Federal Court  Cour fédérale

Date: 20111220

Docket: IMM-608-11

Citation: 2011 FC 1503

Ottawa, Ontario, December 20, 2011

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

RAED HADAD

Applicant

and

THE MINISTER OF CITIZENSHIP, IMMIGRATION AND MULTICULTURALISM

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision of an immigration officer of Citizenship and Immigration Canada (the officer), dated January 19, 2011, wherein the applicant's application for criminal rehabilitation was denied. This conclusion was based on the officer's finding that she was not satisfied that the applicant had been rehabilitated under paragraph 36(3)(c) of the Act.

[2] The applicant requests that his application for rehabilitation be granted or in the alternative, that the matter be remitted for reconsideration.

Background

[3] The applicant, Raed Hadad, is an Israeli citizen. He was born in Jordan and moved to Israel with his family when he was a child. In Israel, his family experienced persecution and discrimination due to their Jordanian background and Christian faith. This tension led to the separation of the applicant's parents in 1974. The applicant's father subsequently moved to the United States.

[4] In Israel, the applicant continued to experience severe persecution, including abuse, beatings, stabbing and even being shot at. To escape these attacks, the applicant fled Israel in 1986 and moved to Flint, Michigan where his father owned and operated a grocery store. Since leaving Israel, one of his brothers and his step-father have been shot and killed.

[5] In the U.S., the applicant worked at his father's store. In 1990, the store was experiencing financial difficulties. The applicant decided to move to California to seek better employment. However, before he left, the applicant's father decided to burn his own shop down. Due to his poor English proficiency, the father asked the applicant to postpone his trip to California for a few days. The applicant complied with his father's wishes. The applicant was not involved in the negotiations or the actual burning of the store, but he did give the arsonist a ride to purchase the gasoline. The

applicant was therefore charged and convicted of arson of real property and conspiracy to burn real property.

[6] While in the U.S., the applicant was also convicted of attempted violation of the *Cigarette Tax Act* and unauthorized acquisition of food stamps. The applicant had observed his father purchasing food stamps at his store and using them for his own use. Due to his own financial difficulties and his failure to understand the system, the applicant also purchased food stamps for his own use.

[7] As a result of these convictions, the applicant was sentenced to a minimum of seven years in prison. In prison, he obtained his GED and held jobs as a cook and tutor. Due to his conviction, he was also charged with deportation under U.S. immigration laws whilst in prison. On June 17, 1998, after serving the minimum sentence, the applicant was released on parole and subsequently returned to Israel. However, upon returning to Israel, the threats and persecution he had previously experienced resumed. He unsuccessfully sought to move to Canada in 1999. Then, in early 2000, the applicant returned to the U.S. where he remained for approximately five years.

[8] In 2005, the applicant was detained at a traffic stop and a search of the National Crime Information Centre revealed his status as a deported felon. U.S. Immigration incarcerated him for approximately one year before again returning him to Israel in February 2006. The following month, the applicant came to Canada and was granted a six month temporary stay. On arrival to Canada, he did not reveal his criminal history.

[9] In Canada, the applicant met Dana Dabour, a Canadian citizen. Within a year, they were married and moved to Saskatoon. They have two children (a daughter born in February 2008 and a son born in February 2010), and the applicant's wife was expecting her third child (due in November 2011). The family also recently purchased a home in Saskatoon.

[10] Since obtaining a work permit, the applicant has been working in the construction industry. In February 2010, he began operating his own general contracting business (Amazon Construction Ltd.) and currently employs three full time staff. The applicant is also involved in a local church and in the Knights of Columbus service group.

[11] The applicant applied for criminal rehabilitation in 2008. In January 2011, his application was denied.

The Decision

[12] In a letter dated January 19, 2011, the applicant was notified that the officer was not satisfied that he had been rehabilitated. His application for criminal rehabilitation was therefore denied. The basis for this letter was a report prepared on January 6, 2011. Collectively, the January 19, 2011 letter and the January 6, 2011 report are referred to herein as the decision.

[13] The decision first described the applicant's past criminal history in the U.S., including the corresponding provisions under the Canadian *Criminal Code* and the circumstances surrounding the

offences. Based on the dates of these offences, the applicant was eligible to apply for rehabilitation on June 18, 2008.

