Date: 20070914

Docket: IMM-3745-06

Citation: 2007 FC 902

BETWEEN:

MOHAMMED SAIYAD ALI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) for judicial review of a decision by an immigration officer, dated June 5, 2006, which denied the applicant's application for permanent residence as a member of the Spouse in Canada Class.

[2] The applicant seeks an order setting aside the officer's decision and remitting the matter for redetermination by a different officer.

Background

[3] The applicant, Mohammed Saiyad Ali, is a citizen of Fiji. He entered Canada in May 1996 with a student visa. He remained in Canada until February 1999, when he returned to Fiji. The applicant married his first Canadian wife in April 1998, and she sponsored his first application for permanent residence. He also applied for an exemption from the requirement to apply for permanent residence from outside Canada on humanitarian and compassionate (H&C) grounds. This application was abandoned a few months later when the applicant's wife withdrew her sponsorship. They were legally divorced in May 2000.

[4] The applicant went to the United States as a visitor and remained there from November 1999 until July 2000. He married his second wife on May 30, 2000. The applicant was unable to extend his stay in the United States and did not wish to return to Fiji. He alleged a fear of deteriorating country conditions, as an Indo-Fijian. He decided to enter Canada illegally in July 2000 and did not report to a port of entry upon doing so.

[5] The applicant filed a second application for permanent residence in July 2000, which was sponsored by his second wife. He also applied for an exemption on H&C grounds. This application was refused in October 2001. The applicant submitted a refugee claim in February 2001, which was denied in March 2003. Leave to seek judicial review of the refugee decision was denied in August 2003. The applicant divorced his second wife in October 2003.

[6] The applicant applied for a pre-removal risk assessment (PRRA) in October 2003, and it was denied in January 2004. Leave to seek judicial review of the PRRA decision was denied. The applicant married his third wife in November 2003. He submitted a third application for permanent residence which was sponsored by his third wife. He also applied for an exemption on H&C grounds. This application was denied in January 2005. The applicant was granted leave to seek judicial review of this decision; however, the application was ultimately dismissed.

[7] On February 18, 2005, the Minister of Citizenship and Immigration (the Minister) established a policy which facilitated the application process for permanent residence applicants living with their spouses or common-law partners in Canada (the Spousal Policy). Pursuant to the policy, applicants seeking permanent residence as members of the Spouse in Canada Class were no longer required to have temporary immigration status. The applicant filed an application under this policy on May 5, 2006, and it was denied on June 5, 2006. This is the judicial review of the officer's decision to deny the applicant's application for permanent residence as a member of the Spouse in Canada Class.

Officer's Reasons

[8] The applicant had not shown that he met the admissibility requirement under subparagraph 72(1)(e)(i) of the *Immigration and Refugee Protection Regulations*, S.O.R./2002-227 (the Regulations) because he was inadmissible under paragraph 41(a) of IRPA, whereby a foreign

national is inadmissible for failing to comply with IRPA. The information on file showed that the following requirements were not met:

1. Subsection 18(1) of IRPA: a person seeking to enter Canada must appear for an examination to determine whether he has a right to enter Canada or is or may become authorized to enter and remain in Canada.

2. Subsection 27(1) of the Regulations: for the purpose of the examination required by subsection 18(1) of IRPA, a person must appear without delay before an officer at a port of entry.

3. Subsection 27(2) of the Regulations: a person seeking to enter Canada at a place other than a port of entry must appear without delay for examination at the port of entry that is nearest to that place.

