Federal Court  Cour fédérale

Date: 20171107

Docket: IMM-3726-16

Citation: 2017 FC 1008

Ottawa, Ontario, November 7, 2017

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

FRANCISCO SUAREZ ABELEIRA

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP CANADA

Respondent

JUDGMENT AND REASONS

I. The Nature of the Application

[1] Francisco Suarez Abeleira [Mr. Abeleira] is a 66-year-old stateless person. He seeks judicial review of the decision of a Senior Immigration Officer [Officer] refusing his application for permanent residence on humanitarian and compassionate grounds [H&C Application] under section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] For the reasons that follow, the application is allowed. The Officer took a narrow view of the facts. He failed to analyze and consider several of the arguments made by Mr. Abeleira. In particular, the Officer failed to consider whether Mr. Abeleira actually can be removed from Canada and, if so, to what country? The Officer also erred in his analysis of the hardship Mr. Abeleira would face if he were returned to the United States, or if he were to continue living in Canada as a stateless person.

II. **Mr. Abeleira's Personal Journey**

[3] There is no dispute that Mr. Abeleira is a stateless person. He believes he was born in Vigo, Spain on August 10, 1951. His parents fled the Franco dictatorship shortly after his birth and moved to Mexico. Spain has no record of his birth - it may not have been registered or, it might have been destroyed during the time of Franco.

[4] Tragically, Mr. Abeleira was orphaned at the age of three when his parents died in an automobile accident. He was then raised by neighbours in Mexico until, at the age of 12, he ran away from them because of their mistreatment of him. He then lived near the US-Mexican border, and made a living smuggling goods across the relatively insecure border and selling them in the United States and selling American electronics and clothing in Mexico. In his late teens, Mr. Abeleira moved permanently to the United States, and lived as an undocumented person for some time.

[5] In 1975, he moved to New York City and purchased a birth certificate in the name of Angel Lagomasini, a legitimate US citizen who lived in Puerto Rico and died in 2008. He used the birth certificate to acquire a driver's licence, social security number and a US passport.

[6] From 1975 to 2009, Mr. Abeleira lived and worked as a teacher in the United States under the false name. He obtained a high school diploma, received a bachelor's degree in education in 1989, and an MSc in education in 1995. In 1987, Mr. Abeleira began working for the New York City Board of Education as a teacher's assistant and was promoted until he became a certified teacher in 2004. Mr. Abeleira ceased working at the New York City Board of Education in 2006, at which point he was earning a gross annual income of $55,000 in US currency. Mr. Abeleira also married twice, in 1993 (divorcing in 1998) and in 2004 (divorcing in 2009, when his second wife discovered that his purported identity was false).

[7] Then, in May of 2009, Mr. Abeleira's secret was discovered. He was arrested at JFK International Airport in New York while he was departing for Spain where he taught English and Spanish as a freelance instructor. He admitted to the agents that his identity was false.

[8] Mr. Abeleira was criminally charged with violating 18 U.S.C. 1542 – false statement in application and use of passport. He was then ordered detained in federal custody by the US District Court. On June 8, 2009, Mr. Abeleira pled guilty.

[9] On July 21, 2009, Mr. Abeleira was sentenced to time served as well as a supervised release order that required him to remain in the local district. The order also stated that if Mr. Abeleira was deported, he was not to re-enter the United States without the consent of the US Attorney General.

[10] Upon release from US Corrections, Mr. Abeleira was remitted to Immigration and Customs Enforcement [ICE] and detained in an immigration detention centre. On July 27, 2009, he was ordered removed from the United States. However, he remained in ICE custody and was

only released in October, 2009, when ICE determined that it could not remove him. A letter from the Spanish consulate confirmed that they did not regard him as having any status in Spain.

[11] According to Mr. Abeleira, he was informed that as someone in the United States without status, he could be put back in detention at any time. He received advice from US attorneys that he would not be able to regularize his status in the United States. He was told that he should instead cross the border to Canada, and attempt to regularize his status here.