[14] The decision then outlined the applicant's immigration history in the U.S. and in Canada:

- US
  - 1989: Applicant obtains permanent resident status through application submitted by his father. This status later revoked due to criminal convictions.
  - 1991 to 1998: Applicant serves prison term.
  - December 10, 1998: Applicant ordered deported from U.S. to Israel.
  - January 5, 1999: Applicant deported to Israel.

- Canada
  - January 21, 1999: Applicant arrived at Toronto's Pearson Airport and made a refugee claim (later withdrawn).
  - January 22, 1999: Applicant issued an allowed to leave.

- US
  - June 1999: Applicant goes to Mexico from Israel, sneaks into the U.S. and lives with his mother and siblings in Las Vegas.
  - February 13, 2005: Applicant recognized as deported felon by Las Vegas police at traffic stop.
  - February 16, 2005: Applicant released from Immigration and Customs Enforcement custody.
  - March 8, 2005: Applicant ordered removed from the U.S. and subsequently removed.

- Canada
  - March 17, 2006: Applicant arrives at Toronto's Pearson Airport and has Israeli passport stamped with six month entry.
  - August 31, 2006: Applicant files refugee claim in Saskatoon.
  - November 8, 2006: Refugee claim hearing scheduled in Windsor. Hearing later cancelled as applicant had moved back to Saskatoon.
  - December 12, 2006: Applicant marries his current wife and files a permanent residence application under spousal category.
  - November 6, 2008: Refugee claim hearing held and applicant ordered deported.
  - November 7, 2008: Applicant's application for permanent residence under spousal category refused.
  - December 9, 2008: Refugee claim found ineligible. Applicant applies for leave and judicial review of this decision.
  - February 5, 2009: PRRA issued.
  - June 19, 2009: Applicant's application for leave and judicial review of refugee claim decision dismissed.

[15] The decision also described the applicant's family. The applicant was previously married in 1988 and had a son the following year. The applicant separated from his first wife in 2005 and they were divorced in 2006. He does not maintain contact with his previous wife and first child. The applicant's current wife was born in Qatar and obtained permanent residence in Canada as a young child. She became a Canadian citizen in 2004. The couple have two children together. The applicant's parents divorced in 1974 and both parents now live in the U.S. The applicant's two siblings also live in the U.S. and he maintains contact with his family there. The parents of the applicant's wife live in Windsor and her three brothers are Canadian citizens that work abroad. The applicant and his wife keep in touch with her family.

[16] The applicant's employment history was also described in the decision. It acknowledged that while in prison in the U.S., the applicant had completed two years of a four year course in restaurant association, had worked as a tutor and a cook and had volunteered with Alcoholics Anonymous. From the time that he arrived in Canada in 2006 through to when he obtained a work permit in 2009, he was supported by family members and did not receive social assistance. Upon receiving his work permit, he worked for a construction company for nine months and later began his own construction company. The applicant's wife previously worked as a chemical lab technician and since having her second child, has done paperwork for her husband's company.

[17] Following this outline of the applicant's background, the following factors were listed in favour of the applicant's rehabilitation:

- No criminal activity since being paroled in 1998;
- Canadian wife and children;
- Applicant's statement that prison changed his life and rehabilitated him;
- Active member in church and community;

- Positive reference letters from members of his community;
- Prompt application for work permit to support his family; and
- Owner and operator of growing construction business.

[18] Factors were also listed that operated against the applicant's rehabilitation:

- Past convictions of serious criminality;
- Failure to apply for rehabilitation before entering Canada;
- Applicant was not eligible for rehabilitation when he entered Canada;
- Applicant did not abide to U.S. law and was therefore deported;
- Applicant showed lack of respect to U.S. law by lying to police officer;
- Applicant's application for judicial review of decision denying his refugee claim was dismissed;
- Deportation order issued against applicant in 2008; and
- Applicant is currently in non-compliance with Canadian immigration law.

[19] The final section of the decision provided a recommendation on the applicant's rehabilitation. It highlighted the applicant's history of criminal behaviour and failure to comply with Canadian and American immigration laws. Concurrently, it acknowledged the applicant's stable family life in Canada, close family ties in Canada and the U.S., successful employment and business operation, active community involvement and support and apparent remorsefulness over past criminal activities. However, based on the applicant's failure to abide to immigration laws in Canada and the U.S., the decision concluded that the officer was not satisfied that the applicant had demonstrated criminal rehabilitation. The applicant's application for criminal rehabilitation was therefore denied.