[9] The applicant or his sponsor provided evidence that the applicant was inadmissible to Canada and did not meet the requirements of the Spousal Policy. The application for permanent residence as a member of the spouse in Canada class was therefore refused. The officer's "report to file", dated June 5, 2006, set out the applicant's immigration and criminal history, and summarized counsel's submissions. The report stated the following at page 5:

> Mr. Ali does not have proof of his last entry to Canada. It appears that he entered without a required visa, that he entered at a place other than a port of entry, and that he failed to report forthwith for examination.
>
> From his declaration of 01 Dec. 2003 (para. 15), "Since I did not have any other option, I decided to enter Canada illegally. I arrived in British Columbia, Canada on July 1, 2000."
>
> …

> A CIC officer's handwritten notes, apparently made on or about 19 Feb. 2001, in connection with his interview of Mr. Ali, include this. "Paid a person to help him enter Canada. Entered by crossing a ditch. Did not report to Imm or Customs. Did you know this was wrong. Yes. Why did you enter this way. I had no choice as there is a [military coup] in my country. When did you enter. Last summer some time 2 July 2000. Between 02 July 2000 and 19 Feb 2001 did you report your presence to an Imm officer. Yes because he has submitted an AFL on 28 July 2000."
>
> …
>
> The Spouse or Common-Law Partner in Canada Class requires applicants to have temporary resident status (R124(b)). […]
>
> The Minister's public policy of 18 Feb. 2005 exempts Mr. Ali from having to meet this requirement. However, other inadmissibility grounds of IRPA continue to apply. Criminal and security prohibitions are not waived under this public policy.
>
> …
>
> In my opinion, Mr. Ali is inadmissible under A41(a) because, on entry to Canada,
>
> - he failed to appear for examination
> - he failed to appear without delay before an officer at a port of entry
> - he failed to appear without delay for examination at the port of entry nearest his place of entry to Canada.

Issues

[10] The applicant submitted the following issues for consideration:

1. Did the officer err in determining that the applicant did not qualify under the Spousal Policy because he entered Canada without authorization and without appearing for examination at a port of entry?

2. Did the applicant apply under subsection 25(1) of IRPA?

3. Did the officer fetter his discretion by adhering to the Spousal Policy, which restricted him from considering whether the H&C factors outweighed the applicant's inadmissibility?

Applicant's Submissions

[11] The applicant submitted that the Minister's announcement of the Spousal Policy, dated February 18, 2005, did not set out the types of inadmissibility that would be excused. The announcement indicated that spouses in Canada, regardless of their immigration status, would be able to apply for permanent residence from within Canada under the Spousal Policy. Operation Bulletin 018 (OB 018) set out the infractions that would be forgiven under the Spousal Policy. The effect of the policy was to exempt applicants from the requirement under paragraph 124(b) of the Regulations to be "in status", and the requirements under subsection 21(1) of IRPA and subparagraph 72(1)(e)(i) of the Regulations not to be inadmissible due to a lack of status.

[12] Under the Spousal Policy, persons with a "lack of status" had: (1) overstayed a visa, visitor record, work or student permit; (2) worked or studied without authorization under IRPA; (3) entered Canada without a visa or other documents required under the Regulations; or (4) entered Canada without a valid passport or travel document. OB 018 also set out which infractions rendered a person ineligible under the Spousal Policy: (1) failure to obtain permission to enter Canada after being deported; (2) entering Canada with a fraudulently or improperly obtained passport, travel

document or visa, and using the document for misrepresentation under IRPA; and (3) persons under removal orders or facing enforcement proceedings for reasons other than the above noted lack of status reasons.

[13] The applicant submitted that the fact that he had entered Canada without reporting for examination was not a form of inadmissibility rendering him ineligible. It was submitted that the officer erred in determining that the applicant did not meet the requirements of the Spousal Policy due to the nature of his entry to Canada.

[14] The applicant submitted that applications under the Spousal Policy were equivalent to H&C applications made pursuant to subsection 25(1) of IRPA. It was noted that applicants under the Spousal Policy who were inadmissible on other grounds were not entitled to a reassessment on H&C grounds. On June 7, 2006, the Minister issued a policy statement which indicated that officers assessing H&C applications should consider exempting any applicable criteria of IRPA, including inadmissibilities, when the foreign national has requested such an exemption, or it is clear that they are seeking an exemption. It was submitted that the officer was under an obligation to consider whether the H&C factors in the applicant's case outweighed the inadmissibility factors not covered by the Spousal Policy.

