Federal Court  Cour fédérale

**Date: 20151118**

**Docket: IMM-1721-15**

**Citation: 2015 FC 1290**

**Québec, Quebec, November 18, 2015**

**PRESENT: The Honourable Mr. Justice Martineau**

**BETWEEN:**

**DAVID CASTILLO OCAMPO**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## JUDGMENT AND REASONS

[1] The applicant seeks judicial review of a decision by a Senior Immigration Officer [Officer], dated March 24, 2015, refusing his application for permanent residence from within Canada on humanitarian and compassionate [H&C] grounds under section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] The applicant is a Colombian citizen who left his country in 1998, at the age of 15, and migrated to the United States, where he worked as a drywall installer. He has not been back to Colombia since that time. In 2008, the applicant arrived in Canada and claimed refugee status. His claim was refused in 2011. While in Canada, the applicant continued to work as a drywaller. In 2013, he founded his own drywall business, which currently employs four people. In 2015, the applicant applied for permanent residence on H&C grounds, based on his degree of establishment in Canada, his personal relationships in Canada and Colombia, and his fear of discrimination in Colombia as an Afro-Colombian.

[3] The Officer did not find the applicant's personal circumstances were such that the requirement of having to obtain a permanent resident visa from outside Canada would constitute unusual or disproportionate hardship. The Officer noted that the applicant worked as a drywall installer from 2009 to 2013. The Officer also noted that the applicant had taken several safety and construction courses related to his business, as well as classes to further his knowledge of English and better communicate with his clients. The Officer considered various letters of reference indicating that the applicant's company had been hired as a subcontractor by several contracting companies, as well as a letter from someone indicating that they worked part time for the company. While the Officer acknowledged that the applicant had not been in Colombia for the last 17 years, he considered that "he would not be returning to an unfamiliar place, culture or language that would render re-integration unfeasible." He assumed that he would have the support and assistance of his mother, brother and sister in Cali, and that he would be able to apply his work experience and skills to obtain employment. Regarding the applicant's fear of discrimination as an Afro-Colombian in Colombia, the Officer noted that according to the 2013

U.S. Department of State Human Rights Report on Colombia [the extrinsic evidence or US Department of State Report], the government has been taking steps, through legal and political measures, to address the discrimination that Afro-Colombians are facing in their country.

[4] The applicant alleges that the impugned decision is unreasonable and that the Officer breached procedural fairness in resorting to the extrinsic evidence. The standard of review applicable to an officer's overall assessment of evidence in an H&C application is that of reasonableness. With respect to the issue of procedural fairness, a stricter approach is required, and such issues should be reviewed on the standard of correctness (*Nicayenzi v Canada (Minister of Citizenship and Immigration)*, 2014 FC 595 at para 11 [*Nicayenzi*]). At the oral hearing of the present application, counsel for the respondent was ready to concede that the Officer had unreasonably engaged in a selective reading of the evidence. On this ground alone, the respondent was prepared to submit a consent judgment setting aside the impugned decision and referring the matter back for redetermination by a different officer. On the other hand, the respondent maintained that the Officer did not breach any principle of natural justice or procedural fairness. The applicant insisted that the Court pronounce itself on both issues, as he was not ready to agree to the issuance of a consent judgment on the terms proposed by the respondent after the hearing.

[5] While an officer need not catalogue every piece of evidence, he or she is required to take account of the totality of evidence. Furthermore, the obligation to comment on the evidence depends on the importance of that evidence (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC)). According to the case law, an officer is

required to address material contradictory evidence (*Buri v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1358 (CanLII) at paras 22 to 23) and is not allowed to 'dissect' the documentary evidence and selectively use only those specific portions in isolation that support his point of view. As the Court notes in *Gulyas v Canada (Citizenship and Immigration)*, 2015 FC 583 at para 40, "[i]t is not sufficient for the Officer to say that she has looked at all the evidence, but then fail to engage with and address evidence that contradicts her conclusions […]."

[6] The fundamental problem in this case is that the Officer apparently did not consider, or arbitrarily chose to discard, the contradictory evidence contained in the US Department of State Report, which demonstrated that actual conditions on the ground remained very difficult for Afro-Colombians. For example, the US Department of State Report indicates that societal discrimination against Afro-Colombians at times restricted their ability to exercise their rights (p 1); that threats and violence against Afro-Colombian leaders and communities continued to cause high levels of forced displacement (p 28); that international organizations and NGOs remained concerned about the slow institutional response to displacement (pp 27-28); and that Afro-Colombians faced significant economic and social discrimination (p 43).