[12] Upon the recommendation of the US attorneys Mr. Abeleira fled the United States on March 29, 2010 and came to Canada where he sought refugee protection. Because he had no real identity documents and was required by his release order to remain in New York City, Mr. Abeleira crossed into Canada at an unmonitored border crossing between Vermont and Quebec. He then made an inland refugee claim on April 9, 2010, on the basis of his statelessness.

[13] Mr. Abeleira has no documentation, of any kind, proving his identity. No birth records exist. Even the United States identity documents he procured using the false birth certificate were confiscated by the authorities there.

III. **The First H&C Application**

[14] On August 3, 2011, the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada rejected Mr. Abeleira's refugee claim. The RPD accepted that he was stateless, but found that he did not face persecution on a Convention ground in the United States, the country of his former habitual residence. Leave to judicially review the RPD decision was denied.

[15] On October 17, 2012, Mr. Abeleira submitted an in-land H&C Application, on the grounds that he could not be removed to the United States, faced imprisonment for lacking status if he somehow was removed to the United States, faced hardship from statelessness in Canada, and was established in Canada.

[16] On May 13, 2014, Mr. Abeleira's H&C Application was denied. Leave to judicially review the decision was granted. On December 3, 2015, Mr. Justice LeBlanc granted the application for judicial review, overturned the decision and remitted the H&C Application back to a different officer for redetermination. Justice LeBlanc found that the officer's decision was unreasonable because she limited her consideration to whether Mr. Abeleira's circumstances were beyond his control and unreasonably dismissed his establishment in Canada despite significant evidence on that point. Justice LeBlanc's decision is reported at 2015 FC 1340.

IV. **Additional Information added to the H&C Application on Redetermination**

[17] On June 23, 2016, Mr. Abeleira made additional submissions on his H&C Application. The updated submissions noted the factors to be considered in H&C applications, as clarified by the Supreme Court of Canada's ruling in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*]. In that decision, the Supreme Court determined that there was no longer a hardship "test" for H&C applicants, and that hardship should be used as descriptive rather than creating new thresholds for relief under section 25 of the *IRPA*.

[18] Mr. Abeleira submitted new supporting documents, including a letter from Javan Courtney at Toronto Community Housing Corporation [TCHC] attesting to Mr. Abeleira's involvement there, a cheque from TCHC with an honorarium for his volunteerism and help, and a copy of a receipt from St. Michael's hospital dated September 23, 2015 for $600 for a

cystoscopy paid by Mr. Abeleira. He submitted that this receipt was proof that his statelessness had created hardship for him by rendering it necessary for him to pay for medical expenses that would be covered by the government if he were a permanent resident.

V. **The Decision under Review**

[19] The updated H&C Application was rejected on August 17, 2016.

[20] The Officer accepted that Mr. Abeleira was stateless. He reviewed the United Nations Convention on Statelessness and expressed sensitivity to the plight of stateless persons. The Officer divided his analysis into sections on establishment, statelessness, and risks and conditions in the country of origin (the United States), before coming to his conclusion.

[21] On establishment in Canada, the Officer noted Mr. Abeleira's volunteer work and accorded some weight to Mr. Abeleira's involvement with his community.

[22] Regarding Mr. Abeleira's employment, the Officer noted his work in 2012 for the Toronto Police College and his honorarium from TCHC. However, the Officer found that a level of employment sufficient to meet basic needs is a minimum expectation of anyone in Canada and did not constitute a full factor for acceptance. Moreover, the Officer noted that as of 2012 Mr. Abeleira was supplementing his work with social assistance and was not receiving sufficient employment income to fully wean himself off social assistance. From this, the Officer drew a negative inference. The Officer also turned to Mr. Abeleira's claim that he would receive a pension from his former employment as a teacher in the United States, but found there was no evidence to support this claim and gave it no weight.

