

Federal Court



Cour fédérale

Date: 20180731

Docket: IMM-5638-17

Citation: 2018 FC 799

Ottawa, Ontario, July 31, 2018

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

ALDO GUSTAVO BARRIOS

Applicant

and

**THE MINISTER OF PUBLIC SAFETY
AND
EMERGENCY PREPAREDNESS**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision dated December 19, 2017 [the Decision] by a delegate of the Minister of Public Safety and Emergency Preparedness [the Delegate or the Minister's Delegate] under ss 44(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], to refer a report made against the Applicant under s 44(1) of IRPA to

the Immigration Division [the ID] of the Immigration and Refugee Board of Canada for an admissibility hearing.

[2] As explained in greater detail below, this application is allowed, because I have found that the Applicant was deprived of procedural fairness. The report prepared under s 44(1) of IRPA, which contained inaccuracies in its description of the Applicant's crime, was not disclosed to the Applicant before the Minister's Delegate made the Decision to refer that report to the ID for an admissibility hearing. In making that Decision, the Delegate considered the Applicant's submissions on humanitarian and compassionate [H&C] considerations but concluded that there were insufficient such considerations to overcome the serious nature of the crime committed by the Applicant. Because the Applicant did not receive a copy of the s 44(1) report, he did not have an opportunity to make submissions on the inaccuracies in the report, which might have influenced the Delegate's weighing of the seriousness of the crime against the H&C factors.

II. **Background**

[3] The Applicant, Aldo Gustavo Barrios, is a citizen of Honduras and a permanent resident of Canada, who has been residing in Canada since 2004. He is married to a Canadian citizen and has a daughter who is also a Canadian citizen.

[4] Mr. Barrios also holds Convention refugee status. He asserted a refugee claim upon entering Canada with his spouse in September 2004, and his claim for protection was granted in March 2005. However, that status is now potentially in jeopardy, as the Canada Border Services

Agency [CBSA] has brought an application for cessation of his status as a result of the criminality underlying the Decision by the Minister's Delegate that is the subject of this judicial review. No hearing has yet been scheduled for the cessation application.

[5] The aforementioned criminality relates to an incident on June 30, 2008, when the RCMP arrested Mr. Barrios near the border of the United States and seized 90 pounds of marijuana. On June 5, 2009, the Provincial Court of British Columbia convicted Mr. Barrios of the offense of possession for export, contrary to s 6(2) of the *Controlled Drugs and Substances Act*, SC 1996, c 19 [CDSA]. He pleaded guilty to the charge and was given a conditional sentence of two years less a day. Mr. Barrios has had no other criminal convictions.

[6] The CBSA subsequently provided notice to Mr. Barrios that he may be inadmissible to Canada as a result of his conviction. He was interviewed by the CBSA and, through his counsel, provided written submissions. The CBSA Officer [the Officer] considering the matter issued two reports dated October 17, 2016, under s 44(1) of IRPA [the Reports]. One of the Reports expresses the Officer's opinion that Mr. Barrios is inadmissible to Canada under s 36(1)(a) of IRPA [the Section 36(1)(a) Report], and the other expresses the same opinion in relation to s 37(1)(b) of IRPA [the Section 37(1)(b) Report]. Section 36(1) provides grounds for inadmissibility based on serious criminality, and s 37(1) provides grounds for inadmissibility based on organized criminality. The Officer also issued a document entitled "Subsection 44(1) and 55 Highlights" dated February 7, 2017 [the Highlights Document], which sets out, in greater detail than the Reports, the observations, recommendations and reasons of the Officer.

[7] On June 12, 2017, a delegate of the Minister made a decision under s 44(2) of IRPA to refer the Section 36(1)(a) Report to the ID for an admissibility hearing. Mr. Barrios sought judicial review of this decision, in Court file number IMM-3049-17. The parties settled the matter, as a result of which it was returned to a different delegate of the Minister for redetermination, and the CBSA wrote to Mr. Barrios' counsel, requesting further submissions and noting that, once the submissions were received, the file would be referred to a new delegate who would determine whether either of the Reports would be referred to an admissibility hearing. Mr. Barrios' counsel provided further submissions by letter dated November 29, 2017.

