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Baker Revisited 2007

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A landmark case in Canadian administrative law, *Baker* set new standards for the review of administrative discretion and the content of the duty of procedural fairness. *Baker's* stipulations regarding procedural fairness, the duty to give reasons, and the requirement for decision makers to be alive to the best interests of children gave many Canadians a sense of hope that all immigrants seeking legal status—including those with Canadian-born children—would at least receive a fair consideration of their cases before being removed from Canada. Unfortunately, *Baker* created expectations that have not been fulfilled. The Supreme Court of Canada's failure to address the racism permeating *Baker* is symptomatic of the larger problem of Canadian society's ongoing failure to come to terms with the reality of systemic anti-Black discrimination. Black people cannot rely on the courts alone to put an end to systemic discrimination. The solution to this challenge may ultimately be political.

Keywords: Baker v. Canada*; Canadian Immigration Act; immigration; deportation; humanitarian and compassionate grounds (H&C)*

It is fitting to revisit the *Baker* case in this 200th anniversary of the British Abolition of the Slave Trade (*Baker v. Canada,* 1999). By any measure, *Baker* was a landmark case in Canadian administrative law. It set a new standard for the review of administrative discretion and the content of the duty of procedural fairness. Though the case left some significant unresolved issues, *Baker*'s pronouncements on the requirements of procedural fairness, the duty to give reasons, and the requirement of decision makers to be alive to the best interests of children gave us a sense of hope that all immigrants seeking legal status—including those with Canadian-born children—would at least receive a fair consideration of their cases before being subject to removal from Canada. Unfortunately, *Baker* created expectations that have not been fulfilled due to active resistance by immigration authorities and some lower courts, all of which has significantly limited its scope and effect.

The case concerned Mavis Baker, a Black Jamaican single mother of four Canadian-born children whose application to remain in Canada on humanitarian and compassionate (H&C) grounds pursuant to what was then Section 114 of the Immigration Act was refused by immigration officer

George Lorenz. Ms. Baker was a psychiatric survivor who, having fallen victim to postpartum depression, suffered from paranoid schizophrenia. In coming to Canada to seek a better life, she had left behind in Jamaica four adult children, none of whom was in a position to assist her were she to be removed from Canada along with her four Canadian-born children. Prior to the onset of her mental illness in Canada, she had managed to support herself and family for several years working as a domestic. In denying her H&C application, the officer stated in his file notes (original text verbatim),

> This case is a catastrophy [*sic.*] It is also an indictment of our "system" that the client came as a visitor in Aug. '81, was not ordered deported until Dec. '92 and in APRIL '94 IS STILL HERE! [*sic*].
>
> The PC is a paranoid schizophrenic and on welfare. She has no qualifications other than as a domestic. She has FOUR CHILDREN IN JAMAICA AND OTHER FOUR BORN HERE. She will, of course, be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C factors other than her FOUR CANADIAN BORN CHILDREN. Do we let her stay because of that? I am of the opinion that Canada can no longer afford this type of generosity. However, because of the circumstances involved, there is a potential for adverse publicity. I recommend refusal but you may wish to clear this with someone at Region. (*Baker v. Canada,* 1999, p. 828)

As a Black Canadian-born lawyer of West Indian heritage, I found the officer's comments offensive. It was his arrogant, insulting tone that gave me the incentive and wherewithal to pursue the appeal of his decision for six years through all levels of court to the Supreme Court of Canada.

Ms. Baker's plight was symptomatic of a larger problem of mass deportations of immigrants seeking status in Canada, including immigrants with Canadian-born children—many such deportations being carried out without due process and contrary to Canada's international obligations under the Convention on the Rights of the Child. A large proportion of these immigrant families are Black. Ms. Baker's migration to Canada was part of a larger scale historical migration of Black people from the West Indies, from the "colonies" to the metropole to escape the endemic poverty engendered by the legacy of colonialism and slavery.

Prior to the release of the *Baker* decision, immigration officers were not required to give reasons when refusing H&C applications, despite the obvious significant adverse impact that such decisions had on the applicants. That impact became exacerbated in the cases of H&C applicants who were parents of Canadian-born children. In the event of an H&C refusal, parents would be forced either to leave their children behind in

Canada in institutional care or to uproot them from Canada and take them to a foreign land where their parents often lacked not only the supports available in Canada but also any meaningful economic prospect. Because there was no automatic right of appeal of such H&C decisions, the only recourse open was to seek leave to obtain judicial review of the Minister of Immigration's decision to refuse Mavis Baker's H&C application. As Federal Court jurisprudence precluded children from having any standing to challenge decisions to deport their parents, the children had no option but to rely wholly on their parents to seek judicial review of the H&C decision. And, because the immigration officers were not required to give reasons, their decisions were often shielded from judicial review by higher courts. As the standard of review for such H&C refusals was the very deferential *patent unreasonableness*, attempts to obtain judicial review were usually futile.[1]