[23] On statelessness, the Officer noted Mr. Abeleira's claim that his precarious status has created barriers to accessing full employment opportunities and healthcare. However, the Officer found insufficient evidence that Mr. Abeleira's minimal employment was due to statelessness. The Officer noted that Mr. Abeleira had been granted several work permits, the last one of which expired on April 25, 2015. The Officer therefore rejected Mr. Abeleira's explanation that his inability to work was due to his statelessness.

[24] Regarding healthcare, the Officer found that Mr. Abeleira had not proven that he could not obtain basic medical care in Canada. In fact, Mr. Abeleira had benefited from the Interim Federal Health Program [IFHP], which expired on May 26, 2016. As a failed refugee claimant, Mr. Abeleira was entitled to coverage under the IFHP and had not established that he had tried to renew it and it was refused.

[25] Regarding risks in the United States, the Officer found that Mr. Abeleira had served his prison sentence for fraudulently obtaining a passport, and therefore had failed to prove that he would be incarcerated if returned to the United States. Because Mr. Abeleira poses no danger to the United States, there was no reason for him to fear incarceration if he were returned to the United States. The Officer also found no evidence to demonstrate psychological harm from his incarceration in the United States or that a return to the United States would place him back in the same situation.

[26] Concluding, the Officer found insufficient evidence that Mr. Abeleira was financially stable and independent or had built strong ties to Canada. As such, he did not discharge his burden of proving he would be at risk if he was removed to the United States, and therefore his circumstances did not warrant an exemption from the requirement to apply from outside Canada.

VI. **The Issue and Standard of Review**

[27] There is one issue: did the Officer commit a reviewable error in refusing Mr. Abeleira's application for permanent residence from within Canada on humanitarian and compassionate grounds?

[28] The Officer's assessment of the evidence and conclusion about whether an H&C exemption should be granted is reviewable on a standard of reasonableness: *Kanthasamy* at para 44.

[29] A decision is reasonable if the decision-making process is justified, transparent and intelligible resulting in a determination that falls within the range of possible, acceptable outcomes which are defensible on the facts and law: *Dunsmuir v New Brunswick,* 2008 SCC 9 [*Dunsmuir*] at para 47.

[30] I am equally mindful that a decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to the final conclusion. If the reasons of the Officer allow the reviewing court to understand why he made his decision and permit the court to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board),* 2011 SCC 62 at para 16.

VII. **Analysis**

[31] The Supreme Court in *Kanthasamy* teaches us that the legal test when considering an H&C Application is not one of three separate thresholds - unusual and undeserved or disproportionate hardship – to be considered separately and apart from the humanitarian purpose

of subsection 25(1). The words unusual and undeserved or disproportionate hardship are to "be seen as instructive but not determinative, allowing s. 25(1) to respond more flexibly to the equitable goals of the provision:" *Kanthasamy* at para 33.

[32] In *Kanthasamy* the Supreme Court also confirms that the phrase "humanitarian and compassionate considerations" is as set out in *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 I.A.C. 338 [*Chirwa*]:

> […] humanitarian and compassionate considerations refer to "those facts, established by the evidence, which would excite in a reasonable man [*sic*] in a civilized community a desire to relieve the misfortunes of another — so long as these misfortunes 'warrant the granting of special relief' from the effect of the provisions of the Immigration Act".
>
> *Kanthasamy* at para 13, citing page 350 of *Chirwa*.

[33] Following *Kanthasamy*, in a case involving a US draft dodger who had resided illegally in Canada for forty years, Mr. Justice Brown explained that the change brought about by *Kanthasamy* means that "reviewing courts should have some reason to believe the Officers have done their job, that is, that H&C Officers have considered not just hardship but humanitarian and compassionate factors in the broader sense:" *Marshall v Canada (Citizenship and Immigration)*, 2017 FC 72 at para 33.

