

Federal Court



Cour fédérale

Date: 20100409

Docket: IMM-1194-09

Citation: 2010 FC 362

Ottawa, Ontario, April 9, 2010

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

**JOSE CESAR FIDEL BAEZA AND
CARMEN PILAR RODRIGUEZ VELASQUEZ**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] The applicants fled to Canada from Peru in November 1998. They claimed refugee protection on the ground that they had been threatened by the Peruvian military and a communist guerrilla group called the Shining Path. The applicants' claim for refugee status was dismissed in 2000, and their application for leave and judicial review was rejected in 2001.

[2] In 2002, the applicants were sent a call-in notice for an interview, but they failed to attend. A warrant was issued for their arrest. The applicants claim that they did not know about the interview or arrest warrant until they were arrested in 2007. They had never hidden from authorities and had always provided accurate coordinates to immigration officials. They suspect that the call-in notice was sent to their immigration consultant, who was later charged with fraud and sexual assault.

[3] The applicants also applied for permanent residence in Canada on humanitarian and compassionate grounds (H&C) in March 2003. Over the years, they updated their application as requested. An immigration officer refused their H&C application in 2009. The applicants argue that the officer made numerous errors and ask me to order another officer to reconsider their application. I agree that the officer erred and will grant this application for judicial review.

[4] While the applicants presented numerous grounds for judicial review, I will confine my analysis to the one I found most persuasive - whether the officer's treatment of the evidence supporting the applicants' establishment in Canada was reasonable.

II. Analysis

(a) The officer's analysis of establishment

[5] The officer noted that the applicants have been in Canada for more than 10 years. However, he also observed that for half of that time the applicants had been the subject of an arrest warrant.

This led the officer to conclude that the applicants “would not hesitate to disregard Canadian laws to stay in Canada”.

[6] The officer then considered Mr. Fidel Baeza’s work history, which included steady employment as a meat packer and painter over the years. The officer noted, however, that there were minor discrepancies between the time frames when Mr. Fidel Baeza said he worked for certain employers as indicated on the H&C application and two letters of reference dating back to 2001 and 2002. There were no discrepancies in the more recent documentation.

[7] Mr. Fidel Baeza also provided tax returns as evidence of employment, but the officer noted that he had not filed T4 slips as further corroborating evidence. In addition, Mr. Fidel Baeza had provided work permits for various periods of time, but not covering the entire time the applicants had been in Canada.

[8] On the basis of the evidence before him, the officer posited two possibilities: (1) that Mr. Fidel Baeza had not been employed during the relevant time frame, meaning that he had failed to show financial independence, or (2) that he had been working illegally, further proof of his disregard for Canadian laws.

[9] In conclusion, the officer found that the applicants had not shown that they are willing to abide by Canadian laws and, therefore, they had not demonstrated that they have established themselves in Canada. Accordingly, leaving Canada would not cause them unusual, undeserved or

disproportionate hardship.

(b) Was the officer's treatment of the evidence reasonable?

[10] I have concerns about two aspects of the officer's analysis:

- (i) The applicants' unwillingness to comply with Canadian laws;
- (ii) Mr. Fidel Baeza's employment history.

[11] As the two areas overlap, I will deal with them together.

[12] In my view, the officer jumped to a conclusion about the applicants' unwillingness to be law-abiding members of Canadian society based on the fact that they had failed to attend an interview in 2002. While this may be a valid consideration in terms of the exercise of discretion in an H&C application, there was ample evidence before the officer that the applicants had been in regular contact with immigration authorities over the years. Clearly, they were not evading detection. They were trying to regularize their immigration status. In my view, the officer's conclusion that the missed interview represented an overall attitude of contempt for Canadian law on the applicant's part is not supported by the evidence.

[13] The officer's characterization of the applicants was seemingly bolstered by his review of Mr. Fidel Baeza's employment record. The officer suggested that Mr. Baeza was either lying about

his work experience or, once again, had failed to respect Canadian law by working sometimes without a permit.

[14] The officer was concerned that the information provided about periods of time spent working for particular employers in 2001 and 2002 was inconsistent. In fact, the time periods in the record are consistent, except in an update provided by the applicants in 2008. A clerical error seems to have been made. This minor discrepancy did not justify the officer's speculation that Mr. Baeza might be lying about his employment history.

[15] With respect to the officer's concern about the absence of corroborating T4 slips, I believe it was incumbent on the officer to convey his concern to the applicants and provide them an opportunity to submit further evidence before concluding that they might be lying: *Ahmed v. Canada (Solicitor General)*, 2005 FC 1111.

[16] The officer also felt that, if Mr. Fidel Baeza had worked during periods of time when he did not have a work permit, this was further evidence of disrespect for Canadian law. Again, I do not believe this was a reasonable inference. To prove that they had established themselves in Canada, the applicants had to show financial independence. It would not be fair to use evidence of steady employment against them simply because work permits did not cover the entire period of their time in Canada: *Lau v. Minister of Employment and Immigration*, [1984] 1 F.C. 434 (C.A).

[17] I note that the guidelines relating to the issue of establishment (Operations Manual, 1P5) indicate that officers should consider the following questions:

- Does the applicant have a history of stable employment?
- Is there a pattern of sound financial management?
- Has the applicant integrated into the community through involvement in community organizations, voluntary services or other activities?
- Has the applicant undertaken any professional, linguistic or other study that shows integration into Canadian society?
- Do the applicant and family members have a good civil record in Canada (e.g., no interventions by police or other authorities, child or spouse abuse, criminal charges).

[18] The guidelines do not refer to relatively minor transgressions, such as missing an interview or working without a permit.

[19] In my view, therefore, the officer's conclusion that the applicants had not established themselves in Canada was unreasonable in light of the evidence before him, and out of keeping the guidelines.

III. Conclusion and Disposition

[20] I find that the officer's conclusion on the issue of establishment was unreasonable. In turn, this rendered his conclusion that the applicants were not entitled to humanitarian and compassionate

relief unreasonable. Accordingly, I must grant this application for judicial review and order another officer to reconsider the applicants' application. No question of general importance arises.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed. The matter is referred back to the Board for a new hearing before a different panel;
2. No question of general importance is stated.

“James W. O’Reilly”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1194-09

STYLE OF CAUSE: BAEZA, ET AL. v. MCI

PLACE OF HEARING: Toronto, ON.

DATE OF HEARING: January 12, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT:** O'REILLY J.

DATED: April 9, 2010

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