Federal Court Cour fédérale

Date: 20200103

Docket: IMM-306-19

Citation: 2020 FC 8

Ottawa, Ontario, January 3, 2020

PRESENT: Mr. Justice Norris

BETWEEN:

SELVIN SYLVESTER WILLIAMS

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The applicant was born in Jamaica in November 1987. In March 2001, when he was thirteen years of age, the applicant and his older sister landed in Canada as permanent residents after being sponsored by their father.

[2] The applicant has had significant contact with the Canadian criminal justice system. Among the criminal offences he has committed are being an occupant in a motor vehicle in which he knew there was a firearm (a Beretta 9mm semi-automatic handgun which had one round of ammunition in the chamber) and unauthorized possession of a prohibited device (an over-capacity ammunition magazine clip for a Beretta 9mm semi-automatic handgun which contained five rounds of ammunition). These offences were committed in June 2012, when the applicant was twenty-four years of age. In September 2014, the applicant was sentenced to prison for two years less a day for each of these offences, to be served concurrently. The applicant was also placed on probation for one year.

[3] These criminal convictions led to reports under section 44(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] that the applicant is inadmissible to Canada due to serious criminality under section 36(1)(a) of that Act. On December 13, 2017, a deportation order was issued against the applicant on the basis of the section 44(1) report relating to the conviction for unauthorized possession of a prohibited device.

[4] In early 2018, the applicant applied for relief from his criminal inadmissibility and for the restoration of his permanent resident status on humanitarian and compassionate [H&C] grounds under section 25(1) of the *IRPA*. In the alternative, the applicant requested a temporary resident permit [TRP] under section 24(1) of the *IRPA*. He relied on the best interests of his two Canadian-born children, his establishment in Canada, his family ties to Canada, the hardship he would face in Jamaica, and the steps he had taken to rehabilitate himself and to distance himself from his previous criminality.

[5] In a decision dated July 19, 2018, a Senior Immigration Officer denied the application.

[6] The applicant now applies for judicial review of this decision under section 72(1) of the *IRPA*. He submits that the decision to reject his H&C application is unreasonable because the officer misapprehended the evidence concerning his criminal history, gave that factor unwarranted weight, and failed to give due consideration to the evidence of the applicant's rehabilitation. The applicant also submits that the decision to reject his request for a TRP is unreasonable because the officer erred when considering the applicant's long-term intention to remain in Canada.

[7] For the reasons set out below, I have concluded that the applicant has failed to establish that the officer's decision on the H&C application is unreasonable. However, I agree with the applicant that the officer erred in refusing the request for a TRP. Accordingly, the application for judicial review will be allowed in part and the request for a TRP will be remitted for reconsideration by another decision maker.

II. BACKGROUND

[8] The applicant's adult criminal record appears to have begun in December 2008, when the applicant was convicted of assault and failure to comply with a probation order. (The fact that the applicant was subject to a probation order when he committed the assault entails that at some earlier time he had been found guilty of a criminal offence but there is otherwise no evidence in the record concerning this earlier offence.) The applicant received a suspended sentence and probation for two years on each offence, to be served concurrently. He was also prohibited

under section 110 of the *Criminal Code*, RSC 1985, c C-46, from possessing any weapon, device, ammunition or explosive (as defined) for five years. Then, in January 2011, the applicant was convicted of failure to comply with a recognizance. (The fact that the applicant was subject to a bail order which he breached entails that at some earlier time he had been charged with another offence but there is otherwise no evidence in the record concerning this earlier charge or its disposition.) The applicant was sentenced to a fine of $400.

[9] On June 29, 2012, the applicant was arrested and charged with a number of offences including assault with intent to resist arrest, escape lawful custody, unauthorized possession of a prohibited device (the over-capacity magazine clip for a Beretta 9mm semi-automatic handgun) and possession of a restricted weapon with ammunition (the Beretta 9mm semi-automatic handgun). Police officers had encountered the applicant and two other men at about 10:30 p.m. sitting in a parked car in the parking garage of a residential complex in Toronto. The applicant was in the back seat of the car, drinking a bottle of beer. Having noticed a strong odour of marijuana and seeing one of the other men in the car apparently attempting to hide something in the centre console between the front seats, the police ordered the three men out of the car and told them they were under arrest. As police officers attempted to handcuff the applicant, he pushed them and ran away. As he ran, the applicant threw away the Beretta magazine. After later searching the car, police found the Beretta handgun (with no magazine) under the front passenger seat but apparently accessible from the rear seat of the car. A quantity of marijuana was also found in the centre console. About an hour later, the applicant was located at a nearby apartment. He was arrested without further incident.

