Federal Court Cour fédérale

Date: 20161024

Docket: IMM-954-16

Citation: 2016 FC 1184

Ottawa, Ontario, October 24, 2016

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

KA HO LAU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] The applicant, Ka Ho Lau, seeks judicial review of a decision wherein his application for criminal rehabilitation and admission to Canada was denied.

[2] For the reasons that follow, this application is granted.

II. BACKGROUND

[3] The applicant is a citizen of Hong Kong, People's Republic of China. He met Fook Yee Grace Au (Grace) in late 2001 and they got married in December 2004. They now have three children together (ages 11, 9 and 6 months). The applicant's wife and children are Canadian citizens.

[4] Mr. Ka Ho Lau is 43 years old. He has a criminal history largely accumulated when he was young. In 1989, when he was fifteen, he was convicted of a school yard assault that occasioned bodily harm. For that he was fined HKD $100 and required to pay compensation of HKD $200 to the victim. Between 1993 and 1997, he was convicted of gambling offences on three separate occasions. His sentences were fines of HKD $600, $500, and $1,000.

[5] In 1998 he was involved in a more serious matter involving blackmail of a construction site manager. For that he was convicted of two offences and sentenced to 2 years and 3 months on each to be served concurrently. He claims that upon his release in 2000, he became determined to change his life style and pursued courses to improve his education and English language skills.

[6] In October 2002, the applicant became employed at a packaging company as a technician. In September 2005, he was promoted to Marketing Manager. In May 2007, he was further promoted to Managing Director. In April 2006, the applicant was convicted of driving while disqualified and an insurance-related offence of using a motor vehicle on a road against

third party risks. For driving while disqualified, Mr. Lau was sentenced to a fine of HKD 1,000, roughly $170 Canadian at the time of writing, and for the second offence, a fine of HKD 3000, roughly $510 Canadian at the time of writing, and disqualified from obtaining a driving license for 12 months.

[7] Since 2006, the applicant has not been charged or convicted of any other offence. He claims that with the positive influence of his wife and family, his life has been given new meaning and he has become a better person. In 2009, the applicant established his own company which manufactures packaging materials.

[8] In June 2013, the applicant's wife moved back to Canada to care for her ailing father. The applicant applied for criminal rehabilitation so that he can be reunited with his family in Canada. In his application, Mr. Ka had assumed that he would be inadmissible by reason of his criminal convictions. It is not clear from the record on this application that a formal finding of inadmissibility had been made.

[9] On January 14, 2016 the application for criminal rehabilitation was denied by an officer of the Department of Citizenship and Immigration (CIC) pursuant to paragraph 36(3)(c) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA").

III. RELEVANT LEGISLATION

[10] The following provisions of IRPA are relevant:

Serious criminality

36 (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for

…

(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

…

Application

(3) The following provisions govern subsections (1) and (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 Minister that they have been rehabilitated or who is a member of a prescribed class that is deemed to have been rehabilitated;

Grande criminalité

36 (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :

…

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;

…

Application

(3) Les dispositions suivantes régissent l'application des paragraphes (1) et (2) :

…

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 ministre de sa réadaptation ou qui appartient à une catégorie réglementaire de personnes présumées réadaptées;

IV. DECISION UNDER REVIEW

[11] The decision to deny rehabilitation was made by a Deputy Program Manager based on the recommendation of a visa officer at the Mission in Hong Kong. It was conveyed by letter to the applicant dated January 16, 2016. The letter also stated that the applicant "remains inadmissible to enter Canada".

[12] The reasons for the decision consist of notes entered in the Global Case Management System (GCMS). There are two separate entries: July 8, 2014 and January 14, 2016. The first entry on July 8, 2014 indicates that the case has been reviewed and that the applicant has the following convictions:

1. 1989/02 – Assault Occasioning Actual Bodily Harm S.39 Cap.212 (charged when applicant was 15yo);
2. 1993/03, 1993/04, 1997/09 – Gambling in a Gambling Establishment S.6 Cap.148;
3. 1999/04 – Blackmail S.23 (1) Cap.210;
4. 2006/04 – Driving while disqualified S.12 Cap. 375; 2006/04 Using a motor vehicle on a road against third party risks S.4 Cap.272

[13] The July 8, 2014 entry then refers to the equivalency of the above convictions under the *Canadian Criminal Code*, RSC, 1985, c C-46 (*Criminal Code*). The officer determines that the equivalent offences under the *Criminal Code* are:

1. Assault causing bodily harm – section 267(b);
2. Person found in gaming house – section 201(2)(a)

3. Extortion – section 346(1)

4. Operation while disqualified – section 259(4)

[14] The officer then noted the following:

> Applicant stated that he grew up from a broken home and was lost for a long time, but after being imprisoned for blackmail for 2 years and later meeting his wife and having children he has changed and become a responsible provider for his family and trying to live an upright life. His last charged in 2006 were due to forgetting that he had just lost all of his driving points and out of habit he went to deliver something for his company when he was caught by police. His spouse is a Canadian citizen and both children, aged 7 and 9 are Canadian by birthright. His spouse moved to Canada a year ago to take care of her father in Canada who has chronic liver problems. As his spouse and children plan to settle in Canada in the long run, he would like to be able to join his family in Canada. Does not appear that 10 years has lapsed since his previous conviction in 2006/04/07 where he was fined and disqualified from driving for 12 months.

