Federal Court  Cour fédérale

Date: 20110630

Docket: IMM-4643-10

Citation: 2011 FC 801

Ottawa, Ontario, June 30, 2011

PRESENT: The Honourable Justice Johanne Gauthier

BETWEEN:

ALBERTO GIUSEPPE FERRARO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] Mr. Alberto Giuseppe Ferraro seeks judicial review of the decision denying his requests for a temporary resident permit (*Immigration and Refugee Protection Act*, SC 2001, c 27, s 24 [*IRPA*]) and for humanitarian and compassionate consideration (H&C) to overcome inadmissibility for serious criminality (*IRPA*, s 25).

[2] Mr. Ferraro is a citizen of Ecuador, who immigrated to Canada when he was nine years old and has lived in Canada continuously ever since. His family lives in Canada, including his four children[1] and a stepson,[2] his widowed father, his sister, his aunts, uncles and cousins. At present, he lives with his sick father and his current common-law wife, his stepson and their new baby (Savannah). He is the owner of two luxury car businesses in Toronto, one of which was opened in February 2009. He has been very successful in his business matters and in one of the written submissions submitted on his behalf, his counsel describes him as financially secure.

[3] Mr. Ferraro pled guilty to two counts of trafficking a controlled substance and possession of stolen property under $5,000 in September 2001. He received concurrent three-year sentences and was released after seven months on accelerated parole. A deportation order was issued against him in 2002.

[4] Since then, Mr. Ferraro has been the subject of various charges (in 2003, 2007 and 2009) related to drugs[3] which had all been either stayed or withdrawn by the time the decision under review was rendered.

[5] He filed his request for a temporary resident permit and for an H&C in May 2006 and, for reasons that have not totally been explained,[4] the decision was only made on June 18, 2010 after he had filed several updated submissions and evidence.[5]

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[1] Vanessa, born in 1984; Victoria, born in 1997; Damian, born in 2006; and Savannah, born in 2009. All children were born from different mothers.
[2] Rio, born in 1998 to Mr. Ferraro's current common-law wife from a previous relationship.
[3] One for sexual assault.
[4] Part of it was due to the fact that the decision-maker was seeking information about new charges and new developments in the file.

[6] Mr. Ferraro raises several issues with the decision, including issues of procedural fairness. First, he said that he should have been granted an interview by the decision-maker, but after discussion at the hearing, it was conceded that this argument was not in accordance with the law as it stands.

[7] Second, Mr. Ferraro argues that the decision-maker exhibited a reasonable apprehension of bias which permeated her whole approach to his case. This allegation of bias arose from an e-mail exchange between the respondent Ministry and Canada Border Services (CBSA) officials. Also, according to the applicant, the decision-maker ignored the fact that he only served seven months of his three-year sentence and was released on accelerated parole because of his good behaviour. For the applicant, this was an important factor to consider with respect to his rehabilitation.

[8] Mr. Ferraro also put a great deal of emphasis on the fact that the decision-maker appears to have relied on an outdated RCMP printout in stating that the December 2009 charges were still awaiting disposition, whereas Exhibit P of the Applicant's Record clearly demonstrates that these charges were stayed (although counsel was not present at the proceeding and afterwards sought, without success, to have these charges withdrawn). The respondent answered that in his written submissions to the decision-maker, the applicant's counsel did not even refer to the disposition of these charges, even though the submissions were made a month after the charges were stayed.[6] That said, and in any event, the weight given to these charges, if any, was minimal.

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[5] First set of submissions was filed on May 26, 2006; the second on September 21, 2007; the third on January 29, 2009; and the final one on May 31, 2010.

[9] Also, the applicant argues that the decision-maker's reliance upon criminal charges, particularly those from 2003 which were later withdrawn, was not proper since withdrawn charges are not evidence of criminality.