[10] The applicant was initially detained in custody but he was eventually released on bail in September 2012. Following a judge alone trial in the Ontario Superior Court of Justice, in May 2014 the applicant was found guilty of escaping lawful custody contrary to section 145(1)(a) of the *Criminal Code*, unauthorized possession of a prohibited device contrary to section 91(3)(a) of the *Criminal Code*, and having been an occupant in a motor vehicle in which he knew that there was a firearm contrary to section 94(2)(a) of the *Criminal Code*. The applicant was acquitted of three charges relating to possession of the Beretta semi-automatic handgun. (The applicant entered guilty pleas to escaping lawful custody and unauthorized possession of a prohibited device at the commencement of his trial but pled not guilty to the other charges.) The trial judge's reasons for judgment are not included in the record on this application.

[11] As noted, in September 2014 the applicant was sentenced to prison for two years less a day on the charges relating to the prohibited device and being in a motor vehicle knowing there was a firearm in it, to be served concurrently. The applicant was also sentenced to prison for three months for the escape lawful custody charge, to be served concurrently with the sentences on the other counts and placed on probation for one year. The trial judge's reasons for sentence are not included in the record on this application.

[12] The applicant had dropped out of high school but he eventually obtained his Ontario Secondary School Diploma in 2013. In recent years he has been steadily and gainfully employed. He has been in a romantic relationship with K.S. since 2010. They have two children – a son born in 2012 and a daughter born in 2016. When the H&C/TRP application was

submitted in early 2018, the applicant and K.S. were engaged to be married and had been living together since May 2015 (after the applicant was released on parole). While in custody, the applicant took part in a number of rehabilitative programs. Reports from the applicant's parole and probation officer were very positive. The applicant states that, since being released, he has been "working hard to resume a normal, law-abiding life," that he is "committed to staying out of trouble, working hard and being a productive member of society." His focus had been on employment and his growing family. The applicant presented substantial evidence to corroborate these statements and there is no evidence in the record that casts doubt on any of them. The H&C/TRP application was also supported by comprehensive and detailed written submissions from counsel.

III. DECISION UNDER REVIEW

[13] Looking first at the application for H&C relief under section 25(1) of the *IRPA*, the officer considered the applicant's establishment in Canada, finding it to be a strong factor in his favour. The officer also considered the applicant's education and employment history, and his family ties to Canada, which included being engaged to his common-law spouse and the presence of his two children, his father, stepmother, two sisters, two aunts, and grandfather in Canada. All of these factors weighed in the applicant's favour.

[14] The officer gave specific consideration to the best interests of the applicant's two young children. The officer noted that the children are emotionally and financially dependent on the applicant and that it would be challenging for their mother to raise them on a single income (or

without two Canadian incomes). The officer concluded that it was in the children's best interests that the applicant remain in Canada and gave this factor "considerable weight."

[15] The officer also considered the best interests of the applicant's half-sister, who is a minor. The officer found it to be in this child's best interests as well for the applicant to remain in Canada but attributed only some weight to this factor because no evidence was provided that she was dependent on the applicant.

[16] The officer noted that the applicant had last visited Jamaica in 2003 and that there are adverse country conditions. The officer nevertheless found that the applicant would likely be able to establish himself in Jamaica given that he had lived there previously, spoke the language, still had family there and had transferrable skills. However, since the applicant would initially face "a certain degree of hardship in the country," the officer gave this factor "some weight in the application."

[17] Finally, the officer considered the applicant's criminal history. The officer noted that the applicant's parole and probation officer described the applicant as "outstanding" and as someone who not only "met all parole and probation conditions but surpassed them." The immigration officer accepted that the applicant had changed his ways since he was charged in 2012. However, the officer also found that the applicant had demonstrated a "marked pattern of criminal behaviour," concluding that the applicant's criminal convictions were "a serious and significant negative consideration." The officer found that, despite the positive changes the

applicant had made in his life, the "sheer number of criminal offences" ought to be given the "utmost weight."

[18] Weighing all of these considerations, the officer refused the application under section 25(1) of the *IRPA*.

[19] Turning to the request for a TRP, the officer noted the applicant's "needs" for being in Canada (family ties and establishment here) as well as his "risks" (the applicant's history of criminality). The officer found that the applicant intended to remain in Canada indeterminately, as evidenced by his application for permanent residence. The officer therefore concluded that the applicant had failed to demonstrate that his reasons for remaining in Canada were temporary and that he would leave by the end of the authorized period for his stay. As a result, the officer concluded that the issuance of a TRP was not justified. The officer also noted that "the applicant's criminality" and "factors mitigating his risk in Canada," which had been considered previously in the H&C decision, had also been "assessed in the context of a TRP application." The request for a TRP was therefore refused.

