence in this way, the visa officer gave no further consideration to the issue of self-defence. As the Supreme Court noted in *Vavilov*, a decision maker's reasons are the primary mechanism by which they communicate the rationale for their decision and show they have listened to the parties: *Vavilov* at paras 81, 84, 127. Absent any reference to the question of self-defence in the visa officer's reasons, this Court should not make assumptions about the visa officer's reasoning on that significant issue: *Vavilov* at paras 96, 128.

[30] Further, the visa officer is tasked with assessing whether there are reasonable grounds to believe that Mr. Ballesteros committed acts that would constitute an offence in Canada. As the

Minister conceded in argument, the visa officer cannot simply delegate that decision-making to a foreign prosecutor. In any case, to the extent that the Philippine prosecutor considered that the defence of self-defence needed to go to trial, they did so in the context of Philippine law. The visa officer had to assess whether there were reasonable grounds that the acts would have constituted an offence in Canada, something the Philippine prosecutor did not address.

[31] It is also important to note that the prosecutor's decision on the reconsideration motion was only that there was sufficient evidence to lay charges against the co-accused. As the parties agree, evidence surrounding charges can be taken into consideration, but the charges themselves cannot be used as evidence of criminality: *Sittampalam v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 326 at para 50. While the visa officer was entitled to consider the evidence leading to the laying of charges, they could not rely on the mere decision to lay charges.

[32] Finally, the evidentiary record before the visa officer was very different from the evidentiary record before the Philippine prosecutor when the reconsideration motion was dismissed. In addition to Mr. Ballesteros' further statutory declaration, the visa officer had the Affidavit of Desistance signed by Mr. Humiwat and the dismissal of the charges in the Philippines. This evidence is addressed further below, but the fact that the reconsideration motion was decided based on a different record further undermines the Minister's argument that the visa officer implicitly assessed the self-defence issue through reliance on the reconsideration motion.

[33] Given the availability of the defence of self-defence, and the importance of that defence to Mr. Ballesteros' response to the criminal allegations, it was unreasonable for the visa officer not to have meaningfully addressed it before reaching a finding on admissibility.

(b) *The visa officer's assessment of the evidence was unreasonable*

[34] Ms. Garcia also challenges the visa officer's treatment of the evidence, particularly the evidence about who instigated the incident and the evidence related to the withdrawal of the charges. I agree with Ms. Garcia that the visa officer's assessment of this evidence was unreasonable.

[35] As reproduced above, the visa officer in the December 2018 GCMS notes briefly addressed the difference between Mr. Ballesteros' and Mr. Humiwat's evidence as to who instigated the attack. However, the visa officer's only analysis of this evidence was that "based on the court documents on file including the medical cert of the complainant," they were satisfied that Mr. Ballesteros had committed the act. The complainant's medical certificate, not surprisingly, speaks only to Mr. Humiwat's injuries, which are not in issue. In my view, it is unreasonable in the circumstances for the visa officer's analysis of the conflicting evidence on a material issue to be limited to the broad statement that their conclusion was "based on the court documents."

[36] The court documents in question included medical evidence confirming that Mr. Ballesteros' friend suffered multiple stab wounds, and that Mr. Balisi was charged (also with "frustrated homicide") for that attack, each of which arguably corroborated Mr. Ballesteros'

evidence. It also included not only Mr. Ballesteros' evidence but that of the other accused, which similarly corroborated the account. The visa officer did not discuss this exonerating evidence or the further evidence contained in Mr. Ballesteros' statutory declaration, and gave no reason why they chose not to accept or rely on that evidence. Nor did the officer give any indication of why they remained satisfied in the face of this evidence that Mr. Humiwat's initial complaint was enough to establish reasonable grounds to believe Mr. Ballesteros had committed a crime.

[37] Rather, the only consideration the visa officer addressed in any detail was the withdrawal of charges and associated Affidavit of Desistance. In the July 2019 GCMS notes, the visa officer discounted the Affidavit of Desistance because it was "common practice [in the Philippines] to settle cases outside of the court," with an affidavit of desistance being part of the "workaround" if the parties are amenable to terms of settlement. However, as Ms. Garcia correctly points out, there was no evidence before the visa officer of there having been any settlement or terms of settlement associated with the affidavit. To the contrary, Mr. Ballesteros' statutory declaration stated that "the reason why Joenard withdrew the charges against us and the case was dismissed" was that he realised that they had been the ones at fault. The situation is thus very different than that in *Urdas*, relied on by the Minister, in which there was evidence both that the dismissal of the complaint was the result of a settlement, and of the terms of that settlement: *Urdas v Canada (Citizenship and Immigration)*, 2019 FC 131 at paras 15, 23, 27–28. While the Minister suggests that the visa officer did not conclude that a settlement occurred in this particular case, the only reason the visa officer's discussion of settlements would have any relevance to the evidence before them would be if they reached such a conclusion.