Issues

[20] The applicant submits the following points at issue:

1. The decision to deny the applicant's application for rehabilitation is unreasonable and not supported by the evidentiary record.

2. In coming to the decision, the officer failed to consider all relevant information and/or considered information which was not relevant.

3. In coming to the decision, the officer failed to follow its own internal guidelines, processes and/or manuals.

[21] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Was the officer's decision that the applicant had not been criminally rehabilitated unreasonable, based on the totality of the evidence?

Applicant's Written Submissions

[22] The applicant submits that *Thamber v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 177, [2001] FCJ No 332, established that the standard of review applicable to criminal rehabilitation decisions is reasonableness *simpliciter*.

[23] The applicant submits that the officer's decision was unreasonable on three grounds:

1. The decision was not supported by the evidentiary record;

2. The officer inadequately considered factors in favour of rehabilitation and gave undue weight to the factors against; and

3. The officer failed to follow its own internal guidelines, processes and/or manuals.

[24] On the first ground, the applicant refers to evidence that he is a committed family man, productively employed, active in his church and community and has not been in any criminal trouble since his release from U.S. prison in 1998. The applicant submits that the officer erred by giving undue weight to his non-compliance with immigration law and giving insufficient weight to the above factors in favour of his rehabilitation.

[25] On the second ground, the applicant submits that the issue in considering an application for criminal rehabilitation is limited to whether or not the applicant is likely to re-offend on a provision of criminal law, not of immigration law. Similarly, the applicant submits that his previous application for leave and judicial review of a decision on his refugee application is not a factor that should be negatively considered in his rehabilitation assessment.

[26] The applicant submits that there was insufficient analysis and reasons provided in the decision as to why the overwhelming factors in his favour were insufficient to overcome those not in his favour. In support, the applicant relies on the similarities between the facts in the case at bar and those in *Kok v Canada (Minister of Citizenship and Immigration)*, 2005 FC 77, [2005] FCJ No 78. The applicant highlights the finding in *Kok* above, that the overwhelming evidence of rehabilitation outweighed the immigration compliance concerns.

[27] Similarly, the applicant refers to *Malicia v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 170, [2003] FCJ No 235 for the importance of adequately considering evidence of compelling humanitarian and compassionate factors that could overcome negative

factors. The applicant points to the section of the decision in which his response to the officer's question on why he should be considered rehabilitated is discussed:

> I asked Mr. Hadad, in his own words, to tell me why he should be considered rehabilitated. He stated that he does not have a criminal mind, that he does not think about anything criminal. He stated that he is a family man (at that point looked at the child who had fallen asleep on his shoulders) and started to cry. He stated that it was a hard lesson to learn and he does not wish anyone to go through what he went through.

[28] The applicant submits that this excerpt is distinguishable from other jurisprudence in which immigration officers have found applicants to be insincere and misleading regarding their remorsefulness and likelihood to re-offend.

[29] Finally, the applicant has been unable to access Citizenship and Immigration Canada (CIC)'s guidelines for criminal rehabilitation applications or similar guidance manuals. In the absence of such objective guidance, the applicant submits that he is entitled to judicial review on the basis that the decision was not made in accordance with objective, established and known criteria. Nevertheless, the applicant submits that CIC's "Evaluating Inadmissibility" policy (ENF 2/OP18) limits it to only considering the possibility of further criminal activities as having an impact on an applicant's rehabilitation. By failing to address the question of whether the applicant would offend against criminal law in the future, the applicant submits that the officer violated its own internal policy.

Respondent's Written Submissions

[30] The respondent submits that the applicant has failed to demonstrate that any reviewable error has been committed under subsection 18.1(4) of the *Federal Courts Act*, RSC 1985, c F-7.

[31] The respondent agrees with the applicant's reference to *Thamber* above, on the standard of review. The respondent submits that post-2008, after the Supreme Court of Canada's decision in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, the standard of review of a decision on criminal rehabilitation is reasonableness. In addition, the respondent submits that the standard of review for whether the officer erred in its treatment of the evidence is also reasonableness.