IV. STANDARD OF REVIEW

[20] The parties agree, as do I, that the officer's decision should be reviewed on the reasonableness standard. This is well-established with respect to H&C decisions (see *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 S.C.R. 909, at para 44 [*Kanthasamy*]; *Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 at para 18 [*Kisana*]; *Taylor v Canada (Minister of Citizenship and Immigration)*, 2016 FC 21 at

para 16). That this is the appropriate standard has recently been reinforced by *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], where the majority of the Court set out a revised framework for determining the standard of review with respect to the merits of an administrative decision (at para 10). Applying *Vavilov*, there is no basis for derogating from the presumption that reasonableness is the applicable standard of review of the officer's decision.

[21] The majority in *Vavilov* also sought to clarify the proper application of the reasonableness standard (at para 143). The principles the majority emphasizes were drawn in large measure from prior jurisprudence, including *Dunsmuir v New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9, and its progeny. Even though the present application was argued prior to the release of *Vavilov*, the footing upon which the parties advanced their respective positions concerning the reasonableness of the officer's decision is consistent with these principles.

[22] Reasonableness review "aims to give effect to the legislature's intent to leave certain decisions with an administrative body while fulfilling the constitutional role of judicial review to ensure that exercises of state power are subject to the rule of law" (*Vavilov* at para 82). The exercise of public power "must be justified, intelligible and transparent, not in the abstract but to the individuals subject to it" (*Vavilov* at para 95). For this reason, an administrative decision maker has a responsibility "to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion" (*Vavilov* at para 96). Accordingly, on judicial review the court focuses on "the decision actually made by the decision maker, including both the decision maker's reasoning and the outcome" (*Vavilov* at para 83). A

reviewing court "must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable" (*Vavilov* at para 99).

[23] A reasonable decision "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). Where the decision maker has provided reasons, the reviewing court must begin its inquiry into the reasonableness of the decision "by examining the reasons provided with respectful attention and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion" (*Vavilov* at para 84, internal quotation marks deleted). The reasons must be read in light of the record as a whole and with due sensitivity to the administrative setting in which they were given (*Vavilov* at paras 91-94). Unless the decision is unreasonable, the reviewing court must defer to the administrative decision maker's determination.

[24] Before a decision can be set aside on the basis that it is unreasonable, the reviewing court must be satisfied that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100). A court applying the reasonableness standard "does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the 'range' of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the 'correct' solution to the problem" (*Vavilov* at para 83). Absent exceptional circumstances, the reviewing court will not interfere with the administrative decision maker's factual findings (*Vavilov* at para 125).

V. ISSUES

[25] The applicant challenges the officer's decision on two main grounds:

a) The decision to deny the H&C application is unreasonable; and

b) The decision to deny the TRP request is unreasonable.

VI. ANALYSIS

A. *The Legal Frameworks*

[26] In *Vavilov*, the majority emphasized the importance of the legal constraints that bear on administrative decision-making, including the statutory scheme within which the decision is made, when assessing the reasonableness of those decisions (*Vavilov* at paras 106 and 108). Three statutory provisions figure here: (1) section 36(1)(a) of the *IRPA*, which provides that a permanent resident or foreign national is inadmissible on grounds of serious criminality; (2) section 25(1) of the *IRPA*, which (among other things) can permit relief from inadmissibility on grounds of serious criminality on humanitarian and compassionate grounds; and (3) section 24(1) of the *IRPA*, which permits an officer to issue a temporary resident permit to someone despite that person's inadmissibility if the officer "is of the opinion that it is justified in the circumstances." (See the Annex to these reasons for the relevant statutory provisions.)

(1) Section 36(1)(a) of the *IRPA*

[27] As has been noted many times, section 36(1)(a) of the *IRPA* reflects a form of social contract. In exchange for the opportunity to reside in Canada, permanent residents (and foreign

nationals) are expected not to commit serious criminal offences. The *IRPA* recognizes that immigration brings many benefits to Canada and that the "successful integration of permanent residents involves mutual obligations for those new immigrants and for Canadian society," including the obligation of the former to avoid serious criminality (*Tran v Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50, [2017] 2 S.C.R. 289 at paras 1-2 [*Tran*]). The *IRPA* "aims to permit Canada to obtain the benefits of immigration, while recognizing the need for security and outlining the obligations of permanent residents" (*Tran* at para 40). Notably, Parliament has stated that among the objectives of the *IRPA* with respect to immigration are "to protect public health and safety and to maintain the security of Canadian society" and "to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks" (*IRPA* paragraphs 3(1)(h) and (i)).