[34] In other words, the changes brought about by *Kanthasamy* require officers to focus on humanitarian and compassionate factors writ large. The purpose of the analysis is to determine whether to offer equitable relief, in a manner that provides a flexible and responsive exception to the ordinary operation of the *IRPA* in order to relieve the misfortunes of an applicant. The officer is to make that determination by substantively considering and weighing, cumulatively, all the relevant facts and factors submitted by an applicant so that there is a global assessment.

[35] Mr. Abeleira alleges several errors were made by the Officer. As explained in the following sections, the three that in my view render the decision unreasonable are:

1. The Officer failed to consider whether Mr. Abeleira can actually be removed from Canada.
2. The Officer did not properly address Mr. Abeleira's evidence of hardship if he is removed to the United States.
3. The Officer did not properly address Mr. Abeleira's evidence of hardship if he were to remain in Canada as a stateless person.

A. *The Officer never determined whether Mr. Abeleira can be removed from Canada.*

[36] Unlike many other stateless persons, Mr. Abeleria is not known to have been a former citizen of any country, who then subsequently became stateless. He is stateless through the circumstances of his unregistered birth during the Spanish civil war and then being orphaned in Mexico at the age of three.

[37] Mr. Abeleira's H&C Application submissions centred on his statelessness and especially the fact that he cannot be removed from Canada. The Officer never determined whether Mr. Abeleira can be removed to another country in order to apply for permanent residence from abroad.

[38] Whether the country of origin was Spain or Mexico or the United States – the country of his last habitual residence – the circumstances are shown on the record to be that Mr. Abeleira cannot be removed to any of those countries. As his counsel points out, Mr. Abeleira is in a state of "legal limbo."

[39] Therefore, the only four countries to which Mr. Abeleira has any connection at all (Canada being the fourth such country) do not want him because he has no status in any of them.

Yet, the Minister says Mr. Abeleira has not shown sufficient humanitarian and compassionate grounds to be permitted to apply for permanent residence from within Canada. He must therefore apply for that status from another country. The conundrum is that there does not appear to be any other country who will accept him. Not only is Mr. Abeleira in a state of legal limbo, there is no way out of it. He appears trapped in an endless loop of "you have to leave to Canada to apply for permanent residence," however "you can't leave Canada because no country will take you."

[40] While I fail to see how that can be a reasonable position in which to place any applicant, I do not have the benefit of the Officer's analysis. What makes the decision unreasonable is that the Officer never analyzed this problem. While he looked at individual aspects of statelessness such as health care and employment, he failed to see the big picture and did not consider the effect of Mr. Abeleira's statelessness at a global level, particularly whether he can be removed from Canada and, if not, whether it is humane or compassionate to leave him in an indefinite state of limbo in this country.

[41] There was important evidence before the Officer that was not mentioned by him and may not have been considered. The ignored evidence is further confirmation that the likelihood of being able to return Mr. Abeleira to the United States is virtually non-existent. In a letter, from an attorney at Vive, Inc. in the United States, an organization that assists refugees seeking asylum and refugee protection in the United States and Canada, it was opined that:

> The key fact is that the person (Mr. Abeleira) was ordered removed from the United States by an Immigration Judge. Therefore, it has been judicially determined that the person does not have a right to remain in the United States.

[42] The attorney also pointed out that "The Reciprocal Agreement for the Exchange of Deportees Between the United States of America and Canada," which once stated that any

refugee who entered Canada from the United States could be removed to the United States has been rescinded and is no longer applicable. The opinion provided as a result of that rescission is that Mr. Abeleira "cannot be removed to the United States against his will." I take the likelihood that Mr. Abeleira will not provide his agreement to be so removed as self-evident.

[43] Nonetheless, the Minister says that statelessness does not necessarily mean that Mr. Abeleira cannot be removed from Canada. Under subsection 241(1) of the *IRPA*, if none of the countries to which Mr. Abeleira has had a connection will authorize him to enter, then the Minister can send him to any country that will authorize his entry within a reasonable time. The Minister also says that difficulties with removal do not warrant a positive H&C determination.

