

Date: 20090304

Docket: IMM-2072-08

Citation: 2009 FC 229

Ottawa, Ontario, March 4, 2009

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

EULER PERNAS HERNANDEZ

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This is the judicial review of a decision by the IRB to deny the Applicant's claim for refugee protection. The only substantive issue in this judicial review is the legal effect of the Immigration and Refugee Board's (IRB) failure to address whether the Applicant paid a bribe to leave Cuba.

II. BACKGROUND

[2] The Applicant, a Cuban national, claimed that he feared persecution because he had accumulated wealth through the tips he received while working at a hotel.

[3] In February 2006, he was fired from his hotel job because of improper use of a computer in that he was searching for foreign work.

[4] The Applicant, while completing the paperwork to take up a new job in Spain, was invited to visit a friend in Germany. He claims that he had to bribe an official to obtain his security clearance which, along with an exit visa, was necessary to leave Cuba.

[5] While in Germany the Applicant obtained a Canadian visitor's visa. He claimed that he decided to seek refugee status while on the flight to Cuba with a layover in Canada.

[6] The IRB found that the Applicant had travelled with a valid exit visa and had now overstayed his visa by remaining in Canada. The IRB relied on the decision in *Valentin v. Canada (Minister of Employment and Immigration)*, [1991] 3 F.C. 390 (F.C.A.), wherein the Court of Appeal held that persons who overstay an exit visa, thus committing an offence in their home country, cannot make a refugee claim by having created a fear of persecution.

[7] The IRB dismissed the other aspects of the refugee claim, which were based on alleged political activities, noting that the Applicant had been able to secure lucrative employment despite his alleged political activities.

III. ANALYSIS

[8] This judicial review is largely fact driven; however the alleged error is the failure to consider a material fact, or alternatively the inadequate consideration thereof. In the post-*Dunsmuir* era (*Dunsmuir v. New Brunswick*, 2008 SCC 9), the first error is one of law and is subject to the correctness standard of review. The alternative is a matter of mixed law and fact with the contextual factors indicating a wide range of reasonable alternatives. For purposes of alternate determination of this judicial review, the application of either test leads to the same result.

[9] The IRB misapplied *Valentin*, above, in this case. That decision bars self-induced refugee status. It starts from the premise that an applicant has a valid exit visa. It then bars the applicant from overstaying the visa and relying on the self-created overstay as a grounds of persecution.

[10] In the present case the IRB did not consider the validity of the exit visa and the circumstances under which it was obtained. One cannot obtain an exit visa for Cuba without a security clearance. The Applicant claimed that he had to bribe an official to obtain the clearance. If true, that act calls the validity of the exit visa into question.

[11] If the Applicant was required to bribe an official for the security clearance, it begs the question as to the reason he had to do so.

[12] The IRB stated “there is no issue in this claim of an illegal exit from Cuba”. This statement must be juxtaposed to the Applicant’s PIF narrative where he raises that issue. It is an issue which goes to the core of the refugee claim.

[13] Therefore, the IRB either failed to consider critical evidence going to the core of the refugee claim or gave inadequate consideration of that evidence and reached an unreasonable conclusion on this material point.

IV. CONCLUSION

[14] This judicial review will be granted, the IRB’s decision quashed, and the refugee claim remitted for a new determination by a differently constituted panel. There is no question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is granted, the Immigration and Refugee Board's decision is quashed, and the refugee claim is to be remitted for a new determination by a differently constituted panel.

“Michael L. Phelan”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2072-08

STYLE OF CAUSE: EULER PERNAS HERNANDEZ

and

THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: November 13, 2008

**REASONS FOR JUDGMENT
AND JUDGMENT:** Phelan J.

DATED: March 4, 2009

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