[28] As the Supreme Court of Canada observed in *Medovarski v Canada (Minister of Citizenship and Immigration); Esteban v Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 539, 2005 SCC 51, the objectives of the *IRPA* "indicate an intent to prioritize security. This objective is given effect by preventing the entry of applicants with criminal records, by removing applicants with such records from Canada, and by emphasizing the obligation of permanent residents to behave lawfully while in Canada" (at para 10). As a result, when a permanent resident commits a serious criminal offence (as defined), this breach of the social contract can lead not only to the consequences imposed by the criminal courts but also to the loss of his or her immigration status and removal from Canada.

[29] The obligation to avoid serious criminality lest adverse immigration consequences follow applies equally to all permanent residents (and foreign nationals). That being said, the uniform application of this principle to all cases can lead to injustice or unfairness in some. Section 25(1) of the *IRPA* exists to protect against this result.

(2) Section 25(1) of the *IRPA*

[30] This provision authorizes the Minister to grant relief to a foreign national seeking permanent resident status who is inadmissible or otherwise does not meet the requirements of the Act. The Minister may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations under the Act. Relief of this nature will only be granted if the Minister "is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national." These considerations include matters such as children's rights, needs and best interests; maintaining connections between family members; and averting the hardship a person would suffer on being sent to a place where he or she has no connections (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at para 41). The fundamental question is whether an exception ought to be made in a given case to the usual operation of the law (see *Damian v Canada (Citizenship and Immigration)*, 2019 FC 1158 at paras 16-22).

[31] In *Kanthasamy*, the Supreme Court of Canada endorsed an approach to section 25(1) that is grounded in its equitable underlying purpose. Writing for the majority, Justice Abella approved of the approach taken in *Chirwa v Canada (Minister of Manpower & Immigration)* (1970), 4 IAC 338, where it was held that H&C considerations refer to "those facts, established

by the evidence, which would excite in a reasonable [person] 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). This discretion provides flexibility to mitigate the effects of a rigid application of the law in appropriate cases (*Kanthasamy* at para 19). Section 25(1) should therefore be interpreted to allow it "to respond flexibly to the equitable goals of the provision" (*Kanthasamy* at para 33).

[32] There will inevitably be some hardship associated with being required to leave Canada and "[t]his alone will not generally be sufficient to warrant relief on humanitarian and compassionate grounds under s. 25(1)" (*Kanthasamy* at para 23). What does warrant relief will vary depending on the facts and context of the case (*Kanthasamy* at para 25). H&C relief is an exceptional and highly discretionary measure (*Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125 at para 15; *Williams v Canada (Citizenship and Immigration)*, 2016 FC 1303 at para 4). The onus is on an applicant to present sufficient evidence to warrant the exercise of such discretion in his or her case (*Kisana* at para 45; *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at para 5; *Ahmad v Canada (Minister of Citizenship and Immigration)*, 2008 FC 646 at para 31; *Zlotosz v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 724 at para 22).

[33] Section 25(1) also expressly requires a decision maker to take into account the best interests of a child directly affected by a decision made under that provision. Protecting children through the application of this principle means "[d]eciding what . . . appears most likely in the circumstances to be conducive to the kind of environment in which a particular child has the best

opportunity for receiving the needed care and attention" (*Kanthasamy* at para 36, quoting *MacGyver v Richards* (1995), 22 OR (3d) 481 (CA), at p 489).

[34] In summary, an H&C application is a weighing exercise in which an immigration officer is asked to consider different and sometimes competing factors. When, as in the present case, an H&C exemption from criminal inadmissibility is sought, the officer must weigh the public policy reflected in section 36(1) of the *IRPA* against the individual circumstances of the case and determine whether the latter outweigh the former so as to warrant making an exception to the usual rule that serious criminality by a permanent resident leads to loss of status and removal from Canada. The officer's determination is entitled to deference from a reviewing court unless the applicant can establish that it is unreasonable.

(3) Section 24(1) of the *IRPA*

[35] This provision provides for the issuance of a temporary resident permit to someone who is inadmissible or who does not meet the requirements of the Act "if an officer is of the opinion that it is justified in the circumstances." Such a permit may be cancelled at any time. Further, under section 63 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, a temporary resident permit is valid until one of the following events occurs:

(a) the permit is cancelled under section 24(1) of the Act;

(b) the permit holder leaves Canada without obtaining prior authorization to re-enter Canada;

(c) the period of validity specified on the permit expires; or

(d) a period of three years elapses from the date of validity.