[44] In my view, the situation in which Mr. Abeleira exists is much more than just a "difficulty" with removal. The fact that none of the countries with which he has had any association will accept him makes it a *prima facie* impossibility to deport him, which is precisely what occurred when the United States tried to deport him.

[45] The Minister did not allege there is actually "any country" to which Canada could send Mr. Abeleira. As such, the notion that there may be a country willing to accept Mr. Abeleira is purely speculative. Moreover, the Officer is required to consider the hardship to Mr. Abeleira if he is removed to another country. However, without knowing the country of removal, an officer cannot consider the conditions in that country in order to determine whether Mr. Abeleira would suffer hardship there. And if an officer cannot consider this, then it is difficult to see how the decision rendered could be deemed reasonable. Therefore, until a country can be identified, it seems Mr. Abeleira risks being stuck in a prolonged ping-pong game between the Minister and the Federal Court.

B. *The Officer did not properly address Mr. Abeleira's evidence of hardship if he is removed to the United States*

[46] Mr. Abeleira had put forward for consideration by the Officer that he had experienced trauma when he was detained by immigration authorities in the United States. In the affidavit he submitted with his H&C Application Mr. Abeleira claimed his life would be at risk if he were to be held in a US detention centre:

> My time in the ICE detention centre was traumatizing. With my own eyes I saw a man dying from Tuberculosis. We were well fed, but we were not treated well. I saw people becoming mentally unstable. People feared for their lives in their home countries and their future after deportation.
>
> It was a shocking experience. My freedom was taken and I was unsure what the future would hold for me or where I would be sent.
>
> (Affidavit of Mr. Abeleira at paras 56 and 57)

[47] Mr. Abeleira submitted with his H&C Application a New York Times article entitled "Officials Hid Truth of Immigrant Deaths in Jail," which outlines the facts of several deaths of immigration detainees and the strategies used by personnel in various fields of occupation, such as medical personnel, to cover up those deaths.

[48] The Officer erroneously found that Mr. Abeleira would not face incarceration in the United States because he had served his criminal sentence and he did not pose a threat to public safety in the United States. As a result he gave no weight to Mr. Abeleira's fear of incarceration.

[49] The evidence is that Mr. Abeleira was detained in ICE custody for three months from July to October 2009, after his criminal sentence of imprisonment had been completed. His release from prison was based on his not being a risk to public safety. His release from immigration detention was based on there being no country to which to send him.

[50] The Officer erred when he mistakenly found that having served the original criminal sentence, Mr. Abeleira was not at risk of incarceration in the United States. Mr. Abeleira's risk of incarceration arises from his fleeing the United States in violation of the Supervised Release Order [the Order] that prohibited him from leaving New York City for a period of three years and which requires that, had he been deported, the US Attorney General give permission for him to re-enter the country.

[51] The conclusion drawn by the Officer that, having served his criminal sentence, Mr. Abeleira was not at risk of further incarceration is without foundation. It runs contrary to the evidence that he could face further detention in ICE custody and is thereby unintelligible. That finding also prevented the Officer from examining the hardship to Mr. Abeleira in the event that he was returned to the United States and incarcerated. As such, the decision is also unreasonable on this ground.

C. *The Officer did not properly address Mr. Abeleira's evidence of hardship if he remained in Canada as a stateless person*

[52] When Mr. Abeleira lived in the United States his false identity was that of a citizen. He therefore had all the rights and privileges that entails. He had a good job through which he was accumulating a pension. He was free to travel outside the United States and return, which he did. None of those opportunities are available to him as a stateless person in Canada.

[53] The Officer noted he was sensitive to the "plight of stateless persons, and of Mr. Suarez Abeleira in particular." The Officer failed to articulate any of those sensitivities. In fact, he neither addressed nor dismissed many of the factors submitted by Mr. Abeleira.