[38] Without any further evidence or rationale, it was unreasonable for the visa officer to speculate or assume that the Affidavit of Desistance was filed as a term of settlement and to discount its contents as a result. This is particularly so where the assumption (a) directly contradicts Mr. Ballesteros' evidence regarding the reason for the withdrawal, and (b) implies that the sworn evidence in the Affidavit of Desistance was untrue. In the Affidavit of Desistance, Mr. Humiwat stated that Mr. Ballesteros had no intention to injure him, and that his evidence would "completely exonerate" Mr. Ballesteros and the other accused from any criminal liability. The visa officer effectively concluded that this evidence was not to be accepted based on their speculation that it was filed as part of a settlement.

[39] This is significant given that the only evidence that Mr. Ballesteros committed acts that constitute assault causing bodily harm (as opposed to acts of self-defence) came from Mr. Humiwat's earlier statement, which he effectively withdrew through the Affidavit of Desistance. Without further analysis, it was unreasonable for the visa officer to conclude, in essence, that Mr. Ballesteros was not to be believed and that Mr. Humiwat's earlier statement gave rise to reasonable grounds to believe that the crime was committed notwithstanding his sworn withdrawal of material aspects of that statement.

[40] In this regard, Ms. Garcia points to the conclusion in *Arevalo Pineda* that the dismissal of charges is *prima facie* evidence the crimes were not committed: *Arevalo Pineda* at para 31. The Minister agrees with this principle, but argues that this presumption can be rebutted based on the evidence and facts of the case.

[41] In this regard, I believe the approach taken in *Red v Canada (Citizenship and Immigration)*, 2018 FC 1271, another case involving an affidavit of desistance as part of a withdrawal of charges in the Philippines, is instructive. At paragraph 28 of that decision, Justice Walker noted the following:

> The Affidavit of Desistance and the Order of the Trial Court are unequivocal. The elements of an offence under BPB 22 could not be established on the basis of the Applicant's actions. The complainant, AsiaLink, swears in the Affidavit that its understanding of the facts was incorrect such that the prosecution of the case could not be successful. The Trial Court accepted the Affidavit of Desistance and withdrew the charge. I recognize that section 33 of the IRPA requires only that an officer have reasonable grounds to believe that an offence was committed by the Applicant outside of Canada. However, in light of the evidence in the record to the contrary, the Officer was required to explain in some detail the conclusion that an offence was committed. The Officer's statement in the GCMS notes that the Applicant could not explain AsiaLink's misunderstanding is not a sufficient explanation.
>
> [Emphasis added.]

[42] The Minister relies on the subsequent decision in *Urdas*, in which Chief Justice Crampton upheld an inadmissibility finding despite the withdrawal of charges and an affidavit of desistance. Importantly, the officer's decision in that case relied on various findings and facts, including Mr. Urdas' own contradictory statements regarding the settlement of the charges, the fact that the complainant's affidavit of desistance did not say Mr. Urdas did not commit the offence, and the presence of multiple witnesses in addition to the complainant: *Urdas* at paras 23–26. The Chief Justice distinguished *Red* on the basis that the affidavit of desistance in *Red* stated that there had been a "misaccounting and a misapprehension of facts," whereas that in *Urdas* simply stated that the complainant was no longer certain the accused were the ones who stabbed them: *Urdas* at paras 25–26. The Chief Justice underscored that the

dismissal of the charges required the officer to "exercise caution" and be satisfied that there were nonetheless reasonable grounds for the inadmissibility finding: *Urdas* at para 38. However, given the officer's factual findings, it was reasonably open to them to reach such a conclusion in that case: *Urdas* at paras 38–39.

[43] In both *Red* and *Urdas*, the issue was whether the officer had reasonably assessed the evidence, including the affidavits of desistance. In *Red*, the Court concluded that given the affidavit of desistance, the officer needed to provide a greater explanation of the conclusion that an offence had been committed. In *Urdas* the officer did provide an adequate explanation and assessment of the evidence. Both cases therefore apply the same approach, which is consistent with *Arevalo Pineda*, namely that the withdrawal of charges is important, but not determinative, and that a reasonable decision must explain why the evidence supports a conclusion of inadmissibility despite the dismissal of charges and any affidavit withdrawing allegations. Ultimately, the question under paragraph 36(1)(*c*) remains whether there are objectively reasonable grounds to believe, based on compelling and credible information, that acts were committed which constitute an offence falling within that provision: *Mugesera* at para 114. The withdrawal of charges associated with the acts in the foreign jurisdiction is relevant evidence suggesting an offence may not have been committed, but it is not determinative.