[36] Operational instructions and guidelines from Immigration, Refugees and Citizenship Canada [IRCC] that were in effect at the time shed additional light on how decisions on applications for TRPs were made when the applicant submitted his request. (They have since been modified in some respects – for example, by clarifying that the predominant consideration is whether "the individual's purpose for entering Canada balances Canada's social, humanitarian and economic commitments to the health and security of Canadians, per the objectives of the *IRPA*": see https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/temporary-residents/permits/eligibility-assessment.html.) While such instructions and guidelines are not law and are not binding, they can "offer guidance on the background, purpose, meaning and reasonable interpretation of legislation" (*Mousa v Canada (Immigration, Refugees and Citizenship)*, 2016 FC 1358 at para 11).

[37] The instructions and guidelines explain that the officer will determine whether "the need for the foreign national to enter or remain in Canada is compelling" and whether "the need for the foreign national's presence in Canada outweighs any risk to Canadians or Canadian society." In evaluating "compelling reasons" versus "risks", officers "must consider the factors that make the person's presence in Canada necessary and the intent of the legislation to maintain program integrity and protect public health and safety." The officer must be satisfied that "the reasons or benefits for an individual to enter or remain in Canada outweigh the risks."

[38] IRCC instructions and guidelines pertaining specifically to risk assessments in cases of criminal inadmissibility note that the "onus is on the client to demonstrate their level of risk and

that further criminal activity is unlikely." In making this determination, officers are directed to assess, among other things:

- the seriousness of the offence
- the chances of committing further offences
- evidence of reform or rehabilitation
- if there is a pattern of criminal behaviour (e.g. the offence was a single event and out of character)
- if all sentences have been completed, fines paid or restitution made
- if there are any outstanding charges.

See: https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/temporary-residents/permits/considerations-specific-inadmissibility-on-criminality-grounds.html.

[39] Finally, section 29(2) of the *IRPA* provides that a temporary resident "must comply with any conditions imposed under the regulations and with any requirements under this Act [and] must leave Canada by the end of the period authorized for their stay."

B. *The Officer's Determinations*

(1) The H&C Decision

[40] As set out above, the officer found that a number of factors weighed in the applicant's favour. Indeed some, such as the best interests of the applicant's children, were given "considerable weight." The applicant does not take issue with any of these determinations. On the other hand, the officer gave "the utmost weight" to the applicant's criminality in assessing the request for H&C relief. In the end, the officer concluded that "the factors supporting an approval" did not "outweigh the applicant's significant criminal history."

[41] Specifically, the officer found as a fact that the applicant had been convicted of ten criminal offences and each of these convictions was "a serious and significant negative consideration of the application [*sic*] as it demonstrates [the applicant's] failure to comply with criminal law and the judicial system of Canada." The officer found as a fact that the applicant had been convicted of six failure to comply offences and these, together with the escape lawful custody conviction, "further demonstrates [the applicant's] disregard of previously imposed conditions and of law enforcement officials in Canada." The officer also found as a fact that the applicant "has convictions of possession (of a semi-automatic handgun and over-capacity magazine clip) which may have led to further violence and took place when [the applicant] was already subject to a weapons prohibition."

[42] While not raised in the applicant's memorandum of argument, in oral argument counsel for the applicant suggested that the officer had misapprehended the evidence relating to his

criminal record in material respects. Although I have concerns about the basis for some of the officer's findings of fact in relation to the applicant's criminal record, I am not persuaded that the officer's reliance on that record is unreasonable.

[43] The officer found that the applicant had been convicted of ten criminal offences. This appears to consist of the following: assault in 2008, escape lawful custody in 2014, unauthorized possession of a prohibited device in 2014, possession of a semi-automatic handgun in 2014, and six counts of failure to comply. (For the sake of clarity, as set out above, the applicant was acquitted of three charges relating to possession of the semi-automatic handgun. However, he was convicted of an offence under section 94(1) of the *Criminal Code* for being an occupant of a motor vehicle in which he knew there was a restricted firearm. Reflecting a form of constructive possession, this offence is referred to in the *Criminal Code* as that of "unauthorized possession in motor vehicle.")

[44] There is no question that the applicant was convicted of four substantive offences. This leaves six convictions for failure to comply to make up the total of ten convictions. The problem is that the information and evidence on this application (in particular, the record kept by the Canadian Police Information Centre (commonly referred to as CPIC)) included in the Certified Tribunal Record appears to establish only two failure to comply convictions – failure to comply with probation in 2008 and failure to comply with a recognizance in 2011. Four alleged convictions for failure to comply offences remain unaccounted for.

[45] This is obviously concerning. In other circumstances, it could well have vitiated the officer's decision. However, what is determinative in the present case is that the applicant has not offered any evidence that the officer is actually mistaken in concluding that he had been convicted of a total of six failure to comply offences.