[54] The record supports the negative factors attaching to statelessness that were identified by Mr. Abeleira. A five page letter dated July 9, 2013 from Amnesty International [Amnesty] specifically addresses Mr. Abeleira's situation as a stateless person in Canada. It summarizes reports by Asylum Aid and the UNHCR regarding the precarious nature of statelessness. It notes that the UNHCR names statelessness as a human rights issue. It explains that being a non-refugee stateless person in Canada means that such a person:

- is in a condition of legal limbo;
- is in an extremely precarious situation: vulnerable and marginalized;
- cannot leave Canada to relocate permanently;
- has no standing to enter another country;
- if they manage to leave Canada, the stateless person has no right to return;
- is subject to removal from Canada and may be detained pending removal;
- may find that removal is impossible and short-term detention may become indefinite;

[55] The Officer did not acknowledge or address the information put before him from Amnesty International concerning the effect of statelessness in Canada, which effect would also apply in the United States. The Officer mentioned that he had reviewed the United Nations Convention Relating to the Status of Stateless Persons. But, at no time did he explain what he considered about Mr. Abeleira being stateless in the United States or Canada and why it did not excite in him a desire to relieve the misfortunes of Mr. Abeleira.

[56] For this reason also, I find the decision unreasonable.

VIII. **Conclusion**

[57] Mr. Abeleira is a stateless person with no ability to apply for permanent residence to Canada from abroad and no country to which he can be removed. He faces an indefinite period of legal limbo in Canada. While that situation may or may not warrant H&C relief, the Officer

failed to examine it. Instead, he looked at individual issues of establishment and hardship or risk without acknowledging the elephant in the room – it is likely impossible to deport Mr. Abeleira.

[58] Taken cumulatively, it is not at all clear that the Officer truly gave Mr. Abeleira's H&C Application the analysis and thought it deserved. As Justice Brown put it in *Marshall*, I find that I do not have some reason to believe that the Officer considered not just hardship, but humanitarian and compassionate factors in the broader sense. It is my view that the Officer failed to consider important factors, overlooked key evidence and made findings contrary to the evidence.

[59] For the foregoing reasons, the decision is not reasonable. It must be set aside and the matter returned once again for redetermination by a different officer.

[60] The parties submit and I agree that this is a very fact specific case and no serious question of general importance arises.

IX. **Mr. Abeleira's Request for Direction by the Court**

[61] At the conclusion of the hearing counsel for Mr. Abeleira asked that the Court issue specific directions that on a redetermination all the evidence be considered. While counsel said he did not request a direction that the H&C Application be granted, he did say he was seeking one of two possible directions:

1. Direct that the redetermination be conducted within a certain time; or,
2. Indicate that this is a compelling case and there is nothing preventing a positive H&C determination.

[62] In the written submissions I requested post-hearing, counsel for Mr. Abeleira revised his position and has requested that the direction compel the next officer to grant the application because, he submitted, the undisputed facts and circumstances of this case clearly show sufficient hardship to satisfy the requirements of section 25 of the *IRPA*, and are sufficiently compelling to warrant such a direction.

[63] In the alternative, counsel asks that the Court indicate that the facts present an extremely compelling case and that, on redetermination, those views of the merits be taken into account.

[64] In support of those arguments counsel relies on two decisions of this Court: *Tran v Canada (Citizenship and Immigration)*, 2007 FC 1249 [*Tran*], a decision of Madam Justice Simpson and *Kargbo v Canada (Citizenship and Immigration)*, 2011 FC 469 [*Kargbo*], a decision of Mr. Justice Russell.

[65] The Minister objected to any directed remedy both at the hearing and in written post-hearing submissions on the basis that it would fetter an Officer's discretion. The Minister relies upon jurisprudence of the Federal Court of Appeal that to direct the outcome is an exceptional power that should be exercised only in the clearest of circumstances and it will rarely be the case when the issue in dispute is essentially factual in nature: *Canada (Minister of Human Resources Development) v Rafuse*, 2002 FCA 31 at para 14 [*Rafuse*].

