Federal Court  Cour fédérale

Date: 20210608

Docket: IMM-4599-19

Citation: 2021 FC 569

Ottawa, Ontario, June 8, 2021

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

MOISES MOREIRA PIRES

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision of an immigration officer [the Officer], dated July 3, 2019, refusing the Applicant's wife's application to sponsor him for permanent residence in Canada under the in-Canada spousal class [the Decision]. The Applicant is inadmissible to Canada on grounds of serious criminality pursuant to s 36(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], and he sought relief on

humanitarian and compassionate [H&C] grounds under s 25(1) of IRPA. However, the Officer was not persuaded that there were sufficient H&C grounds to warrant exempting the Applicant from his inadmissibility.

[2] As explained in more detail below, this application is dismissed, because I find the Decision to be a reasonable treatment of the H&C considerations applicable to this case.

II. **Background**

[3] The Applicant, Moises Moreira Pires, is a citizen of Portugal. He moved to the United States [the US] in 1975. While living in the US, he was convicted of several criminal offences. These offences include:

A. A conviction of larceny in 1982 for breaking and entering into a motor vehicle, with a 30 day prison sentence;

B. A conviction in 1984 for aggravated rape, kidnapping, assault and battery, and larceny, for which he received a 20 year prison sentence, although the Applicant was later released after 18 months following a review of that sentence; and

C. A 1987 conviction for possession with intent to deliver LSD and obstructing a police officer, for which he received no prison sentence.

[4] The Applicant was also registered as a sexual offender with the Agency of Public Safety of the Federal Bureau of Investigation National Crime Information Centre in the US in August of

1996. He was subject to removal proceedings in 1999 and was deported from the US to Portugal in 2010.

[5] The Applicant met his current wife, who is a Canadian citizen, in 2012 while working as a taxi driver in Portugal. He married her in September of 2013. The Applicant entered Canada as a visitor in April 2013 and has remained in Canada ever since. Between 2013 and 2017, he applied to extend his visitor status six times, but he did not disclose his US convictions on any of his applications. In 2017, the Applicant applied to have his visitor status restored, but this was refused.

[6] The Applicant submitted an application for criminal rehabilitation in September 2016, which he failed to action and was deemed withdrawn. He subsequently submitted a second application in April 2017. That application was refused on July 2, 2019, in a decision that is the subject of an application for judicial review currently before this Court in file no. IMM-4598-19.

[7] In September of 2016, the Applicant's wife also applied to sponsor him for permanent residence under the in-Canada spousal class. The spousal sponsorship application acknowledged that the Applicant had been convicted of criminal offences in the US in the past and asked the Officer to grant an exception to his serious criminal inadmissibility based on the following H&C factors pursuant to s 25(1) of IRPA:

A. The disproportionate, unusual or undeserved hardship that the Applicant and his wife will encounter if he is returned to Portugal;

B. The Applicant's ties to Canada; and

C. The best interests of children [BIOC] affected by the application.

III. **Spousal Sponsorship Decision**

[8] In the Decision that is the subject of this application for judicial review, the Officer refused the spousal sponsorship application. The Officer determined that the Applicant does not meet the statutory requirements to become a permanent resident of Canada, because he is a person inadmissible to Canada under s 36(1)(b) of IRPA as someone who has 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.

[9] The Officer also noted that the Applicant applied for criminal rehabilitation but that his application was refused on July 2, 2019.

[10] The Officer then turned to the Applicant's request for an exception to his criminal inadmissibility based on H&C considerations under s 25(1) of IRPA, noting that the H&C request raised issues of the difficulty of separation between the Applicant and his wife, the best interests of the children from his wife's side of the family, and the hardship the Applicant would encounter if required to return to Portugal. The Officer also set out details surrounding these submissions.

[11] At the outset of the analysis, the Officer explained the obligation to weigh and balance the interests of both the Applicant and Canadian society. The Officer found that the Applicant is in a loving genuine marriage with his wife but explained the requirement to consider the fact that

the Applicant had committed some very serious crimes of which he had been found not to be rehabilitated. The Officer commented that the interests, safety and security of the Canadian public and society are at stake.