[7] Moreover, this contradictory information was further corroborated by the documentary evidence submitted by the applicant with his H&C application – evidence that indicated that Afro-Colombians face racism, socio-economic exclusion, and discrimination in the workplace in Colombia. The document "Afro-Colombians battle racism and socio-economic exclusion" (Colombia Reports) states that "Afro-Colombians are plagued by high rates of informal labor

and unemployment, high dropout rates, illiteracy, overcrowding, poor access to potable water, poor sanitation, child labor, and poor access to government services, among other things." That article goes on to note:

> "While the constitutional and legislative measures [taken by the government] are praiseworthy, the […] implementation of Colombia's legislation on Afro-Colombian communities remains woefully inadequate, limited and sporadic," according to a 2010 statement by Gay McDougall, the United Nations Independent Expert on minority issues.

[8] The other document provided by the applicant, entitled "Afro-Colombians Fighting against Discrimination at Work", notes that "Afro-Colombians are far likelier than other Colombian workers to earn less than the minimum wage and to be employed in jobs where they cannot form unions to improve their working conditions."

[9] The Court finds that it was unreasonable for the Officer not to have discussed in his reasons this contradictory evidence and not to have included an assessment of the operational adequacies of the government's efforts to improve the situation of Afro-Colombians in Colombia. Unlike cases concerning state protection, the Officer must assess the probability of hardship occurring in reality, rather than just efforts on the part of the state to address such hardship. As the Federal Court of Appeal held in *Kanthasamy v Canada (Citizenship and Immigration)*, 2014 FCA 113 (CanLII) at para 55, "Officers must always scrutinize the particular facts before them and consider whether the applicant is personally and directly suffering unusual and undeserved, or disproportionate hardship […]" [emphasis added]. In this sense, a boilerplate statement by the Officer that the government is making efforts to improve the situation was clearly unreasonable, when considered in relation to specific and contradictory evidence

submitted by the applicant, and in the face of contradictory evidence within the very same report upon which the Officer relied.

[10] Furthermore, while it was up to the Officer to determine the weight to be given to the different factors in the H&C application, it does not appear from the reading of the Officer's reasons that any such weighing process actually took place. Rather, the Officer appears to have drawn conclusions that were not grounded in a reasonable evaluation of the evidence. In light of the documentary evidence on record that Afro-Colombians face socio-economic hardship and discrimination in Colombia, the Officer's determination with respect to the applicant's ability to find employment using his construction and entrepreneurial skills, as well as his conclusion that the applicant's mother and siblings in Colombia would be able to provide support, appear to be speculative statements, rather than reasoned inferences (*Ukleina v Canada (Citizenship and Immigration)*, 2009 FC 1292 at paras 8 and 14).

[11] In *Damte v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1212 (CanLII), the Court noted at paragraph 33 that "the Guideline test requires a subjective as well as an objective evaluation of hardship", and that "a disproportionate impact analysis must reflect an understanding of the reality of life a person would face, in body and mind, if forced to leave Canada." In the case at bar, the applicant has lived outside of Colombia for over half his life, and has not been back to the country since he was a 15-year-old boy. Based on the documentary evidence he has submitted, he faces a return to a country where he would confront significant discrimination, adverse socio-economic conditions, and limited opportunities on account of his ethnicity. While it is not for this Court to make a determination on the merits of the case, it

appears that the Officer closed his mind to understanding the applicant's reality and failed to appreciate the difficulties that the applicant might face if he were to return to Colombia.

[12] Since I find that, overall, the impugned decision is unreasonable and must be set aside, the issue of whether the Officer also breached procedural fairness is rendered somewhat academic. However, since the matter was fully argued at the hearing, I will nonetheless provide my opinion on the matter. I also find that the Officer erred in this respect.

[13] The CIC's document "Humanitarian and Compassionate: Conducting Research" (http://www.cic.gc.ca/english/resources/tools/perm/hc/tools/research.asp) includes the following guidelines for officers:

> You may do research with respect to the issues identified in the application. The research sources consulted will vary with each individual case.
> When information is obtained through Internet research you should:
>
> - share documents and relevant external documentation (PDF, 1010.93 KB) on which you intend to rely with the applicant. This should be done if the applicant could not reasonably be expected to have seen or know about the information, even if the document is "publicly accessible".
> - keep copies of all documents obtained from the Internet and used in the decision-making on file.
> - refer to the most recent information sources.
>
> [My emphasis]

[14] Furthermore, the CIC's document "Humanitarian and Compassionate: Administrative law principles to guide H&D decision-making" (http://www.cic.gc.ca/english/resources/tools/perm/hc/tools/principle.asp) states with respect to the "case to be met":

> There is no particular "case to be met." Applicants determine what they believe are the H&C factors for their particular circumstances and make submissions to support the application. You may have information or evidence from a source other than the applicant (i.e. extrinsic information). If the information will be used when making the Stage 1 or Stage 2 assessment, you must share the information with the applicant and allow submissions to be made on this information.
>
> [My emphasis]

[15] In the case at bar, the only evidence of country conditions in Colombia contained in the Tribunal Record are:

- A print-out from an unnamed website entitled "Afro-Colombians Fighting against Discrimination at Work", submitted by the applicant;
- A print-out of an internet article by Colombia News submitted by the Applicant; and
- The US Department of State 2013 Human Rights Report for Colombia, obtained independently by the H&C Officer [the extrinsic evidence or US Department of State Report].