Baker was the first time that the Supreme Court of Canada intervened substantively to address some of these issues. The Court outlined a system for evaluating the content of the duty of procedural fairness in which international human rights law was to be used as a reference point for interpreting and applying domestic law. The criteria required public officials to exercise their discretion in a way consistent with international laws and conventions to which Canada was a signatory and to give reasons for their decision. Where children were affected by such H&C decisions, the Court's guidelines demanded that immigration officers be alive and sensitive to the best interests of the children in accordance with the Convention on the Rights of the Child. It also confirmed a presumption that domestic laws, including the Canadian Charter of Rights and Freedoms (1982), were in compliance with international law (*Baker v. Canada,* 1999, para. 70). *Baker* raised the standard of review for such decisions from *patent unreasonableness* to *reasonableness simpliciter.*

Although from my own practitioner's vantage point, Madame Justice L'Heureux-Dube, the presiding justice in the case, is to be applauded for her courage in obtaining a unanimous consensus in this decision. *Baker* nevertheless left some important issues unresolved:

1. The Court failed to deal with the issue of racism in denying standing both to the African Canadian Legal Clinic and the Congress of Black Women to intervene on the issue of anti-Black racism, and the justices were conspicuously silent about the obvious racial animus of hostility that pervaded the immigration officer's decision.
2. Ms. Baker's arguments in respect of the lack of effective remedy in the leave provisions of the Federal Court Act for applicants seeking to appeal an H&C refusal were not addressed.

3. Under Federal Court jurisprudence, children still do not have standing to challenge administrative decisions regarding the removal of their parents from Canada. *Baker* failed to address the issue of whether the deportation of a child's parent engages the child's Section 7 rights under the Charter.[2] Paradoxically, Ms. Baker's Canadian children were systematically denied standing in the case even though one of the main issues in the case was the consideration of the best interests of children in the exercise of discretion.

Despite the unresolved issues, many of the Canadian public hoped that the blueprint for fairness in the exercise of administrative discretion outlined by *Baker* would help to ensure that all immigrants seeking legal status in Canada would receive a fair consideration of their cases. Such a fair consideration would include the right and opportunity to make an H&C application and have it duly considered in accordance with the principles of *Baker* prior to their being removed from Canada.

Unfortunately, this was not to be the case. Before the ink was dry on the *Baker* judgment, Canadian immigration authorities routinely and aggressively resumed removing immigrants without status from Canada—whether they had H&C applications pending and whether there were Canadian children involved. Immigration authorities attempted to justify this action on the basis that unlike officers who review H&C applications, "removals officers" have a different mandate, that is, a mandate to remove individuals as soon as reasonably practicable.

Consequently, the only legal recourse for families whose removal was sought prior to disposition of an outstanding H&C application, was

1. to request that removals officers first defer their removal pending the final disposition of the H&C application and then
2. to seek a judicial review of the removals officer's failure to defer their removal.

Regrettably, since *Baker*, the Federal Court has taken a somewhat hands-off approach and held that the standard of review of a removals officer's discretion in these circumstances—whether children are affected by the removals officer's exercise of discretion—is *patent unreasonableness*. As a result, hundreds of families are being deported and removed from Canada without ever receiving a consideration of their cases in accordance with the requirements of *Baker* and prior to their having had an opportunity to seek relief from the Federal Court. This result is clearly contrary to the letter and spirit of *Baker* and, lamentably, has had the full support of Federal Court jurisprudence.

Appeal to the Federal Court is not automatic; permission or leave to appeal is either granted—or not—by the Court. For Mavis Baker and her children, the Federal Court's existing leave-to-appeal provisions posed certain problems, and it had been the hope that the Supreme Court's decision would correct these deficiencies. For example, the terms provided no standing to children so as to allow them to seek the judicial review of discretionary decisions to remove their parents from Canada. Because the *Baker* decision did not address these Federal Court deficiencies, some families were now forced, alternatively, to try to seek recourse in the provincial superior courts, relying on the Superior Court's historic inherent special *parens patriae* jurisdiction to intervene in situations of urgency to protect children.[3]

For example, in the illustrative case of *Francis v. Canada* (1999), the Provincial Superior Court did intervene to confer constitutional protection of the right of children to reside in Canada with their parents. The Court stayed permanently the deportation of the parent, and the Department of Justice appealed.

Unfortunately, the Provincial Appellate Court subsequently ruled that this was an inappropriate use of the Superior Court's *parens patriae* jurisdiction. The provincial Appellate Court referred the matter back to the Federal Court on the basis that the matter was primarily an immigration matter for which the appropriate forum was the Federal Court. The Appellate Court however did retain jurisdiction over the matter pending the conclusion of the family's H&C application, out of the Court's expressed concern that unless it intervened in this limited way, immigration authorities would remove the family before they could get the matter into Federal Court. In this case, the family, who were Black, ultimately received landed immigrant status.

Not so, however, in the case of *Antonio v. Canada* (1999), where the parents were ultimately deported and forced to leave their young children behind with other family members. In that particular case, immigration officers actually broke into my inner office, arrested my Filipino client while we were in the midst of a consultation, and took her directly to the detention facility without even allowing her to see about her Canadian-born children. Given such unprecedented conduct by immigration officials, one may reasonably query to what extent such extraordinary action might not constitute a retaliation for the victory obtained in *Baker*, for which I was the lawyer of record.

