Federal Court  Cour fédérale

**Date: 20151203**

**Docket: IMM-4412-14**

**Citation: 2015 FC 1340**

**Ottawa, Ontario, December 3, 2015**

**PRESENT: The Honourable Mr. Justice LeBlanc**

**BETWEEN:**

**FRANCISCO SUAREZ ABELEIRA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. Introduction

[1] This is an application for judicial review of the decision of an Immigration Officer (the Officer), dated May 13, 2014, rejecting the Applicant's in-land permanent residence application on humanitarian and compassionate (H&C) grounds made pursuant to section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act).

## II. Background

[1] The Applicant arrived in Canada from the United States (US) in March 2010. He had been living in that country for the previous 38 years until the American authorities discovered that he was living under an assumed identity. Shortly after entering Canada, the Applicant filed for refugee protection, claiming being stateless and fearing the vulnerability of statelessness. On August 3, 2011, the Refugee Protection Division (RPD), although it accepted the Applicant's identity as Francisco Suarez Abeleira and found him to be credible and stateless, denied the Applicant's refugee claim on the ground that he had not established a well-founded fear of persecution or harm. This Court subsequently denied leave to judicially review the RPD's decision.

[2] In October 2012, the Applicant applied for permanent residence under H&C grounds. His application was based on the unusual and undeserved, or disproportionate hardship of being forced to apply for permanent residence from abroad since he is unable to leave Canada and go abroad given his status of a stateless person.

[3] In support of his H&C application, the Applicant provided the following details about his past, alleging that:

a. he was born in Vigo, Spain, on August 10, 1951 and that while he was an infant, his parents relocated to Mexico in order to escape the Franco dictatorship;

b. his parents died in a car accident in Mexico when he was only three years old and following that tragic event, his neighbours took him in and raised him until he was 12 years old;

c. he then left the family because they mistreated him and spent the following two years travelling north towards the US border, working for room and board;

d. once he reached the border, he began earning a living by selling goods across the border, which he alleged was easy to cross at the time, and learned English with his interactions with Americans;

e. by the end of the 1960's, at 17 years of age, he decided to start a new life for himself in the US and purchased a birth certificate under the name Angel Lagomasini in 1975, which he used to obtain a driver's license, social security number, and a US passport;

f. he then set out to increase his education with the result that (i) around 1985, he received a high school diploma after taking several equivalency exams, (ii) in 1988, he graduated with Honours with an Associate Diploma in Arts, and (iii) in 1993 and 1995, respectively, he completed a Bachelor's Degree in Education and a Master's Degree in the same field, graduating with Honours in both programs;

g. in 2004, he became a permanent certified teacher with the New York Board of Education after working there for approximately 16 years;

h. in 2007, he went to Madrid, Spain, where he taught English and Spanish as a freelance instructor and returned to the US every couple of months to spend time with his wife at the time;

i. while leaving for Spain in May of 2009, he was arrested at JFK International Airport in New York because of his false identity and after confessing to using a false identity, he was detained for two and a half months while the authorities conducted an investigation;

j. he was released from detention in July 2009 and was ordered to be deported to Spain on July 27, 2009, but the deportation order could not be executed since he has no status in Spain or in Mexico;

k. as the US government could not find a country to deport him to, he was released in October of 2009 but was told upon release that he could be imprisoned at any time in the US because of his lack of identification; and

l. on the advice of US lawyers, he crossed the border by foot into Canada on March 29, 2010 in order to seek refugee protection.

[4] The Applicant married and divorced twice while living in the US. He did not reveal to either wife that he was living under a false identity.

[5] Since his arrival in Canada, the Applicant claims to have been hired as a part-time instructor at the Police Foundation College in Toronto where he teaches sociology, psychology and First Nations studies, and to be very active in his community as a volunteer for several organizations.

[6] On May 13, 2014, the Applicant's H&C application was denied. The Officer essentially found that the Applicant's claim of statelessness was not credible:

> In spite of submitting a long autobiography, we have no material evidence of his past life prior to 1985. […] The central issue of his real identity still remains undetermined. As far as can be ascertained, his recently-acquired and presumed identity does not exist and therefore the origin of his nationality is left unresolved. As such, his statelessness does not arise because of circumstances beyond his control; it is a creation of his own choice

[7] In refusing the Applicant's application, the Officer noted that the Applicant could have rectified his status in the US after the US Congress passed the Immigration Reform and Control Act in 1986, which offered amnesty and legal status to persons living in the US illegally or through another amnesty bill passed in 2000. The Officer also found that as a result of being unable to verify many of the Applicant's assertions, the Applicant was unable to demonstrate any H&C grounds with any degree of certainty.

[8] The Applicant contends that the Officer did not use the correct test in assessing the Applicant's H&C factors since the Officer failed to consider the Applicant's establishment in Canada and failed to adequately assess the hardship he would face if he were to apply for permanent residence from outside of Canada.