[15] The applicant submitted that the officer fettered his discretion to weigh inadmissibility against H&C factors, by following the Spousal Policy. It was submitted that the Spousal Policy fettered the discretion of officers to provide relief under subsection 25(1) of IRPA from any

requirement under IRPA. It was submitted that the timing of the H&C policy statement (June 2006) was not relevant, as the wording of section 25 of IRPA had not changed and the phrase "any applicable criteria or obligation" was wide enough to include inadmissibility under subsection 18(1) of IRPA, and subsections 27(1) and (2) of the Regulations.

[16] The applicant acknowledged the respondent's right to establish guidelines under section 25 of IRPA, but submitted that they could not be rigid requirements (see *Yhap* v. *Canada (Minister of Employment and Immigration)*, [1990] 1 F.C. 722, (1990) 34 F.T.R. 26 (T.D.)). It was submitted that the Spousal Policy left officers with no discretion to consider H&C factors that might overcome inadmissibility. The applicant submitted that OB 018 imposed a policy restriction upon section 25 of IRPA, which was not contained in IRPA or the Regulations. It was submitted that the officer committed a jurisdictional error in relying upon the restriction to deny the application (see *Hui* v. *Canada (Minister of Employment and Immigration)*, [1986] 2 F.C. 96, (1986) 65 N.R. 69 (F.C.A.)); *Cabalfin* v. *Canada (Minister of Employment and Immigration)*, [1991] 2 F.C. 235, (1990) 40 F.T.R. 147 (T.D.)).

Respondent's Submissions

[17] Section 25 of IRPA states that the Minister may waive requirements for immigration to Canada. Acting pursuant to section 25 of IRPA, the Minister waived the requirement that applicants for permanent residence as members of the Spouse in Canada Class be "in status". It was submitted that the Spousal Policy did not exempt applicants from any requirements for membership in the

Spouse in Canada Class, other than those listed. In particular, the Spousal Policy did not exempt applicants from the requirement that they not be inadmissible for having failed to appear for examination at a port of entry before entering Canada.

[18] Section 25 also permits applicants to request exemptions from any requirement under IRPA or the Regulations. Upon receipt of such a request, the Minister must determine whether an exemption is warranted. The applicant did not make an H&C request in the context of his Spouse in Canada application, and the officer was therefore not under an obligation to consider whether an exemption on H&C grounds was warranted (see *Phan* v. *Canada (Minister of Citizenship and Immigration)* (2005), 137 A.C.W.S. (3d) 407, 2005 FC 184).

[19] The applicant acknowledged that he entered Canada illegally, without reporting at a port of entry. It was submitted that on his own account, he was inadmissible under paragraph 41(a) of IRPA. The respondent submitted that the Spousal Policy did not exempt the applicant from the requirement that he appear at a port of entry upon entry to Canada. The applicant did not request an exemption from this requirement, and it was therefore open to the officer to find that he did not meet the requirements of the Spouse in Canada Class.

Applicant's Reply

[20] The applicant submitted that section 25 of IRPA did not require one to expressly request an exemption from the application of certain criteria. It was submitted that the applicant's application

under the Spousal Policy was an application under section 25 of IRPA. Therefore, a request was made to the Minister to determine whether an exemption was warranted. The applicant submitted that *Phan* above, was distinguishable from his case, as it dealt with a sponsor who did not make a request to sponsor his child on H&C grounds. The applicant submitted that his application for permanent residence was not a Spouse in Canada Class application, but one under the Spousal Policy created under section 25 of IRPA. It was submitted that he was therefore entitled to a determination regarding whether the H&C factors in his case outweighed his inadmissibility.

Respondent's Further Submissions

[21] The respondent submitted that the applicant's position was premised upon a misconception of the Spousal Policy. The respondent noted the applicant's presumption that the Spousal Policy created a "Spousal Policy application", which was a request under section 25 of IRPA for an exemption from any immigration requirements. The respondent submitted that it was only when an applicant for permanent residence made an H&C request that the officer was required to weigh the H&C factors in the case in order to determine whether to waive certain criteria.