[8] On December 19, 2017, the Minister's Delegate issued a letter, conveying the Decision that is the subject of this application for judicial review. The Delegate referred to having conducted a thorough review of the new submissions, the existing evidence already on file from previous submissions, the prior recommendations of the Officer regarding the Reports, and the decision by the previous delegate of the Minister.

[9] The Minister's Delegate also refers to having carefully weighed as factors Mr. Barrios' age at time of landing, length of residence, location of family support and responsibilities, conditions in home country, degree of establishment in Canada, criminality, history of noncompliance and current attitude, and best interests of the child. The Delegate accepted that Mr. Barrios plays a central role in supporting his family in Canada, that he appears to have taken responsibility for his criminal act, and that he has expressed remorse for his actions. The Delegate agreed that conditions in Honduras might not be on par with those in Canada in terms of safety, security, and financial opportunities but also noted that, despite his positive refugee

decision, Mr. Barrios had returned to Honduras on at least five occasions since arriving in Canada.

[10] The Delegate accepted Mr. Barrios' paternity of his daughter (that apparently having been a matter about which the prior delegate was uncertain) and recognized that he is an active parental figure in his daughter's life. The Delegate agreed that there would be some emotional impact on Mr. Barrios' daughter should he be required to leave Canada and agreed that the family would be required to make financial adjustments, although disagreeing with the submission that the family would necessarily be pushed into poverty. Commenting that, if the best interests of a child were the only consideration, it would be in her best interests for Mr. Barrios to remain in Canada, the Delegate noted that it was necessary to consider that factor and the other factors previously noted in connection with the serious nature of his criminal act and his conviction.

[11] After considering all the factors, and emphasizing the best interests of the child, the Minister's Delegate concluded that there were insufficient H&C considerations to overcome the serious nature of the crime committed. The Delegate therefore decided to refer the Section 37(1)(b) Report to an admissibility hearing.

III. **Issues and Standard of Review**

[12] As issues in this application for judicial review, the Applicant articulates the following alleged errors by the Minister's Delegate:

- A. The Delegate and the Officer made an error of law in concluding that the Applicant exported 90 pounds of marijuana into the United States along with at least five people working in concert, and breached procedural fairness owed to the Applicant by not disclosing the Section 37(1)(b) Report;
- B. The Delegate made an unreasonable decision despite the Applicant's compelling H&C considerations and relied on the decision by the first delegate of the Minister;
- C. The Delegate did not provide reasons for determining that the submissions made by the Applicant were insufficient, and the Delegate fettered his/her discretion.

[13] The Respondent identifies the issues as follows:

- A. Was the Minister's Delegate's decision to refer the Section 37(1)(b) Report to the ID for an admissibility hearing reasonable?
- B. Was there a breach of procedural fairness by CBSA in not providing the Section 37(1)(b) Report to the Applicant or by not providing him an opportunity to respond to the allegations?

[14] In my view, the two issues identified by the Respondent represent an appropriate framework for considering this application.

[15] The parties agree, and I concur, that the procedural fairness issue is governed by a standard of correctness and the other arguments raised by the Applicant are governed by the standard of reasonableness. As noted by the Respondent, the question for the Court in considering procedural fairness arguments can alternatively be described as whether the process followed by the decision-maker was fair (see *Kidd v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 1044 at para 19).

IV. Analysis

[16] My decision to allow this application for judicial review turns on the procedural fairness argument raised by Mr. Barrios. It appears undisputed that he was not provided with a copy of the Section 37(1)(b) Report before he made submissions to the Minister's Delegate and the Delegate made the Decision. Mr. Barrios deposed in the affidavit he filed in support of this application that he did not receive a copy of the Section 37(1)(b) Report, and the Respondent's counsel confirmed at the hearing of this application that there is no other evidence in the record before the Court on this point.