[46] The applicant knew the officer had made this finding of fact when he sought judicial review of the officer's decision. In his affidavit in support of this application, the applicant describes the circumstances that led to the 2008 assault conviction (although he does not explain why he was on probation at the time of the incident). He then says simply: "Apart from failure to comply convictions, my next interaction with the court system came in 2012." (The reference to 2012 is, of course, to the June 29, 2012, incident.) The applicant presumably knows what his criminal record is. His CPIC record reflects only one failure to comply conviction between the 2008 assault conviction and the 2012 incident yet the applicant refers to "convictions" in the plural, without providing further details. If the applicant believed that the officer had erred in finding that his criminal record included a total of six convictions for failure to comply offences, one would expect him to have pointed out the mistake and not to have dealt with the issue so casually.

[47] Further, on the basis of the information and evidence in the record on the H&C application, it was not unreasonable for the officer to make this finding of fact. The applicant would have known that the referral for an admissibility hearing in relation to his two reportable convictions prepared by the Canada Border Services Agency in 2016 listed his non-reportable convictions as "assault" and "failure to comply x 6." While the source of this information is far

from clear, the applicant did not take issue with it in his affidavit in support of the H&C application. Instead, after describing the assault incident (again without explaining why he was on probation at the time), he said simply: "Apart from failure to comply convictions, my next interaction with the court system came in 2012."

[48] The number of convictions for failure to comply offences was an important factor for the officer because they demonstrated a disregard for Canadian law and court-imposed obligations on the part of the applicant. The applicant has not persuaded me that the officer's reliance on this factor is unreasonable.

[49] The applicant also contends that the officer failed to give due consideration to the evidence of his rehabilitation in weighing relevant factors under section 25(1) of the *IRPA*. I do not agree.

[50] The officer expressly accepted that "the applicant has made changes to steer himself away from his previous lifestyle" and commended the applicant for "taking various rehabilitative programs, maintaining full employment, and abstaining from smoking marijuana." The officer also acknowledged "the positive changes the applicant has undergone since his last convictions and lack of criminality since then." On the other hand, the officer noted that the applicant's criminal history did not reflect an isolated event; rather, the convictions spanned several years, which the officer found demonstrated "a marked pattern of criminal behaviour." Residents of Canada are expected to obey the law. Considering the number of offences of which the applicant had been convicted and their nature (including serious firearms offences), the officer found that

the evidence of rehabilitation did not outweigh these significant negative considerations. In challenging the officer's decision as he does, the applicant is in effect asking me to reweigh these unquestionably relevant factors. That is not my role.

[51] Further, I do not accept the applicant's submission that, as in *Sivalingam v Canada (Citizenship and Immigration)*, 2017 FC 1185 at para 9, the officer focused on why the applicant was inadmissible in such a way as to reinforce rather than mitigate the rigidity of the law. Given the seriousness of the applicant's criminal history, the officer's assessment of that factor amongst all the other relevant factors (including the evidence of the applicant's rehabilitation) was not unreasonable.

[52] Having regard to the foregoing, the applicant has not persuaded me that the officer's exercise of discretion under section 25(1) of the *IRPA* is unreasonable.

[53] I do, however, agree with the applicant that the officer erred in rejecting the request for a TRP. I turn to this now.

(2) The TRP Decision

[54] The applicant requested, in the alternative, that he be permitted to remain in Canada on a TRP if his request for H&C relief was refused. Counsel provided detailed submissions in support of this alternative request. These submissions tracked closely the IRCC instructions and guidelines reviewed above. Among other things, counsel relied on the best interests of the applicant's children and the applicant's establishment in Canada as demonstrating a compelling

need for the applicant to remain in Canada. She also addressed in detail the issue of risk, discussing the nature of the applicant's offences and his steps towards rehabilitation within the framework outlined in paragraph 38, above.

[55] In summary, counsel for the applicant submitted as follows to the officer:

> Given the above, the Applicant poses little risk to the Canadian public if permitted to remain in Canada on a TRP. It is noteworthy that TRPs may be cancelled at any time. As such, issuing a TRP to the Applicant would essentially provide the Applicant an opportunity to prove that he is fully rehabilitated and if he fails to do so, Immigration Refugee & Citizenship Canada [*sic*] may cancel the TRP and immediately enforce removal.

[56] Although counsel did not state it expressly in her submissions to the officer, there is no issue that TRPs can and have been employed in effect as a form of probation to give someone who is criminally inadmissible to Canada but who has compelling reasons to remain here the chance to continue to build a track record of law-abiding behaviour: see, for example, *Cardenas v Canada (Citizenship and Immigration)*, 2018 FC 263 at para 7.