[10] Third, Mr. Ferraro argues that the decision-maker's finding that there was little before her to prove Mr. Ferraro was rehabilitated was unreasonable as he had submitted extensive evidence of rehabilitation, including, as mentioned, that he had been released on accelerated parole after seven months due to his good behaviour, that he participated in a program called Choices, and that his business sponsors children's charities, teams and churches. That said, it is not clear that these sponsorships were part of his rehabilitation as opposed to his ongoing role in the community since Mr. Ferraro only notes that these sponsorships were done "in past and present" (Certified Record at 47).[7]

[11] Fourth, Mr. Ferraro argues that the decision-maker's assessment regarding the best interests of his children was flawed. His main submission in this respect concerned the decision-maker's statement that were Mr. Ferraro to be removed "each [child] has another parent remaining in Canada who could continue to care for [him or her]" and that in the case of his step-son, Rio, there were two parents – his mother and biological father. According to the applicant, this particular statement is ridiculous since Rio's biological father had allegedly been abusive, as was noted in a letter from the applicant's common-law wife (Rio's mother).[8] The respondent disagreed and submitted that the best interests of the child analysis was reasonable, especially since a different

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[6] See Affidavit of Jillan Sadek at 17.
[7] Thus, it is not clear whether they also occurred prior to 2001 when he pled guilty to the criminal charges.
[8] Certified Record at 31.

letter from Mr. Ferraro's wife confirmed that Rio sees his biological father on weekends and some holidays,[9] suggesting he is now a fit parent.

[12] Fifth, although Mr. Ferraro asserts that it was unreasonable for the decision-maker to have considered that he could be deported to Italy instead of Ecuador, this was not an argument he insisted upon at the hearing before me, given that Italy had been raised as a potential country of destination by the applicant himself[10] and the decision-maker clearly expressed no views in that respect. She simply attempted to cover in her reasons all the representations made by Mr. Ferraro and his counsel.

[13] Finally, the applicant took issue with the fact that the decision-maker failed to perform a separate analysis regarding his request for a temporary resident permit.

[14] The parties are agreed that questions involving procedural fairness, including the allegation of a reasonable apprehension of bias, are reviewable on a correctness standard (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 43 [*Khosa*]; *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*]; *Ahmad v Canada (Minister of Citizenship and Immigration)*, 2008 FC 646 at paragraph 14). As to the validity of the overall decision made under the H&C provision of *IRPA*, this is generally subject to a reasonableness standard (*Dunsmuir*, above, at paragraphs 51, 53; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817; *Kinsana v Canada (Minister of Citizenship and Immigration)*, 2008 FC 307, aff'd FCA 189 at paragraph 12 [*Kinsana*]). The decision-maker's assessment of the best interests of the children attracts a

[9] Certified Record at 426.
[10] See submissions of May 26, 2006 (Certified Record at 551 at 553).

reasonableness standard (*Kinsana*, above). Similarly, her assessment of and weighing of the evidence regarding the applicant's criminality, rehabilitation and return to Ecuador or Italy is governed by the reasonableness standard (*Khosa*, above, at paragraph 46; *Katwaru v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1277 at paragraph 30). Whether or not we consider the decision-maker's failure to give separate reasons for the temporary resident permit application as an issue of procedural fairness (as was done in *Voluntad v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1361 [*Voluntad*]) or an error of law calling for a correctness standard or under the overall reasonableness standard, this does not impact the resulting decision not to intervene in this respect.

[15] A high burden rests on an applicant who seeks to establish that there was a reasonable apprehension of bias (*Zambrano v Canada (Minister of Citizenship and Immigration)*, 2008 FC 481 at paragraph 53). The e-mail exchange referred to by the applicant does not indicate a nefarious motive on the part of the respondent and the Court cannot reasonably read into these e-mails what the applicant wishes to infer. An informed person viewing the matter realistically and practically would think that the respondent was simply trying to move Mr. Ferraro's file along in the process, a request Mr. Ferraro had himself made on several occasions.[11]