[15] The second note entered on January 14, 2016 indicates that the applicant is now requesting individual rehabilitation. The officer finds that:

> He is married to a Canadian citizen and has 2 Canadian citizen children who live in Canada. The Applicant's submission focuses on his childhood wherein he states that his family background and the way he was "brought up…is closely related to my behaviours and offences which I had committed". While the Applicant does state that he has deep regrets for what he has done in the past, the majority of his explanation focuses on his childhood, father working, step-mother not taking care of him, moving around schools, his need for attention and love. He also states that he wanted to make money therefore he started gambling. Then, a friend convinced him to demand money from a construction site manager and states "I guess the site manager informed the police and I was arrested in early November in 1998 and charged with blackmail". The driving while disqualified was because he did not realize he was disqualified until he was pulled over by the police.

[16] The following factors were listed in favour of the applicant's rehabilitation:

- appears to have some stability in employment with father's firm and family; and
- has participated in some training.

[17] The following factors were listed that operated against the applicant's rehabilitation:

- long history of offending;
- multiple offences and history of re-offending;
- superficial remorse;
- strong tendency to blame criminality on others and not take responsibility; and
- downplays serious offences like extortion.

[18] The officer concludes by stating that the applicant has a long history of offences and recidivism, he shows little or no remorse and he does not take responsibility for his crimes.

V. ISSUES

[19] In his Application for Leave and for Judicial Review the applicant sought leave only with respect to the decision denying his application for criminal rehabilitation. Issues pertaining to inadmissibility and the equivalency of the Hong Kong and Canadian offences were raised in his memorandum of fact and law and oral argument. Having considered the record and the parties' submissions, I would limit the issues to be determined to the following:

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

VI. ANALYSIS

[20] There is no dispute between the parties and the Court accepts that it is well settled that the standard of review applicable to an officer's determination of criminal rehabilitation is reasonableness: *Hadad v Canada (Minister of Citizenship, Immigration and Multiculturalism)*, 2011 FC 1503 at para 40.

[21] I agree with the applicant that on the record before the Court, it is not clear that a formal inadmissibility finding was ever properly made – at least not before the decision under review was issued. There is no indication that the officer conducted a thorough equivalency assessment such as that described by the Federal Court of Appeal in *Hill v Canada (Minister of Employment and Immigration)*, [1987] FCJ No 47 at page 9. It is impossible to conclude from the record, for example, whether the officer considered that the comparable offences under Hong Kong and Canadian law had common essential elements.

[22] The officer in this instance may have assumed that an equivalency assessment was not required as the applicant appears to have submitted his application on the assumption that he would be found to be inadmissible. The respondent contends that an inadmissibility determination can be made either before or after a criminal rehabilitation finding is made. As Justice Shore noted in *Alabi v Canada (Minister of Public Safety and Emergency Preparedness)* 2008 FC 370 at para 46, that may not be consistent with the language of the statute. It would be

preferable, in my view, for the inadmissibility determination to be made first before the question of rehabilitation is addressed. That does not appear to have been done in this instance. If it was necessary to deal with the issue, based on the record before me I would have found that the inadmissibility determination had been inadequate.

[23] In any event, I am satisfied that the rehabilitation decision cannot withstand judicial review.

[24] The officer failed to consider the most important factor in the context of a rehabilitation application, which is whether or not the foreign national will re-offend: *Thamber v Canada (Minister of Citizenship and Immigration),* 2001 FCT 177 at para 16. Rehabilitation does not mean that there is no risk of further criminal activity only that the risk is assessed as "highly unlikely": CIC Operational Manual "ENF-2/OP 18 18 – Evaluating Inadmissibility". The period for which the applicant has been crime free is a necessary consideration in a rehabilitation application: *Thamber,* above, at paras 14, 17-18.

[25] In particular, the officer failed to reasonably consider the applicant's history from the time of his last serious offence i.e., the blackmail convictions in 1999. While the driving offences in 2006 are not insignificant, they don't constitute serious offences within the meaning of the statute. But even if those offences were taken into account, the applicant had been charge free for a decade when the decision was finally made in January 2016.

[26] In deciding a criminal rehabilitation application, it is important to consider key factors such as: the nature of the offence, the circumstances under which it was committed, the length of time which has lapsed and whether there have been previous or subsequent offences: *Aviles v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1369 at para 18. In my view, the officer did not give due consideration to any of these factors except for the history of re-offending.

[27] The officer's reasons disproportionately focus on the applicant's past conduct and do not properly consider the positive factors present in the application. As this Court found in *Hadad*, above, rehabilitation is forward looking. Therefore, the question is, is he likely to continue in this or similar conduct? To answer this question, it is necessary to consider the last ten years of the applicant's life where he has not been involved in any criminal activity. The officer noted that the applicant had found stable employment but neglected to consider that the applicant had in fact incorporated his own firm in 2009.

[28] Mr. Lau's biographical narrative submitted in support of his application provides context and background to the offences he committed. The officer interpreted the narrative as Mr. Lau blaming his parents and friends for his criminal activities and demonstrating a lack of remorse and personal responsibility for his conduct. This was unreasonable in my view, particularly in light of the fact that the CIC 'Application for Criminal Rehabilitation' asks applicants to "explain in detail the events/circumstances leading to the offence(s)/conviction(s)".

[29] The officer's focus on the applicant's "long history of offending" was disproportionate and she 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.

[30] The application is therefore allowed and the application for criminal rehabilitation is referred back to a different officer for reconsideration. And while it is not necessary for determination of this application, it appears to the Court that the question of whether a proper equivalency determination has ever been made remains open.

[31] No questions were proposed for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted and the matter is remitted for redetermination by a different officer. No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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