[9] The Applicant further argues that the Officer breached the duty of procedural fairness since she failed to conduct a hearing when the Applicant's credibility was central to her decision, based her credibility findings on extrinsic evidence and demonstrated a reasonable apprehension of bias.

## III. Issues and Standard of Review

[10] The issue to be determined in this case is whether the Officer, in concluding as she did and in the manner that she did, committed a reviewable error as contemplated by section 18.1(4) of the *Federal Courts Act*, RSC, 1985, c F-7.

[11] It is well-settled that decisions taken on H&C applications are highly discretionary and that the standard of review applicable to such decisions is reasonableness (*Kanthasamy v Canada (Citizenship and Immigration)*, 2014 FCA 113, at para 40 [*Kanthasamy*]; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, [1999] SCJ No 39 [*Baker*]. This means that the Court will only interfere with the Officer's decision if it falls outside the range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190 [*Dunsmuir*]; *Kanthasamy*, above at paras 81 to 84).

[12] On issues of procedural fairness, the standard of review is correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, at para 43, [2009] 1 SCR 339; *Eshete v Canada (Citizenship and Immigration)*, 2012 FC 701, at para 9; *Prieto v Canada (Citizenship and Immigration)*, 2010 FC 253, at para 24).

## IV. Analysis

### A. *Did the Officer err by applying the wrong test?*

[13] Granting permanent residence on H&C grounds is a discretionary remedy and is only granted in the presence of extenuating or extraordinary circumstances (*Banquero Rincon v Canada (Citizenship and Immigration)*, 2014 FC 194, at para 1, 449 FTR 19 [*Rincon*]; *Joseph v Canada (Citizenship and Immigration)*, 2015 FC 904 at para 24 [*Joseph*]).

[14] As Justice Henry Brown recently described H&C relief in *Joseph* at paragraph 24:

> 24 […] The Supreme Court of Canada confirmed the exceptional nature of H&C relief in *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3 at para 64 [*Chieu*] in which it stated an application for H&C relief "is essentially a plea to the executive branch for special consideration which is not even explicitly envisioned by the [IRPA]". The Federal Court of Appeal in *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at para 16 [*Legault*], relying on the Supreme Court of Canada's decision in *Chieu* also confirmed H&C relief is an exceptional and discretionary measure which:

> ... is a part of a legislative framework where "[n]on-citizens do not have a right to enter or remain in Canada", where "[i]n general, immigration is a privilege not a right" (*Chieu*, *supra*, at paragraph 57) and where "the Act treats citizens differently from permanent residents, who in turn are treated differently from Convention refugees, who are treated differently from individuals holding visas and from illegal residents. It is an important aspect of the statutory scheme that these different categories of individuals are treated differently, with appropriate adjustments to the varying rights and contexts of individuals in these groups" (*Chieu*, paragraph 59).

[15] Thus, relief under section 25 of the Act is only granted when an applicant demonstrates that they will directly suffer an unusual and undeserved or disproportionate hardship in having to apply for permanent residence from outside of Canada (*Ibabu v Canada (Citizenship and Immigration)*, 2015 FC 1068; *Kanthasamy*, above at para 75; *Joseph*, above at para 48).

[16] In *Shah v Canada (Citizenship and Immigration)*, 2011 FC 1269, 399 FTR 146, Justice Leonard Mandamin explains the test to be met under section 25 of the Act in the following terms at paragraph 16 of his decision:

> [16] […] the applicant bears the onus of demonstrating that her personal circumstances are such that the hardship of having to obtain a permanent resident visa from outside Canada in the normal manner would be:
>
> > i) unusual ("a hardship not anticipated by the Act or Regulations") and undeserved (the result of circumstances beyond the applicant's control) or
> >
> > ii) disproportionate (where the hardship would have a disproportionate impact on the applicant due to their personal circumstances).

[17] This definition is consistent if not identical to the definition of unusual and undeserved or disproportionate hardship found within section 5.10 of the Minister's processing manual (the Manual), which defines "unusual and undeserved hardship" as a hardship that is "not anticipated or addressed by the Act or Regulations": and which result from circumstances "beyond the person's control." The Manual then goes on to state that where applicants may not meet the "unusual and undeserved" hardship criteria, the H&C application may still be granted if "the hardship of not being granted the requested exemption(s) would have an unreasonable impact on the applicant due to their personal circumstances."

[18] The Applicant argues that the following comments made by the Officer in her reasons raises a doubt as to whether she understands and uses the correct legal test:

> Mr Suarez Abeleira's present status is quite atypical. He does not have a well-founded fear of persecution. Indeed the striking difference between him and the plight experienced by innumerable refugees and protected persons who are facing threats to their life or who are unable to avail themselves of the protection of their country of origin, is that he was never persecuted and never feared for his life.