[57] In the decision, the officer "noted" both the reasons the applicant relied on to demonstrate his compelling need to remain in Canada and the risk arising from the applicant's criminality. The officer "noted" that the risks assessment for the TRP concerns the applicant's criminality, which has rendered him inadmissible to Canada. The officer "noted" that the applicant had ten criminal convictions. The officer also "noted" that "counsel states the applicant was released from incarceration in May 2015 and has complied with conditions of his parole and has no outstanding charges. Counsel further states," the officer continued, "the applicant poses little risk to the Canadian public". Despite having "noted" all these things, the officer refused the

request for a TRP on an entirely different ground: the applicant had failed to demonstrate that he would leave Canada by the end of the period authorized for his stay.

[58] In its entirety, the officer's reasoning in support of this conclusion is as follows:

> I find the applicant has expressed a desire to remain in Canada for indeterminate [*sic*] period of time, which is also evident by him submitting an application for permanent residence. I further find the applicant's ties within Canada are considerably stronger than those of his country of citizenship, Jamaica. As a result, I find the applicant failed to demonstrate his reasons to remain in Canada, such as to be with his immediate family, would be temporary in duration and that he would leave Canada by the end of the period authorized for his stay.

[59] The applicant submits that this determination is unreasonable. I agree.

[60] Obviously, the applicant made no secret of his desire to stay in Canada permanently or the reasons why. But simply having a desire to stay in Canada permanently and having stronger ties to Canada than to one's country of citizenship does not entail that one would not leave Canada if and when required to do so. Whether a given individual would leave Canada if and when required to do so is a question of fact. Depending on the circumstances, a negative answer may require a fine-grained analysis of the evidence (notwithstanding that the burden rests on the applicant to establish this precondition to being given a TRP). That this is a separate and distinct question is reflected in section 22(2) of the *IRPA*, which specifically contemplates granting a foreign national temporary resident status even if the foreign national has an intention to become a permanent resident, as long as the officer is satisfied that the person will leave Canada by the end of the period authorized for their stay.

[61] In the present case, given the interests at stake and the detailed submissions provided in support of the request, the officer's conclusory statement that the applicant had failed to demonstrate that he would leave Canada by the end of his authorized stay simply because he wants to stay here permanently and has stronger ties to Canada than to Jamaica falls well short of the requisite degree of justification, transparency and intelligibility.

[62] Although this is sufficient to dispose of this aspect of the application for judicial review in the applicant's favour, I would also add this. As set out above, the officer "notes" several facets of the risk analysis. To the extent that the officer made any findings of fact in this regard, they are simply adopted from the H&C analysis. The officer states: "I also note I have considered the applicant's criminality in the H&C decision above, along with the factors mitigating his risk in Canada, and assessed it in the context of a TRP application. I note my assessment of the applicant's criminal history in Canada remains the same."

[63] In my view, while it is indisputable that the applicant's criminal history in Canada is a relevant consideration in the request for a TRP, it was insufficient for the officer simply to adopt the earlier analysis of this factor in relation to the H&C application.

[64] The discretion bestowed on an officer by sections 25(1) and 24(1) of the *IRPA*, respectively, are similar in that each allows for relief from a strict or rigid application of the law. However, section 24(1) is more narrowly framed. It does not embody the broad equitable discretion to make exceptions based on humanitarian and compassionate considerations that section 25(1) does. Rather, a TRP is a time-limited privilege available in specific circumstances.

It is expressly provided for by Canadian immigration law and policy to permit flexibility when other aspects of that law and policy (e.g. the requirement that one not be inadmissible) would lead to an individual's exclusion from Canada (cf. *Alabi v Canada (Citizenship and Immigration)*, 2018 FC 1163 at para 20).

[65] When the applicant requested a TRP, he needed to establish that his reasons for remaining in Canada were sufficiently compelling to outweigh any risks posed by his continued presence here. This was the heart of the matter (cf. *Shabdeen v Canada (Citizenship and Immigration)*, 2014 FC 303 at para 23). The officer simply adopted the earlier assessment of the applicant's criminal history from the analysis under section 25(1) but the assessment of the significance of the applicant's criminality is more constrained under section 24(1) than it is under section 25(1). This is so for at least three reasons. First, under section 24(1) of the *IRPA*, the significance of a criminal history is more closely tied to an assessment of risk as a forward-looking determination. This is reflected in the IRCC instructions and guidelines, which state that the onus is on an applicant "to demonstrate their level of risk and that <u>further</u> criminal activity is unlikely" (emphasis added). Second, the significance of the breach of the social contract entailed by committing criminal offences must be judged in relation to this forward-looking assessment rather than in relation to the broader equitable considerations that guide decisions under section 25(1) of the *IRPA*. Third, unlike a decision to grant someone permanent residence, the scope of the risk Canada would be assuming by granting a TRP under section 24(1) is constrained by the duration of the TRP (which, to repeat, is time-limited and can be cancelled at any time).