[44] Here, the visa officer appears to recognize that their role was to "thoroughly review the circumstances that led to the filing of the charge," including the evidence submitted. However, despite this statement, in my assessment they did not undertake such a thorough review. As a result, neither Ms. Garcia nor the Court are able to assess why the visa officer accepted that

Mr. Humiwat's original evidence remained sufficiently credible and compelling to conclude there were reasonable grounds to believe Mr. Ballesteros had committed acts that would be an offence in Canada, despite the witness having stated that their evidence would exonerate Mr. Ballesteros, and despite Mr. Ballesteros' direct evidence to the contrary. Without such an assessment of the evidence, the decision lacks the justification, transparency, and intelligibility of a reasonable decision: *Vavilov* at paras 86, 99, 133.

(c) *Applicability of the* Hill *equivalency analysis*

[45] Ms. Garcia also argues that the visa officer's decision was unreasonable because it failed to conduct an "equivalency" analysis between the Philippine and Canadian offences in accordance with the Federal Court of Appeal's decision in *Hill v Canada (Minister of Employment and Immigration)*, [1987] FCJ No 47, 1 Imm LR (2d) 1 (CA). While I need not determine this argument given my conclusions above, I believe it worth discussion in light of the parties' arguments on the issue.

[46] In *Hill*, the Federal Court of Appeal set out three ways in which an officer may conduct an "equivalency" analysis to determine whether a foreign offence "would constitute an offence" in Canada: (i) by comparing the precise wording in each statute to determine the essential ingredients of the respective offences; (ii) by examining the evidence adduced before the adjudicator to ascertain whether the evidence was sufficient to establish that the essential ingredients of the offence in Canada had been proven in the foreign proceedings; or (iii) a combination of (i) and (ii).

[47] In the present case, the visa officer did not undertake a comparison between the essential elements of the "frustrated homicide" offence with which Mr. Ballesteros was charged in the Philippines and the assault causing bodily harm offence in Canada. Ms. Garcia argues that an officer must at least describe the constituent elements of the Canadian and foreign offences, with reference to applicable provisions: *Nshogoza v Canada (Citizenship and Immigration)*, 2015 FC 1211 at paras 27–31. Relying on Justice Diner's decision in *Liberal*, she argues that mere reference to the provisions followed by a brief statement regarding their equivalence is not a reasonable analysis: *Liberal v Canada (Citizenship and Immigration)*, 2017 FC 173 at paras 28–32.

[48] In my view, it is relevant to note that *Hill, Nshogoza* and *Liberal*, as well as the cases they rely on, were decided in the context of paragraph 36(1)(*b*) of the *IRPA* or its predecessor, as the applicant in each case had been convicted of a foreign offence: *Nshogoza* at para 1; *Liberal* at para 1; see also *Li* at paras 2–3; *Brannson v Canada (Minister of Employment and Immigration)*, [1981] 2 FC 141 (CA) at pp 142–143; *Kathirgamathamby v Canada (Citizenship and Immigration)*, 2013 FC 811 at paras 1, 24.

[49] As set out above, paragraph 36(1)(*b*) is triggered where a party has been convicted of an offence outside Canada that, if committed here, would be an offence punishable by a maximum term of imprisonment of at least 10 years. This requires an assessment of whether the offence of which the individual was convicted outside Canada would also constitute an offence in Canada. This engages the equivalency question addressed in *Hill*.

[50] The analysis under paragraph 36(1)(*c*) of the *IRPA*, however, pertains not to a conviction outside Canada or even a charge, but to an act committed by the individual. The paragraph has two requirements. First, the act must be “an offence” where it was committed. Second, the act must constitute an offence punishable by a maximum term of imprisonment of at least 10 years, if it were committed in Canada. Unlike paragraph 36(1)(*b*), the paragraph does not on its face require that there be any equivalence between the offences in the two jurisdictions; simply that the act be “an offence” where it was committed, and constitute “an offence” with a particular punishment in Canada.

[51] This difference has led this Court to question the applicability of the equivalency analysis to paragraph 36(1)(*c*): *Victor v Canada (Public Safety and Emergency Preparedness)*, 2013 FC 979 at paras 35–37; *Nguesso v Canada (Citizenship and Immigration)*, 2015 FC 879 at paras 208–210. Nonetheless, this Court has also held in a number of cases that paragraph 36(1)(*c*) does trigger the *Hill* equivalency analysis: *Pardhan v Canada (Citizenship and Immigration)*, 2007 FC 756 at paras 9–10; *Somal v Canada (Citizenship and Immigration)*, 2014 FC 891 at para 19; *Singh v Canada (Citizenship and Immigration)*, 2019 FC 946 at paras 16–17; *Cruz v Canada (Citizenship and Immigration)*, 2020 FC 455 at paras 42–43.