Though the federal immigration legislation was reformed after *Baker*, the Immigration and Refugee Protection Act has retained the very same leave provisions that Mavis Baker had sought to have the Supreme Court strike down.

As a further indication of the degree of ongoing resistance by some lower courts to *Baker*, consider the recent case of *Carmelita Haynes and the Minister of Public Safety and Emergency Preparedness* (2007). In that case, a Black woman from the Caribbean island of St. Vincent, who had worked for several years continuously in Canada as a domestic and who had not had any recourse to social assistance, was ordered deported. After this first deportation, she subsequently returned to Canada several months later, fleeing domestic violence, and she resumed her domestic work. She suffered postpartum psychosis after the birth of her child in Canada and became schizophrenic, requiring medication not available to her in her country. She was also the primary caregiver for her 2-year-old child and had no criminal record. Immigration officials issued a second deportation order against her, and Canadian immigration authorities then sought to remove her from Canada, even though a decision on her H&C application had not yet been issued. When the removals officer refused her request for a deferral of removal pending final disposition of her H&C application, she applied to the Federal Court for review of the officer's exercise of discretion and brought a motion for a stay of removal.

In denying her request for a stay of removal, the Court held that as she had not disclosed that she had been ordered deported on a previous entry to Canada,

> the Court cannot find that the balance of convenience favours the granting of a stay of removal in her favour over the interests of the Respondent and of the Canadian public in general, notwithstanding that her removal may entail substantial risk of irreparable for herself and her infant child. (*Carmelita Haynes and the Minister of Public Safety and Emergency,* 2007)

The Court did not articulate what interests of the respondent and public necessitated removal of the mother from Canada prior to her receipt of the decision regarding her H&C application in accordance with the requirements of *Baker*.

Despite the Court's finding that Ms. Haynes's removal might entail substantial risk of irreparable harm for herself and her infant child, the applicant's motion for stay was dismissed, and she was scheduled for removal from Canada. The result in this case is clearly contrary to the letter and spirit of *Baker*.

As laudable as *Baker's* pronouncements are about the content of procedural fairness in administrative decision making, the Supreme Court's failure to address the issue of racism is symptomatic of the larger problem of the continuing failure of Canadian society to come to terms with the reality of systemic anti-Black discrimination.

Despite the Court's statement that discriminatory decision making would not be tolerated, as Aiken and Scott (2000) have so rightly observed,

> Somewhat striking in this aspect of the judgment, however, is the absence of any explicit reference to the social reality of racism and the extent to which Ms. Baker and her children were victims of racism—on the part of the individual officer as well as in a wider system which continues to operate on exclusionary principles, despite the formal eradication of racist selection criteria from the *Act*. As Carol Aylward has observed, "law in all its manifestations—in substance . . . in procedure and in interpretation—has been and continues to be an instrument that contributes to and maintains racial inequalities, divisions and tensions . . . " in Canada. The facts presented to the court in *Baker* provided an ideal context to conceptualize racism as a defining feature of the bias manifested in the case and to offer a more pointed rejection of decisions tainted by racism. The judgment's failure to articulate racism—and its intersection with the other stereotypes attributed to the Baker family (concerning gender, number of children, economic and mental health status)—as the source of the bias may have been a function of the way the arguments were framed by the litigants themselves. In any event, as racism was swept under the proverbial judicial rug, the Court refused to confront a critical problem that continues to disadvantage H&C applicants and their children at the first instance. (pp. 236-237)

The ongoing resistance to *Baker* by immigration authorities and some lower courts in Canada is unacceptable because it both exacerbates the adverse impact of systemic racial discrimination and perpetuates a culture of denial. Could it be that the Court in *Baker* only went as far as it thought it needed to go to avert international embarrassment? Regrettably, it would appear that persons of African descent in Canada cannot rely on the Courts alone to put an end to systemic discrimination and achieve social justice. The solution to this challenge may ultimately lie in the political arena.

Notes

1. *Patent unreasonableness* is the most deferential of the three standards of review applied by Canadian courts in judicial review of administrative decision making. The other two standards are *correctness*, the least deferential, and *reasonableness simpliciter,* the intermediate standard that falls midway between *correctness* and *patent unreasonableness*.

2. "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice" (Canadian Charter of Rights and Freedoms, 1982, Section 7).

3. As a statutory court, the Federal Court lacks *parens patriae* jurisdiction.

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Roger Rowe is a private practice sole practitioner in the Greater Toronto Metropolitan area. He has appeared before all levels of court including the Supreme Court of Canada where he successfully argued the landmark case of *Baker v. Canada (Minister of Citizenship and Immigration),* a case that established new standards for the duty of procedural fairness in administrative law. A founding member and past president of the Canadian Association of Black Lawyers, he is actively involved in professional and community organizations and has received a number of awards and citations.