[19] This Court has consistently held that risk of persecution is a factor that an officer may consider under an H&C application (*Beluli v Canada (Minister of Citizenship & Immigration*, 2005 FC 898, at para 10; *Rebaï v Canada (Citizenship & Immigration)*, 2008 FC 24, at para 7). Be that as it may, an officer is obliged to assess an applicant's H&C application on the grounds submitted by the applicant (*Strachn v Canada (Citizenship and Immigration)*, 2012 FC 984, at paras 24 and 25, 416 FTR 312; *Chekroun v Canada (Citizenship and Immigration)*, 2013 FC 737 at para 98, 436 FTR 1). Nowhere in the record does the Applicant state that his H&C application is based on a fear of persecution. Instead, the Applicant's H&C application is based on his status

and vulnerability of being a stateless person, specifically that as a stateless person he has no right to basic rights in any country. This factor was correctly identified by the Officer when she stated that "the first and foremost compassionate consideration in this application is based on his statelessness." Therefore, I cannot agree with the Applicant when he states that the Officer did not apply the correct legal test since the Officer's comments, when read together with her decision in its entirety, do not demonstrate that she misunderstood the hardship test, but rather demonstrate that she considered irrelevant factors in coming to her decision. This is not in and of itself fatal since the task of this Court is to determine whether the Officer's decision as a whole falls outside the range of possible, acceptable outcomes and lacks transparency, justification, and intelligibility (*Dunsmuir*, above at para 47).

**B.** ***Was the Officer's decision reasonable?***

[20] The Respondent argues in its submissions that the Officer's decision is reasonable since the Applicant's status as a stateless person was not beyond his control. The Applicant chose not to rectify his status in the US when he had the opportunity to do so through amnesty programs available to him. On this point, I agree with the Respondent. The Applicant was living under a false identity in the US for 38 years. It was therefore reasonably open for the Officer to determine that the Applicant's status as a stateless person was not beyond his control. He could have applied for and acquired American citizenship without fear of being returned to Mexico or Spain as a stateless person since as early as 1986.

[21] Yet, in my view, this fact alone is not enough to conclude that there is insufficient evidence of hardship and reject the Applicant's H&C application outright. In other words, I

cannot agree with the Respondent that the Applicant's failure to rectify his status in the US can serve as the sole basis from barring him from obtaining an exemption under section 25 of the Act since the Officer still has a duty to assess the Applicant's personal circumstances to determine whether these circumstances would cause the Applicant to suffer a disproportionate hardship if he were to apply for permanent residency from outside of Canada (*Legault*, above at paras 23-24, *Kaur v Canada (Citizenship and Immigration)*, 2010 FC 805, at para 12). This finding is consistent with previous decisions rendered by this Court since the Court has held that where an officer is preoccupied with the question of whether the applicant was in Canada for reasons beyond his control and therefore failed to consider the grounds for an H&C application that were submitted to him, the officer commits a reviewable error (*Strachn*, above at para 24).

[22] In addition to the above, in my view, the Respondent mischaracterizes the Officer's reasoning since further to a review of the Officer's reasons, it is clear that the Officer did not mean to bar the Applicant from obtaining an exemption under section 25 for failing to obtain American citizenship while he still had the opportunity to do so, but instead took the view that the Applicant's statelessness is a creation of his own choice since she held the view that the Applicant continues to mislead authorities and has assumed a new false identity under the name Franscisco Suarez Abeleira since the American authorities discovered that he was not Angel Lagomasini back in 2009.

[23] In this respect, failure to obtain status may be an obstacle for a finding of establishment (*Joseph*, above at para 30). This Court has consistently held that those who live and work illegally in Canada for a lengthy period of time cannot seek to profit from the years spent here by

applying for permanent residence from within Canada for H&C considerations (*Joseph*, above at para 29; *Millette v Canada (Citizenship and Immigration)* 2012 FC 542 at para 41, 409 FTR 162; *Tartchinska v Canada (Citizenship and Immigration)*, [2000] FCJ No 373, at paras 21 and 22, 185 FTR 161).

[24] However, in my view, these cases are distinguishable from the present case since the evidence demonstrates that the Applicant set out to rectify his status as soon as he entered Canada by applying for refugee status and when that failed, the Applicant applied for permanent residence on H&C grounds. Moreover, the Applicant has provided evidence that he was issued a valid work permit, thus it appears that he has not been working in Canada illegally since at least April 2012 when he began working as an instructor at the Police Foundations Department of Canadian Law Enforcement Training College in Toronto.