[66] The applicant's "risk" given his criminal history and efforts at rehabilitation might or might not be overcome by his compelling reasons for wanting to remain in Canada. This was for the officer to determine. Given the distinct legal framework in which this determination had to be made when considering the request for a TRP, it was unreasonable for the officer simply to adopt the "assessment of the applicant's criminal history in Canada" from the H&C decision. Further analysis reflective of the legal framework for determining a request for a TRP under section 24(1) of the *IRPA* was required.

VII. CONCLUSION

[67] For these reasons, the application for judicial review is allowed in part. The decision refusing the applicant's request for a temporary resident permit under section 24(1) of the *IRPA* is set aside and the matter is remitted for redetermination by another decision maker in accordance with these reasons.

[68] The parties did not suggest any serious questions of general importance for certification under section 74(d) of the *IRPA*. I agree that none arise.

JUDGMENT IN IMM-306-19

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed in part.
2. The decision dated July 19, 2018, refusing the applicant's request for a temporary resident permit under section 24(1) of the *IRPA* is set aside and the matter is remitted for redetermination by another decision maker in accordance with these reasons.
3. No question of general importance is stated.

"John Norris"
Judge

ANNEX

Immigration and Refugee Protection Act, SC 2001, c 27

Temporary resident	**Résident temporaire**
22 (1) […]	**22 (1)** […]
Dual intent	**Double intention**
(2) An intention by a foreign national to become a permanent resident does not preclude them from becoming a temporary resident if the officer is satisfied that they will leave Canada by the end of the period authorized for their stay.	**(2)** L'intention qu'il a de s'établir au Canada n'empêche pas l'étranger de devenir résident temporaire sur preuve qu'il aura quitté le Canada à la fin de la période de séjour autorisée.
…	…
Temporary resident permit	**Permis de séjour temporaire**
24 (1) A foreign national who, in the opinion of an officer, is inadmissible or does not meet the requirements of this Act becomes a temporary resident if an officer is of the opinion that it is justified in the circumstances and issues a temporary resident permit, which may be cancelled at any time.	**24 (1)** Devient résident temporaire l'étranger, dont l'agent estime qu'il est interdit de territoire ou ne se conforme pas à la présente loi, à qui il délivre, s'il estime que les circonstances le justifient, un permis de séjour temporaire — titre révocable en tout temps.
…	…
Humanitarian and compassionate considerations — request of foreign national	**Séjour pour motif d'ordre humanitaire à la demande de l'étranger**
25 (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa,	**25 (1)** Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande

examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

…

…

Right of temporary residents

Droit du résident temporaire

29 (1) […]

29 (1) […]

Obligation — temporary resident

Obligation du résident temporaire

(2) A temporary resident must comply with any conditions imposed under the regulations and with any requirements under this Act, must leave Canada by the end of the period authorized for their stay and may re-enter Canada only if their authorization provides for re-entry.

(2) Le résident temporaire est assujetti aux conditions imposées par les règlements et doit se conformer à la présente loi et avoir quitté le pays à la fin de la période de séjour autorisée. Il ne peut y rentrer que si l'autorisation le prévoit.

…

…

Serious criminality

Grande criminalité

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 :

(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;

(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

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

10 years; or

(c) committing an act outside Canada that is an offence in the place where it was committed and 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.

ans;

c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.

Immigration and Refugee Protection Regulations, SOR/2002-227

Period of permit's validity

63 A temporary resident permit is valid until any one of the following events occurs:

(a) the permit is cancelled under subsection 24(1) of the Act;

(b) the permit holder leaves Canada without obtaining prior authorization to re-enter Canada;

(c) the period of validity specified on the permit expires; or

(d) a period of three years elapses from its date of validity.

Période de validité du permis

63 Le permis de séjour temporaire est valide jusqu'à ce que survienne l'un des événements suivants :

a) il est révoqué aux termes du paragraphe 24(1) de la Loi;

b) le titulaire quitte le Canada sans avoir obtenu au préalable l'autorisation de rentrer au Canada;

c) il expire à la date qui y est prévue;

d) une période de trois ans s'est écoulée depuis sa prise d'effet.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-306-19
STYLE OF CAUSE:	SELVIN SYLVESTER WILLIAMS v MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JULY 17, 2019
JUDGMENT AND REASONS:	NORRIS J.
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