[16] While the Officer decided to consult the US Department of State Report, he did not consider any of the other documents contained in the Immigration and Refugee Board [IRB's] National Documentation Package [NDP] for Colombia. While the NDP is a publicly available document and therefore may be consulted by an officer, there is no legal obligation to do so. Be that as it may, the applicant submits that if an officer decides to consult this extrinsic evidence, he must share the information he intends to rely on if this information happens to contradict the other objective information submitted by the applicant.

[17] The respondent concedes that the US Department of State Report was not cited or submitted by the applicant, but maintains that as a publicly available document, the Officer was

nonetheless permitted to consult and rely on it without notifying the applicant. In oral arguments, in response to the question of whether a fairness letter should have been sent to the applicant alerting him that the Officer planned to rely on the US Department of State Report, counsel for the respondent submitted that the requirement of a fairness letter would have a cost for applicants, slowing down an already lengthy process.

[18] I agree with the applicant. The rules of procedural fairness require that when a decision-maker's decision is based on a credibility finding or on concerns that could not have reasonably been predicted by the applicant, an officer has a duty to share these concerns with the applicant so as to allow him or her to respond in a meaningful way (*Nicayenci*, above, at para 18). Such obligation is consistent with the CIC's own policy guidelines, which state that even if a document is publicly accessible, it should be shared with the applicant if he or she could not reasonably be expected to have seen or know about the information (see also *Mark v Canada (Minister of Citizenship and Immigration)*, 2009 FC 364 at paras 16-18 and *De Vazquez v Canada (Minister of Citizenship and Immigration)*, 2014 FC 530 at paras 27-29). In the present case, the Officer's reliance on extrinsic evidence concerning the State's efforts to combat discrimination could not have reasonably been predicted by the applicant in view of the particular circumstances of the case.

[19] Given the fact that the Officer was selectively relying on passages from the US Department of State Report, which directly contradicted the applicant's evidence, and given the fact that this report was indeed key to the Officer's reasoning that the applicant would not face undue and undeserved or disproportionate hardship in Colombia, the duty of fairness required

him to bring this evidence to the attention of the applicant, giving the applicant an opportunity to respond.

[20] The respondent has proposed the following question for certification:

> When evaluating an application for permanent residence on Humanitarian and Compassionate grounds, is an officer entitled to independently consult a single document found on CIC's "Sources of country of origin information" list, when other documents from that source also exist, without sending a fairness letter to the Applicant?

[21] The applicant, on the other hand, has proposed three questions for certification:

> (a) Does duty of fairness require that an immigration officer exercising discretion under section 25 of the IRPA specifically refer to, weigh and analyse contradictory evidence?
>
> (b) Is there an appearance of bias in the case because an immigration officer utilizes a 'boilerplate' approach when analyzing an H&C application and omits to address and weigh contradictory documents?
>
> (c) Considering the rules of natural justice and procedural fairness, can the principles of administrative efficiency justify a breach of an applicant's right to be heard?

[22] I do not believe that any of the three questions proposed by the applicant should be certified. The question of how an officer should weigh and evaluate contradictory evidence has been addressed on numerous occasions, as has the issue of an officer's use of a "boilerplate" approach. The general principles guiding procedural fairness in an H&C application are to be found in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 CanLII 699 and do not need to be revisited. Nor do I believe that the question proposed by the respondent is appropriate for certification. In the present case, the question of whether an

officer should be required to send a fairness letter to an applicant if that officer has independently consulted a document found in the CIC's "Sources of country of origin information" list, when other documents from that source also exist, is highly factual in nature and I doubt that it can be answered in the abstract (see *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at paras 17 and 62). Furthermore, given that the Officer arrived at an unreasonable decision by engaging in a selective reading of the evidence, I do not believe that this question on the issue of fairness is dispositive (*Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at paras 13 and 16).

[23] In conclusion, the Court shall grant the application and a judgment setting aside the impugned decision and directing the matter back for redetermination by another Officer shall be rendered. No questions shall be certified.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application for judicial review be granted, that the impugned decision of the Officer be set aside and that the matter be submitted to another visa officer for redetermination. No question is certified.

"Luc Martineau"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-1721-15 |
| **STYLE OF CAUSE:** | DAVID CASTILLO OCAMPO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | MONTRÉAL, QUEBEC |
| **DATE OF HEARING:** | OCTOBER 22, 2015 |
| **JUDGMENT AND REASONS:** | MARTINEAU J. |
| **DATED:** | NOVEMBER 18, 2015 |

**APPEARANCES:**

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| Me Thomas Cormie | FOR THE RESPONDENT |

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