[16] Turning now to the applicant's submission that the decision-maker did not properly consider that he was released on accelerated parole and made an unreasonable finding in respect of his rehabilitation, the Court notes that Mr. Ferraro's submissions regarding his rehabilitation were indeed limited to what has already been described as well as to statements from his counsel (not supported by affidavits) that he no longer associates with persons related to his criminal convictions,

is a changed man as evidenced by successful businesses and is involved with his family.[12] In her reasons, the decision-maker expressly refers to Mr. Ferraro's work record, the sponsorships, the Choices program and his business and personal relationships. She specifically refers to the fact that he was released from custody on accelerated parole after serving seven months on the first page of her decision dealing with the background as well as on page 8 of the Certified Record where she expressly quotes from a written statement from the applicant himself explaining how he had made an error in judgment, how he used his time in prison to upgrade his education and how he benefited from an accelerated parole and took this opportunity to enrol in the Choices program and how he has not been convicted of any other offence since the 2001 conviction. She also refers to the said accelerated parole by quoting an older statutory declaration from the applicant on the same page.

[17] There is a presumption that the decision-maker has considered all the evidence before her. This presumption will only be rebutted where the evidence not discussed has high probative value and is relevant to an issue at the core of the claim (*Florea v Canada (Minister of Employment and Immigration),* [1993] FCJ No 598 (CA); *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration),* [1998] FCJ No 1425, 157 FTR 35 at para 17; as further explained in *Ozdemir v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 331 at paras 9-11). In the particular circumstances of this case, I am not prepared to conclude simply because the decision-maker does not repeat her reference to the accelerated parole on page 10 of the Certified Record that she has failed to consider this point in her assessment of Mr. Ferraro's rehabilitation.

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[11] See requests for expedited reviews in the Certified Record at 129, 133, 136 and 380.

[12] See, among others, his September 21, 2007 submission where he also included a checklist of factors demonstrating rehabilitation.

[18] I am not satisfied that she failed to weigh all the evidence provided before reaching her conclusion. As she noted, she also considered his relationship at the time and concluded that in 2001 he was already 39 years old and that no argument could be made that he was "an impetuous youth who 'got in with the wrong crowd'". At that point in his life, he already had children of his own and was running a business which had been established for many years already and was presumably successful. His only motivation thus appeared to have been personal gain. In the context of her determination on the nature of the applicant's criminality,[13] the conclusion she reached was certainly one of the outcomes that was justifiable on the facts and the law of this case.

[19] The decision-maker may have overlooked the fact that the 2009 charges were stayed, but this error was not material, especially since, as noted by the respondent, the applicant's submissions to the decision-maker did not even mention that these charges had been stayed a month before.[14] The Court cannot ask the decision-maker to provide greater explanation in her reasons than that which the applicant submitted, especially since in H&C applications, the applicant bears the burden of adducing proof of any assertion on which he relies (*Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38).

[20] At the hearing, the central debate concerned the issue of the decision-maker's reliance on withdrawn charges, particularly those from 2003. Counsel for the applicant submitted that according to the Federal Court of Appeal in *Sittampalam v Canada (Minister of Citizenship and Immigration)*,

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[13] One notes from the Criminal Narrative Report prepared by an Immigration Investigator, as referred to in the decision (Certified Record at 4-5), that the applicant's convictions related to the selling of counterfeit American currency and guns, possession of anabolic steroids, Ecstasy and Cannabis and that the applicant was "deeply involved in drug trafficking for a number of years".

[14] The Application Record at Exhibit P shows these charges were stayed on April 6, 2010 and Mr. Ferraro's supplementary submissions on H&C grounds are dated May 31, 2010. In his January 29, 2009 submissions, the

2006 FCA 326, withdrawn or dismissed charges cannot be used as evidence of an individual's criminality. This argument is also supported by *Thuraisingam v Canada (Minister of Citizenship and Immigration)*, 2004 FC 607 [*Thuraisingam*], where Justice Mactavish found that "a distinction must be drawn between reliance on the fact that someone has been charged with a criminal offense, and reliance on the evidence that underlies the charges in question" (para 35). In *Thuraisingam*, the applicant noted, there was external evidence underlying the charges, including wire-tap evidence and sworn affidavits from a police officer and a witness, whereas, the withdrawn charges in his case were only detailed by a CPIC record (including a record of convictions and an arrest record) and a summary by the CBSA. The applicant also relied upon *Bain v Rodrigue*, 2004 BCPC 259, where it was found that a record of arrest does not have the reliability necessary to be considered admissible in any proceedings.

