Federal Court  Cour fédérale

Date: 20210104

Docket: IMM-5718-19

Citation: 2021 FC 9

[ENGLISH TRANSLATION]

Ottawa, Ontario, January 4, 2021

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

SANTOS LINO ALFARO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] The applicant, Santos Lino Alfaro, is a citizen of El Salvador. He has been a permanent resident of Canada since October 1996.

[2] In January 2012, the applicant was convicted of assault with a weapon under subsection 267(1) of the *Criminal Code*, RSC 1985, c C-46. As a result of this conviction, a report under subsection 44(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 28 (IRPA), was written against him in February 2016. The officer is of the opinion that the applicant is inadmissible for serious criminality within the meaning of paragraph 36(1)(a) of the IRPA. His report was referred to the Immigration Division [ID] for investigation.

[3] On February 18, 2016, an ID member found the applicant inadmissible to Canada pursuant to paragraph 36(1)(a) of the IRPA. He issued a removal order against the applicant. The applicant appealed this decision to the Immigration Appeal Division [IAD] pursuant to subsection 63(3) of the IRPA. The applicant did not challenge the validity of the removal order, but instead asked the IAD to stay the order on humanitarian and compassionate grounds.

[4] On August 27, 2019, the IAD dismissed the applicant's appeal and found that the humanitarian and compassionate considerations were not sufficient. In assessing humanitarian and compassionate considerations, the IAD considers the non-exhaustive factors set out in *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IABD No 4 (QL) at paragraph 14 [*Ribic*], and approved by the Supreme Court of Canada in *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3 at paragraph 40. The IAD found that the likelihood of recidivism is too high given the seriousness of the crime committed, the violence exhibited by the applicant and his disregard for the institutions of justice.

[5] The applicant is seeking judicial review of that decision. He complains that the IAD ignored or misinterpreted the evidence presented and relied on evidence of charges for which he was not convicted or which were withdrawn.

II. Analysis

[6] The standard of review applicable to decisions made by the IAD under paragraph 67(1)(c) of the IRPA is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 16–17 [*Vavilov*]; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 58).

[7] When the reasonableness standard applies, the Court is interested in "the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome" (*Vavilov* at para 83). It must consider whether "the decision bears the hallmarks of reasonableness—justification, transparency and intelligibility—and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99).

[8] The Court agrees with the applicant that the IAD's decision should be set aside because it failed to consider certain evidence.

[9] In considering the degree of hardship that would be caused by the applicant's removal to El Salvador, the IAD notes that the applicant has not provided any objective evidence about the current living conditions in El Salvador. It notes that the letter from the applicant's sister outlines

the difficult living conditions that prevailed there during his childhood, but finds that there is nothing contemporary in the record. She then notes that the applicant has not demonstrated how he would be exposed to street gangs if he returned to El Salvador and adds that he still has a sister living there and therefore would not be alone.

[10] The review of the file shows, however, that the applicant has two sisters who have filed letters with the IAD. One of them resides in Canada while the other still resides in El Salvador. The 2017 letter signed by the applicant's sister in Canada does mention the difficult living conditions in El Salvador during their childhood and the danger posed by street gangs before they left El Salvador for Canada. The other sister's letter instead discusses the current conditions in El Salvador. In her letter dated June 2019, the applicant's sister who lives in El Salvador testifies to the high level of street gang criminality and danger in El Salvador. She states that she was forced to leave her home to save the life of her son, whom the street gangs wanted to murder. There is no mention of the conditions that prevailed during her childhood. It is clear from these two letters that the IAD is basing its assessment of hardship on the letter from the sister in Canada and not on the letter from the sister still living in El Salvador.

[11] The Court recognizes that the decision maker is presumed to have considered all the evidence before him or her and is not obliged to refer to all the evidence. However, the IAD's finding that "[t]here is nothing contemporary on the record" suggests that it did not consider the letter from the applicant's sister in El Salvador in assessing the degree of hardship that a return to El Salvador would cause the applicant. This is particularly evident in its conclusion that the

hardship of return would be mitigated by the presence of his sister in El Salvador. This comment in no way takes into account her difficult situation, which is reflected in her letter.

[12] The respondent argues that this error is not determinative as the letter from the applicant's sister is not objective evidence and the IAD recognizes that the situation in El Salvador will cause hardship to the applicant.

[13] The respondent is correct in pointing out that the IAD's conclusion is based on its assessment of the totality of the factors set out in *Ribic* and that its reasons must be interpreted holistically and contextually (*Vavilov* at para 97). However, the IAD assessed the degree of hardship the applicant would face if he returned to El Salvador as a neutral factor. The Court cannot presume what weight the IAD would give to the letter from the sister living in El Salvador. Given that two of the five applicable *Ribic* factors are found to be favourable to the applicant and two are found to be unfavourable, the Court is of the view that the IAD's error in assessing the fifth criterion is dispositive. This factor, which the IAD found to be neutral, could affect the final weighting of all the factors.

[14] Since the IAD's decision does not have the characteristics of reasonableness and it is not for this Court to reweigh humanitarian and compassionate considerations, the application for judicial review is allowed. The decision is set aside and the matter is referred back to the IAD for reconsideration by a different panel.

[15] No question of general importance has been submitted for certification and the Court is of the view that none are raised by this case.

JUDGMENT in IMM-5718-19

THIS COURT ORDERS as follows:

1. The application for judicial review is allowed.
2. The decision of the Immigration Appeal Division dated August 27, 2019, is set aside.
3. The case is referred back to the Immigration Appeal Division for reconsideration by a different panel.
4. The style of cause is amended to replace the Minister of Public Safety and Emergency Preparedness with the Minister of Citizenship and Immigration.
5. No question of general importance is certified.

"Sylvie E. Roussel"
Judge

Certified true translation
Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5718-19
STYLE OF CAUSE:	SANTOS LINO ALFARO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD VIA TELECONFERENCE BETWEEN MONTRÉAL, QUEBEC AND OTTAWA, ONTARIO
DATE OF HEARING:	DECEMBER 9, 2020
JUDGMENT AND REASONS:	ROUSSEL J.
DATED:	JANUARY 4, 2021

APPEARANCES:

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