[52] In my view, the reasoning in *Victor* and *Nguesso* regarding the applicability of the *Hill* equivalency analysis to paragraph 36(1)(*c*) is persuasive. In any event, as Justice Roy noted in *Victor*, *Hill* sets out three alternative methods that may be used in the analysis, and to the extent that the *Hill* analysis may be necessary under paragraph 36(1)(*c*), the second *Hill* method seems “particularly advisable”: *Victor* at para 45. To this, I would add the observation that if applying

the second *Hill* method in the context of paragraph 36(1)(*c*), the evidence in question may not have been "adduced before the adjudicator" or "proven in the foreign proceedings," since no conviction is necessary under the section.

[53] The Minister argues that the visa officer did undertake an adequate examination of whether the essential elements of the Canadian offence had been established on the evidence, and thereby followed the second *Hill* method. While I have concluded above that the visa officer's analysis of the evidence and the elements was not reasonable, I cannot conclude that the decision was also unreasonable because it failed to adequately assess equivalency between the Philippine offence for which Mr. Ballesteros was charged and the Canadian offence of assault causing bodily harm.

B. *Fairness*

[54] Ms. Garcia argues that in addition to being unreasonable, it was unfair for the visa officer to rely on the "common practice to settle cases outside of the court" as a reason to discount the Affidavit of Desistance. She argues the visa officer apparently relied on extrinsic sources regarding the workings of the criminal system in the Philippines without putting that information or those issues to Ms. Garcia to allow her to respond with submissions or evidence. The Minister argues that Ms. Garcia was given the opportunity to address the overall criminality finding through the issuance of the procedural fairness letter, and that the visa officer is entitled to rely on specialized localized information regarding the country in which they work: *Habte v Canada (Citizenship and Immigration)*, 2019 FC 327 at paras 23, 32, 35.

[55] While the duty of procedural fairness owed by visa officers generally tends to be at the lower end of the spectrum, this Court has recognized that decisions that involve inadmissibility invoke a greater degree of procedural fairness: *Nguesso* at paras 65–66. In my view, the officer did not meet the duty of fairness in this case.

[56] While a visa officer's expertise and knowledge is central to their decision making, this does not resolve the issue of whether a visa officer has an obligation in a particular case to raise an aspect of that specialized knowledge before rendering a decision based on it. This Court has recognized that the rules of procedural fairness require that in some instances, such information or evidence must be disclosed: *Al Hasan v Canada (Citizenship and Immigration)*, 2019 FC 1155 at paras 10–11; *Nguyen v Canada (Citizenship and Immigration)*, 2019 FC 439 at para 28. The issue is whether "meaningful facts essential or potentially crucial to the decision" were relied upon without the applicant having been given an opportunity to comment on them: *Nguyen* at para 28, quoting *Yang v Canada (Minister of Citizenship and Immigration)*, 2013 FC 20 at para 17.

[57] In the present case, it is clear that the role of settlement and affidavits of desistance in the Philippine criminal justice system was a matter "essential or potentially crucial" to the visa officer's decision. Indeed, it was the material focus of their analysis of Mr. Ballesteros' admissibility. Yet neither the visa officer's understanding that "it is common practice to settle cases" because of the lengthy trial process, nor their understanding that affidavits of desistance are simply a "workaround" arising from the terms of settlement was put to Ms. Garcia for comment in the fairness letter. In my view, it was unfair for the officer to rely on this information

in this context, particularly where there was no evidence of a settlement, and where the visa officer’s understanding or information directly contradicted Mr. Ballesteros’ evidence that the withdrawal arose from Mr. Humiwat’s realization that he was at fault.

IV. Conclusion

[58] The application for judicial review is therefore allowed, and Ms. Garcia’s application is referred back to a different officer for redetermination.

[59] Neither party proposed a question for certification. I agree that none arises.

JUDGMENT IN IMM-5235-19

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed. The visa officer's decision is set aside and Ms. Garcia's application for permanent residence is returned for re-determination by a different officer.

"Nicholas McHaffie"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5235-19
STYLE OF CAUSE:	LOREBETH GARCIA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

HEARING HELD BY VIDEOCONFERENCE ON SEPTEMBER 9, 2020 FROM OTTAWA, ONTARIO (COURT) AND CALGARY, ALBERTA (PARTIES)

JUDGMENT AND REASONS:	MCHAFFIE J.
DATED:	FEBRUARY 11, 2021

APPEARANCES:

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