[12] The Officer acknowledged that separation of the Applicant from his wife would create physical and emotional difficulties but found insufficient evidence that the difficulties could not be reasonably mitigated. The Officer noted that his wife could visit or stay with the Applicant in Portugal, as she is Portuguese. The Officer recognized that her children and grandchildren are in Canada but determined that it would not amount to unacceptable hardship if they were not all living in the same country. The Officer also dismissed the Applicant's argument related to the fact that his wife owns a business in Canada. Although acknowledging that, if the Applicant's wife chooses to go to Portugal, she may have to make arrangements for others to manage the business, the Officer found this would not amount to unacceptable or serious hardship.

[13] With respect to the BIOC factor, the Officer considered the interests of the Applicant's stepchildren and stepgrandchildren. The Officer accepted that the Applicant plays a loving role as grandfather to his wife's grandchildren, but found little, if any, evidence that this relationship amounts to a level of interdependency that, if severed, would cause serious and long-term difficulties.

[14] Lastly, the Officer considered the Applicant's submissions surrounding difficulties he would face upon returning to Portugal. The Applicant raised that, aside from a brother, he has no family members in Portugal. He also argued that he has no job in Portugal and would have

difficulty providing for his wife and himself. The Officer was not persuaded by these concerns. Commenting that it is not unusual for people in their late 50s not to have family members around, the Officer noted that the Applicant had spent most of his life away from his family. Although recognizing that the Applicant would likely not depend on his Portuguese relatives, the Officer considered it a positive factor that the Applicant has a brother in Portugal. The Officer also found that there was no reason to think the Applicant could not resume work as a taxi driver in Portugal, a job he held before moving to Canada. The Officer also noted that the Applicant's wife's business generates income and that she owns two condominiums in Canada, which the Officer saw as reasonable grounds to believe that the couple have access to funds necessary to establish a decent living if they decided to relocate to Portugal.

[15] Overall, the Officer was not persuaded that there were sufficient H&C grounds to warrant exempting the Applicant from his serious criminal inadmissibility.

IV. **Issues and Standard of Review**

[16] The parties agree that the sole issue to be decided by the Court is whether the Decision withstands the reasonableness standard of review.

V. **Analysis**

[17] In challenging the reasonableness of the Decision, the Applicant first argues that the Officer erred in finding that he is a risk to the security of Canada. He submits that the Officer erred in arriving at this finding by adopting the decision in the rehabilitation application, without

exercising independent discretion, and that this finding was reached without regard to the evidence.

[18] The Applicant has cited no authority for his position that the Officer was obliged to independently assess whether the Applicant was rehabilitated, notwithstanding that a delegate of the Minister of Citizenship and Immigration had reached a determination on the issue of the Applicant's rehabilitation the previous day. He draws comparisons with circumstances in which an officer deciding an H&C application considers factors that have previously been assessed in a refugee claim or a pre-removal risk assessment. However, the Applicant cites no authority, even in that somewhat distinct context, for the proposition on which his argument is based. I find no basis to conclude that the Officer erred by relying on the rehabilitation decision and not repeating that assessment. There is therefore no need for the Court to consider the Applicant's argument that the rehabilitation finding was made without regard to the evidence, although I note that this argument is addressed in Court file no. IMM-4598-19.

[19] I also note the Applicant's submission that the Officer erred in extrapolating from the negative rehabilitation decision to a finding that the Applicant posed a risk to the safety and security of Canada. On this point, I agree with the Respondents' submission that the Decision does not include such a finding. Rather, the Officer referred to the competing policy considerations, relevant when considering a request for an exemption from serious criminal inadmissibility, of family unification and protection of Canada's safety and security. While it is perhaps a nuanced point, I read the Decision as noting that, absent rehabilitation, the Applicant's criminality engages the latter policy consideration. I find no error in this analysis.

[20] The Applicant also argues that the Officer erred by failing to consider the establishment of the Applicant and his wife in Canada, when concluding that they would not face undue hardship if they relocated to Portugal. In this respect, the Applicant emphasizes that his wife is 61 years old, has lived almost her entire life in Canada, and has 3 children, 9 grandchildren, a business and two apartments in Canada. He relies on authorities which identify that establishment is a relevant factor to be considered when assessing an H&C application and that, absent a proper assessment of establishment, a proper determination cannot be made as to whether an applicant would suffer hardship if an application for permanent residence submitted from within Canada is denied (see *Brar v Canada (Minister of Citizenship and Immigration)*, 2011 FC 691 at para 63; *Raudales v Canada (Minister of Citizenship and Immigration)*, [2003] FCJ No 532, 2003 FCT 385 (FCTD) at para 19; *Jamrich v Canada (Minister of Citizenship and Immigration)*, 2003 FC 804).