[17] Before proceeding further with this analysis, I must note that there are authorities from this Court that the duty of procedural fairness does not require that an officer's report under s 44(1) of IRPA be put to an applicant for a further opportunity to respond prior to the referral under s 44(2) (see *Hernandez v Canada (Minister of Citizenship and Immigration)*, 2005 FC 429 [Hernandez] at para 72; *Lee v Canada (Minister of Citizenship and Immigration)*, 2006 FC 158 [Lee] at para 32; and *Hernandez v Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 725 at paras 13-26).

[18] However, I do not read these authorities as supporting a conclusion that failure to provide an applicant with the s 44(1) report before making the s 44(2) a decision can never, in the circumstances of a particular case, represent a breach of procedural fairness. Nor do I understand the Respondent to be advancing such a position. Rather, the Respondent submits that there is a low level of procedural fairness in administrative decisions such as referrals made under s 44(2) (see *Chand v Canada (Public Safety and Emergency Preparedness)*, 2008 FC 548 at para 28, and *Lee* at para 39) and relies on the explanation in *Apolinario v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 1287 [*Apolinario*] at para 38, that the question to be considered is whether the applicant had been advised of the case to be met and was given the opportunity to make submissions. I agree with the Respondent's characterization of the applicable law.

[19] I also agree with the Respondent's position that the record clearly demonstrates that Mr. Barrios was advised that inadmissibility under s 36(1)(a) and/or s 37(1)(b) of IRPA was under consideration, based on the crime of which he was convicted in 2009, and that he was given an opportunity to make submissions before the decision under s 44(2) was made. However, in this particular case, the Section 37(1)(b) Report that was before the Minister's Delegate when the Decision was made contained factual inaccuracies in its description of the information upon which the report was based. Those inaccuracies therefore formed part of the case to be met.

[20] In particular, the Section 37(1)(b) Report stated that Mr. Barrios "did export 90 pounds of Marijuana into the United States from Canada". The offence of which he was convicted was possession of a controlled substance for purposes of export from Canada, contrary to s 6(2) of

the CDSA. He was not convicted of exporting a controlled substance from Canada, which is a different offence. A similar error is also identifiable in the Highlights Document, where the Officer states correctly that Mr. Barrios was charged for possession for the purpose of export from Canada but then states incorrectly that he pled guilty to export of marijuana.

[21] One might question whether the distinction between the two offences is material. However, it is important to focus upon the nature of the Decision, which represented a weighing of the H&C considerations favouring Mr. Barrios against the seriousness of his crime. It is clear from the Decision that the negative outcome turned significantly on the Delegate's conclusion as to the seriousness of Mr. Barrios' criminal act and conviction. It is therefore problematic that the Delegate received from the Officer inaccurate information surrounding the act and the conviction. The Decision contains no express analysis explaining how the Delegate arrived at his or her conclusion as to how serious the crime was. The Court therefore cannot know whether the inaccuracy in the Section 37(1)(b) Report contributed to the seriousness with which the Minister's Delegate regarded Mr. Barrios' criminality. The point is that, because Mr. Barrios was not provided with a copy of the Section 37(1)(b) Report, he was deprived of the opportunity to point out the factual inaccuracy and possibly influence the Delegate's assessment of the seriousness of his offence.

[22] As such, viewed through the lens of *Apolinario*, because Mr. Barrios was not aware of the inaccuracy in the Section 37(1)(b) Report, I cannot conclude that he was advised of the case to be met and given the opportunity to make submissions on that case. It is therefore my finding

that the decision-making process was not fair and that the Decision must be set aside and returned to another delegate of the Respondent for redetermination.

[23] Neither party proposed a question for certification for appeal, and none is stated.

JUDGMENT IN IMM-5638-17

THIS COURT'S JUDGMENT is that this application for judicial review is allowed, and the matter is returned to another delegate of the Minister of Public Safety and Emergency Preparedness for redetermination.

“Richard F. Southcott”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5638-17

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