[66] As noted in *Rafuse*, the basis for the reluctance of a reviewing court to direct an outcome when returning a matter is that if a tribunal has omitted to make a finding of fact, including a factual inference, it should be given the opportunity to complete its work: *Rafuse* at para 13.

[67] Shortly before the hearing of this application, the Federal Court of Appeal released its decision in *Canada (Citizenship and Immigration) v Yansané*, 2017 FCA 48 [*Yansané*] which answered a certified question that bears directly on the consideration of the request for a directed "verdict." At paragraph 27, the Federal Court of Appeal's answer to the reformulated question was:

> Question: In the absence of a specific verdict, what impact do the Federal Court's directions have on an administrative decision-maker assigned to re-determine the case?
>
> Answer: The administrative decision-maker to whom the case is returned must always comply with the reasons and findings of the judgment allowing the judicial review, as well as with the directions and instructions explicitly stated by the Federal Court in its judgment.

[68] The reformulated question reduced the original certified question from addressing "findings of fact and directions" to simply "directions."

[69] This Court often returns matters to a tribunal indicating that it should make a redetermination "in accordance with these reasons." Mr. Justice de Montigny in *Yansané* found that the reference to another immigration officer for redetermination "in accordance with these reasons" does not give instructions to the new officer. In fact, the words merely reiterate the well-known principle that an administrative decision-maker must comply with the decision of a superior court in applying the principle of *stare decisis*.

[70] Specifically, it was held at paragraph25 that "it matters little whether the judgment allowing an application for judicial review contains such a statement; it goes without saying that an administrative tribunal to which a case is referred back must always take into account the decision and findings of the reviewing court, unless new facts call for a different analysis."

[71] What is further clarified by *Yansané* is that "only instructions explicitly stated in the judgment bind the subsequent decision-maker; otherwise, the comments and recommendations made by the Court in its reasons would have to be considered mere obiters, and the decision-maker would be advised to consider them but not required to follow them:" *Yansané* at para 19 (my emphasis).

[72] The reason for this restrictive approach and warning is that issuing directions or instructions departs from the logic of a judicial review and may go against Parliament's desire to give administrative tribunals responsibility for ruling on matters, particularly those involving determining eligibility and weighing of evidence: *Yansané* at para 18.

[73] While I am very mindful of and sympathetic to the legal limbo within which Mr. Abeleira finds himself, I am satisfied that this matter will turn on the facts once they are properly considered. It is not the job of this Court to substitute its view of the facts and direct an outcome when there are facts yet to be determined on a full evidentiary record.

[74] I do, however, strongly urge the Minister to come to grips with whether there is a country to which Mr. Abeleira may be deported under subsection 241.(1) of the *IRPA*, so that on redetermination there is no need for speculation. If there is no such country, then I strongly urge the Minister and Mr. Abeleira to engage in meaningful discussions to try to find a way to resolve his application without the ongoing intervention of the Court.

[75] Furthermore, the Court is not in a position to dictate when the redetermination should occur as that is a scheduling matter for the parties generally, which also requires a consideration of the workload of the immigration officers. I acknowledge that in *Kargbo*, Justice Russell set a

short time period (7 days from the date of his judgment); however the circumstances there were that the Minister agreed that there were no factors that might prevent a positive determination. Sadly, that is not currently the case for Mr. Abeleira.

[76] The last redetermination of this matter took place within 8.5 months of the date of Justice LeBlanc's decision. I would expect, therefore, that it would be reasonable to have this next redetermination conducted well within a similar time period.

JUDGMENT IN IMM-3726-16

THIS COURT'S JUDGMENT is that:

1. The application is granted and the matter is returned for redetermination by a different Officer who is to take particular note of paragraph 70 of these reasons.
2. There is no serious question of general importance to be certified.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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