[21] While the applicant's submissions on the law are correct, the Court cannot agree that the decision-maker's analysis in respect of the withdrawn charges was unreasonable. This is not a situation where the decision-maker used charges, in and of themselves, as evidence of Mr. Ferraro's criminality. Here, the decision-maker only took note of the physical evidence found at the scene of Mr. Ferraro's business premises at the time of the seizure, regardless of who may have been involved or responsible. She indicated her concern as to the quantities of drugs and weapons found and seized. The underlying evidence relied upon by the decision-maker was based on an inventory of items seized as detailed in the police report, evidence which is concrete and can be distinguished from the allegations of involvement in criminal activities which were the subject of *Thuraisingam*. In his voluminous and numerous submissions, and despite the fact that he deals at length with his

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applicant's counsel had noted that there was a high probability that those charges would be withdrawn. It is thus surprising that he said nothing about this in his May 31, 2010 submissions.

later criminal charges, Mr. Ferraro never contested the fact that physical evidence was recovered from his business premises in 2003.[15] In the particular circumstances, it was within the decision-maker's discretion to consider the portion of the incident report that relates to physical seizure as credible. In any event, in the end she notes that she gives this factor little weight and, in fact, that in the final analysis, without reference to the numerous later charges, in her opinion it was the applicant's actual convictions in 2001 that were determinative of the application as illustrated by her comments at page 10 of the Certified Record.

[22] Similarly, the applicant's argument that the decision-maker failed to assess properly the best interests of his children must fail. The recent jurisprudence on this issue was summarized by Justice Michel Shore in *Khoja v Canada (Minister of Citizenship and Immigration),* 2010 FC 142, who concluded that the best interests of the child is only one factor to be weighed by H&C decision-makers (para 43). It is not necessarily conclusive of the H&C request.

[23] The decision-maker clearly considered the particular circumstances of each child separately, including letters from them and their mothers. She noted that Mr. Ferraro is indeed an active participant in the lives of his then three youngest children, despite the fact that he is neither the custodial parent of Victoria and Damian, nor Rio's biological father. There is little doubt that she was alert, alive and sensitive to the best interests of the children, especially when she confirms, in her conclusions, that they are all strongly attached to their father. She weighed this factor in favour of granting the exceptional privilege sought by the applicant. I see no reason to intervene in this portion of the decision.

[15] In his further submissions to this Court, the applicant seems to concede that drugs were found on his business' premises in 2003 (Applicant's Further Memorandum of Argument at para 25).

[24] Although the decision is seen as harsh and will have significant impacts on the applicant, his family, and employees, the decision-maker's reasoning is cogent and well-balanced, meeting the requirements of justification, transparency and intelligibility (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). The decision-maker had to balance not only the best interests of the children and the general principle of reunification and maintenance of the family unit, but also the clear objective of the legislature to remove criminals from Canada (*Medovarski v Canada (Minister of Citizenship and Immigration*), 2005 SCC 51 at para 10; *Ramnanan v Canada (Minister of Citizenship and Immigration)*, 2008 FC 404 at paras 2, 46-47). In that context, the overall decision falls within the range of possible, acceptable outcomes defensible in respect of the facts and the law and the Court cannot intervene to substitute its own opinion for that of the decision-maker.

[25] There was also no error with respect to rejection of the applicant's request for a temporary resident permit without a distinct analysis. In effect, given that Mr. Ferraro's request was clearly based on the same grounds as those of his H&C application, it was proper for the decision-maker to simply refer to her same analysis (*Voluntad*, above).

[26] The parties did not seek certification of any question and upon determining that this case turns on its own facts, no question will be certified.

[27] The application is dismissed.

ORDER

THIS COURT ORDERS that the application is dismissed.

"Johanne Gauthier"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4643-10
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