[32] The respondent submits that the recommendation in the decision was supported by the record and was reasonable. The respondent refers to *Aviles v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1369, [2005] FCJ No 1659, for its position that when applying paragraph 36(3)(c) of the Act, the unique facts of each particular case must be considered along with whether the overall situation warrants a finding that the individual has been rehabilitated. Therefore, although CIC's former Inland Processing Manual included guidelines recommending that immigration officers be satisfied that it was highly unlikely that the person would be involved in any further criminal activities, the jurisprudence, which carries greater legal weight, requires that the overall situation be considered and not merely the likelihood of future criminal events.

[33] In the alternative, the respondent submits that it was reasonable to doubt that the applicant was unlikely to commit further crimes based on his past conduct; particularly as his violations of

immigration laws could have subjected him to criminal prosecution. In support, the respondent refers to available statutory criminal provisions for the applicant's acts in:

- Unlawful re-entry to the U.S. subsequent to his 1999 deportation;
- False representation of U.S. citizenship in 2005; and
- Failure to declare his criminality at the port of entry into Canada in 2006.

[34] The respondent submits the applicant's willingness to violate these laws suggests that he may engage in further criminal activity. Therefore, the officer's finding that these actions outweighed those in favour of the applicant's rehabilitation was reasonable. As deference is owed to the weight assigned to the evidence by an immigration officer, the respondent submits that this finding should not be overturned.

[35] The respondent also submits that contrary to the applicant's submissions, the officer did not consider irrelevant information and did not fail to consider all relevant information in its decision. The fact that the applicant was not criminally convicted of violating Canadian and American immigration laws did not render those violations irrelevant. Rather, the applicant's willingness to comply with those laws was an important factor to consider. In support, the respondent refers to *Cheung v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 710, [2003] FCJ No 935, where Mr. Justice James Russell, at paragraph 20, deemed it reasonable for a delegated manager of CIC to draw a negative inference from an applicant's past disrespect of Canadian immigration laws.

[36] In response to the applicant's reliance on *Kok* above, the respondent submits that it is distinguishable from the case at bar because the officer went further than merely acknowledging the

mitigating factors in a general way. After a detailed discussion of the positive aspects of the applicant's case, the officer found them inadequate to offset the negative aspects, namely, the violations of immigration laws. The respondent submits that this Court should not reweigh these factors.

[37] Finally, the respondent submits that the decision cannot be reviewed by the Court on the basis of it being contrary to CIC's internal policy or guidelines. In addition, although the excerpts of the guidelines referred to by the applicant speak of further criminal activities, the respondent submits that *Aviles* above, requires that all the facts of a particular case be considered.

Applicant's Written Reply

[38] The applicant submits that the case at bar is distinguishable from *Cheung* above. In *Cheung*, the applicant's credibility was deemed questionable. Conversely, in the case at bar, the applicant submits that all accounts suggest that he is genuine in both his remorse and acceptance of responsibility.

Analysis and Decision

[39] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the Court, the reviewing court may adopt that standard (see *Dunsmuir* above, at paragraph 57).

[40] It is established law that the standard of review of an immigration officer's decision on criminal rehabilitation is reasonableness (see *Thamber* above, at paragraph 9; and *Dunsmuir* above, at paragraph 45).

[41] In reviewing the officer's decision on the standard of reasonableness, the Court should not intervene unless the officer came to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47; and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] SCJ No 12 at paragraph 59). As the Supreme Court held in *Khosa* above, "it is not up to a reviewing court to substitute its own view of a preferable outcome, nor is it the function of the reviewing court to reweigh the evidence" (at paragraph 59).

[42] **Issue 2**

Was the officer's decision that the applicant had not been criminally rehabilitated unreasonable, based on the totality of the evidence?

In the case at bar, the applicant was inadmissible to Canada on grounds of criminality (paragraph 36(2)(b)) and serious criminality (paragraph 36(1)(b)) until June 18, 2008, ten years after the date of his release from U.S. prison. The applicant could then attempt to satisfy CIC that he had

been rehabilitated (paragraph 36(3)(c)). If successful, he would no longer be inadmissible to Canada.