[25] It is clear from reading the Officer's reasons that she did not find the Applicant to be credible in his assertions that he is in fact a stateless person. Despite being unable to confirm the Applicant's identity or nationality, the Officer's duty to assess the Applicant's establishment and hardship remained. In *Diaby v Canada (Citizenship and Immigration),* 2014 FC 742, 460 FTR 188 [*Diably*], Justice James Russell allowed the judicial review of an officer's decision to refuse the applicant's H&C application despite the fact that her identity and nationality as a citizen of Sierra Leone was not sufficiently proven. In assessing the applicant's establishment in Canada, the officer noted "that the more than 15 years the Applicant has spent in Canada is not due to circumstances beyond her control, but rather is mainly due to her failure to comply with Canadian law and to cooperate with immigration authorities toward establishing her identity."

[26] Justice Russel found that the officer made several reviewable errors, notably, the officer failed to consider hardship faced by the applicant if returned to Sierra Leone stating:

> [62] It was unreasonable for the Officer not to assess hardship in this case because it is clear on the evidence that the Applicant either comes from Sierra Leone or Guinea, and the Guinea claim was clearly fraudulent. Hence, it is obvious that the Applicant will either be retuned to Sierra Leone or she will remain as a stateless person in Canada. […] The fact that the Applicant did not establish to the Officer's satisfaction that she is a citizen of Sierra Leone does not mean she will not be exposed to risks and hardship when she is returned there. And, if the Applicant remains in Canada, then the Officer should have assessed the hardship she will face as a stateless person.

[27] Given the foregoing, for the Officer to have come to any determination as to whether the Applicant's lack of legal status prevented a finding of establishment, she would have necessarily have had to assess the hardship the Applicant were to face if returned to the US or Mexico as a stateless person and what kind of hardship he would face as a stateless person in Canada if no

country is willing to take him back. In *Rincon*, this Court agreed with Justice Eleanor Dawson's finding in *Raudales v Canada (Minister of Citizenship & Immigration)*, 2003 FCT 385, 121 ACWS (3d) 932 [*Raudales*], as she was then, that establishment and hardship are interrelated:

> [43] In *Raudales v. Canada (Minister of Citizenship & Immigration),* 2003 FCT 385 (Fed. T.D.), this Court stated: "[a]bsent a proper assessment of establishment... a proper determination could not be made... as to whether requiring [the Applicant] to apply for permanent residence from abroad would constitute hardship that is unusual and undeserved or disproportionate." (at para 19) (Reference is also made to *Judnarine v. Canada (Minister of Citizenship and Immigration),* 2013 FC 82, 425 F.T.R. 312 (Eng.) (Eng.)).
>
> [44] […] A proper determination cannot be made as to whether requiring the Applicants to apply for permanent residence from Columbia would constitute unusual and undeserved or disproportionate hardship, as no assessment was done regarding the hardship they would endure from being removed from Canada.

[28] I am therefore inclined to agree with the Applicant that the Officer did not sufficiently assess the Applicant's establishment in Canada since all she says on the matter is that the Applicant "lives in a refugee shelter, has a working permit and is part-time employed." The Officer also listed "No" under the establishment heading in the factors for consideration chart, which is an indication that she did not believe the Applicant's establishment in Canada was a relevant factor for her to consider in rendering her decision. Given the ample evidence the Applicant provided to demonstrate his establishment in Canada in the form of letters from his employer and establishments he volunteers at, it was not open for the Officer to completely disregard the evidence of the Applicant's establishment in Canada in her reasons. In my view, the Officer's failure to adequately consider the Applicant's establishment in Canada is a reviewable error (*El Thaher v Canada (Citizenship and Immigration),* 2012 FC 1439, at para 71;

*Raudales*, above at para 19; *Hamam v Canada (Citizenship and Immigration)*, 2011 FC 1296, at paras 55-56).

[29] Moreover, further to a review of the record, it is clear that no country, including Spain and Mexico is open to having the Applicant returned there and that if he were to be returned to the US, the Applicant may be subject to imprisonment because of his lack of status. The Officer therefore committed a reviewable error by not turning her mind to the hardships the Applicant would face in light of his personal circumstances. The Applicant's main reason for alleged hardship, as recognized by the Officer herself, was the Applicant's status as a stateless person. For that reason alone, the Officer had a duty to assess the hardship as explained by the Applicant. This error is compounded with the fact that the Officer did not provide any reasons as to why she rejected the RPD's finding that the Applicant is a stateless person.

[30] Given my finding that the Officer's decision is unreasonable, there is no need for me to determine whether the Officer breached the Applicant's right to procedural fairness.

[31] Neither party has proposed a question of general importance. None will be certified.

## JUDGMENT

**THIS COURT'S JUDGMENT is that**:

1. The application for judicial review is granted;
2. The matter is referred back to Citizenship and Immigration Canada to be redetermined by a different immigration officer; and
3. No question is certified.

"René LeBlanc"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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