[21] I accept the jurisprudential principle upon which the Applicant relies. However, I disagree with the Applicant's position that the Decision does not demonstrate consideration of establishment. First, I would note that the establishment factors that the Applicant points to in this application are mostly related to his wife. In relation to the Applicant, the September 2016 submissions provided in support of the sponsorship application refer to him having lived with his wife in Canada for 3 years and having been accepted into his wife's family. They also note that he has not been employed in Canada. In contrast, as noted above, his wife has substantial and long term family and business connections in Canada.

[22] However, the Decision clearly takes these establishment factors into account. The Officer considers the physical and emotional difficulty that the Applicant would suffer if separated from his wife, but also how such difficulty could be mitigated by his wife visiting him or moving to Portugal. The Officer considers the couple's relationships with the Applicant's wife's children and grandchildren but concludes that the effects of physical separation could be mitigated and would not amount to undue hardship. The Officer also considers the effect on his wife's business, if the Applicant and his wife moved to Portugal, and concludes it would not amount to serious unacceptable hardship. Clearly, it is the level of establishment in Canada that informs each component of this analysis.

[23] I appreciate that the Officer did not structure the Decision such that there is an analysis labelled "Establishment" , separate and distinct from the analysis of the hardship that the Applicant or his wife would face by leaving Canada. However, I do not consider there to be any requirement for an H&C analysis to be structured in that manner. Indeed, in *XY v Canada (Citizenship and Immigration)*, 2018 FC 213 [*XY*], an authority upon which the Respondent relies, Justice Pentney notes that the degree of establishment in Canada can form part of the hardship analysis integral to the H&C determination (at para 32).

[24] I note that *XY* also comments on the importance of keeping the analyses of the degree of establishment in Canada, and the capacity of an individual to adapt to life in their country of origin, separate and distinct. Justice Pentney found that the officer's failure to maintain that separation in the H&C analysis in that case was a reviewable error (at para 32). However, that error related to the officer's use of the applicant's degree of establishment in Canada to conclude

that she had the personal attributes to allow her to similarly thrive if she returned to her country of origin. The Officer's analysis in the case at hand does not follow a line of reasoning which engages this error.

[25] In relation to the Officer's consideration of hardship, the Applicant argues that the Decision demonstrates an error by applying a test of unusual hardship. As explained by the Supreme Court of Canada in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*] at para 33:

> 33. The words "unusual and undeserved or disproportionate hardship" should therefore be treated as descriptive, not as creating three new thresholds for relief separate and apart from the humanitarian purpose of s. 25(1). As a result, what officers should not do, is look at s. 25(1) through the lens of the three adjectives as discrete and high thresholds, and use the language of "unusual and undeserved or disproportionate hardship" in a way that limits their ability to consider and give weight to all relevant humanitarian and compassionate considerations in a particular case. The three adjectives should be seen as instructive but not determinative, allowing s. 25(1) to respond more flexibly to the equitable goals of the provision.

[26] In advancing his argument that the Officer applied a test of unusual hardship, the Applicant relies on the Officer's frequent references to the effect that the hardship that the Applicant or his wife may face is not something that one cannot expect. These references do not demonstrate the sort of error identified in the above passage from *Kanthasamy*. The Decision is responsive to the Applicant's submissions in support of his request for H&C relief, which argued that the Applicant and his wife would suffer certain hardships if he were required to return to Portugal. I do not read the Decision as adopting a test based on unusual hardship.

[27] Finally, the Applicant notes the Officer's statements that, in this age of tremendous population movement, it is common for parents and adult children not to live close together in the same city, and it is not unusual for people not to have many family members around them when in their late 50s. The Applicant submits that these statements are speculative and without any basis in the evidence. I agree with this submission. However, in my view, these statements do not give rise to a reviewable error in the Decision. These statements formed only a part of the Officer's analysis, which was otherwise grounded in the evidence of the Applicant having lived away from family members for most of his life and which relied on the absence of any evidence of particular hardship that would arise from family separation in the case at hand. I am conscious of the admonition that judicial review is not a "line-by-line treasure hunt for error" (see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 102). I find that the impugned comments by the Officer do not undermine the reasonableness of the Decision.

[28] Having considered the Applicant's arguments and finding no basis to conclude that the Decision is unreasonable, this application for judicial review must be dismissed. Neither party proposed any questions for certification for appeal, and none is stated.

JUDGMENT IN IMM-4599-19

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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