[43] In *Aviles* above, Mr. Justice Paul Rouleau explained that the purpose of paragraph 36(3)(c) of the Act is "to allow the Minister to take into consideration the unique facts of each particular case and to consider whether the overall situation warrants a finding that the individual has been rehabilitated". Information significant to this determination would include: the nature of the offence, the circumstances under which it was committed, the length of time which has elapsed and whether there have been previous or subsequent offences (at paragraph 18).

[44] Implicit in the concept of rehabilitation is the acknowledgement that the person has already participated in some type of conduct from which he or she needs to be rehabilitated. In the present case, for the applicant, that conduct was the criminal convictions and the breach of immigration laws. Rehabilitation is forward looking, that is, is he likely to continue in this or similar conduct?

[45] CIC's "Evaluating Inadmissibility" policy (ENF 2/OP18), the matter to be considered in an application for criminal rehabilitation is whether an applicant is likely to commit another violation of the criminal law. It was put this way in section 13.6 of the same policy:

> Whereas criminal rehabilitation is specific and results in a decision that the person is not likely to re-offend, the concept of national interest is much broader. The consideration of national interest involves the assessment and balancing of all factors pertaining to the applicant's entry into Canada against the stated objectives of the *Immigration and Refugee Act* as well as Canada's domestic and international interests and obligations.

[46] The following factors were listed in the officer's decision in favour of and against the applicant's rehabilitation:

In favour of rehabilitation:

- No criminal activity since being paroled in 1998;
- Canadian wife and children;
- Applicant's statement that prison changed his life and rehabilitated him;
- Active member in church and community;
- Positive reference letters from members of his community;
- Prompt application for work permit to support his family; and,
- Owner and operator of growing construction business.

Against rehabilitation:

- Past convictions of serious criminality;
- Failure to apply for rehabilitation before entering Canada;
- Applicant was not eligible for rehabilitation when he entered Canada;
- Application did not abide to US law and was therefore deported;
- Applicant showed lack of respect to US law by lying to police officer;
- Applicant's application for judicial review of decision denying his refugee claim was dismissed;
- Deportation order issued against applicant in 2008; and,
- Applicant is currently in non-compliance with Canadian immigration law.

[47] I am satisfied that the inevitable conclusion to be drawn from the factors favouring rehabilitation must be that the applicant has presented evidence, that when properly considered, shows that he has been rehabilitated. I am of the view that the officer attributed too much importance to the fact that the applicant had past criminal activity as opposed to the likelihood that he would be involved in future criminal or unlawful activity. For this reason, the officer's decision was unreasonable and must be set aside. The application for judicial review is allowed and the matter is referred to a different officer for redetermination in accordance with these reasons.

[48] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

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

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

Federal Courts Act, RSC 1985, c F-7

18.1 . . . (4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal	18.1 . . .(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :
(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;	a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;
(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;	b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;
(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;	c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;
(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;	d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;
(e) acted, or failed to act, by reason of fraud or perjured evidence; or	e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;
(f) acted in any other way that was contrary to law.	f) a agi de toute autre façon contraire à la loi.

Immigration and Refugee Protection Act, SC 2001, c 27

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;
(2) A foreign national is inadmissible on grounds of criminality for . . .	(2) Emportent, sauf pour le résident permanent, interdiction de territoire pour criminalité les faits suivants : . . .
(b) having been convicted outside Canada of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, or of two offences not arising out of a single occurrence that, if committed in Canada, would constitute offences under an Act of Parliament;	b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions qui ne découlent pas des mêmes faits et qui, commises au Canada, constitueraient des infractions à des lois fédérales;
(3) The following provisions govern subsections (1) and (2): . . .	(3) Les dispositions suivantes régissent l'application des paragraphes (1) et (2) : . . .
(c) the matters referred to in paragraphs (1)(b) and (c) and (2)(b) and (c) do not constitute inadmissibility in respect of a permanent resident or foreign national who, after the prescribed period, satisfies the	c) les faits visés aux alinéas (1)b) ou c) et (2)b) ou c) n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui, à l'expiration du délai réglementaire, convainc le

Minister that they have been rehabilitated or who is a member of a prescribed class that is deemed to have been rehabilitated; . . .	ministre de sa réadaptation ou qui appartient à une catégorie réglementaire de personnes présumées réadaptées; . . .
72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d’une demande d’autorisation.

Federal Court  Cour fédérale

FEDERAL COURT

SOLICITORS OF RECORD

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