[22] The respondent submitted that the Spousal Policy did not create a "Spousal Policy application", nor were Spouse in Canada Class applications made under the Spousal Policy tantamount to H&C requests. It was submitted that the Spousal Policy granted an exemption from certain criteria for membership in the Spouse in Canada Class, namely, inadmissibility for lack of status. It was submitted that the applicant's inadmissibility was not within the policy definition of

"lack of status" and that he was not covered by the exemption. Therefore, his application was properly refused.

[23] The respondent noted two problematic issues which resulted from the applicant's misconception of the Spousal Policy:

(1) if every Spouse in Canada Class application which engaged the Spousal Policy were an H&C request, officers would have to re-weigh the H&C factors and substitute their discretion for that of the Minister (i.e. officers could refuse applicants who met the terms of the Minister's exemption/Spousal Policy); and

(2) if an officer determining a Spouse in Canada Class application which engaged the Spousal Policy must consider whether to waive all inadmissibilities under IRPA, it would be open for officers to waive all criteria under the spouse in Canada class, including the marriage requirement.

Analysis and Decision

Standard of Review

[24] The applicant's application for permanent residence as a member of the Spouse in Canada Class was refused because he had not complied with certain statutory requirements. In *Apaza* v. *Canada (Minister of Citizenship and Immigration)* (2006), 146 A.C.W.S. (3d) 887, 2006 FC 313, at

paragraphs 7 to 11, Justice Heneghan applied the pragmatic and functional approach in order to determine the relevant standard of review:

> The first factor is neutral, since the Act contains neither a privative clause nor a full right of appeal. Judicial review is available, if leave is granted.
>
> Immigration officers continually deal with assessments of applications for permanent residence and the validity of marriages. Their relative expertise is greater than that of the Court and tends to attract greater deference.
>
> The broad purpose of the Act is to regulate the admission of immigrants into Canada and to maintain the security of Canadian society. This involves consideration of many interests which may conflict with each other. Decisions made in a polycentric context tend to attract judicial deference.
>
> The final factor is the nature of the question. Here, the Immigration Officer was required to exercise her discretion and make factual determinations. This discretion is to be informed by the Act and Regulations, and involves an element of statutory interpretation. The application of the statutory and regulatory provisions to the evidence yields a question of mixed law and fact. Such a question is reviewable on the standard of reasonableness *simpliciter*.
>
> On balance, the four factors tend toward according some deference to the decision of the Immigration Officer. I conclude that the applicable standard of review is reasonableness *simpliciter*. This standard was applied by the Supreme Court of Canada in *Baker* v. *Canada (Minister of Citizenship)*, [1999] 2 S.C.R. 817 in respect of a discretionary decision of a visa officer.

I would adopt Justice Heneghan's reasoning with respect to the standard of review and will apply the standard of reasonableness to the officer's decision.

[25] **Issue 1**

Did the officer err in determining that the applicant did not qualify under the Spousal Policy because he entered Canada without authorization and without appearing for examination at a port of entry?

In a press release on February 18, 2005, the Minister of Citizenship and Immigration provided that Spouse in Canada Class applicants were exempted from the requirement that they be in status. This decision was based on public policy considerations as authorized by subsection 25(1) of IRPA.

[26] Subsection 125(b) of the Regulations requires that an applicant under the Spouse or Common-law Partner Class must have temporary residence status in Canada. On September 26, 2005, the Minister's public policy was implemented in Operational Bulletin 018 (OB018). At page 2 of this bulletin, "lack of status" for the purposes of the current public policy only is defined as:

> persons who have overstayed a visa, visitor record, work permit or student permit;
>
> persons who have worked or studied without being authorized to do so under the Act;
>
> persons who have entered Canada without the required visa or other document required under the Regulations;
>
> persons who have entered Canada without a valid passport or travel document (provided valid documents are acquired by the time CIC seeks to grant permanent residence).

[27] OP018 also states at page 2:

> A25 is being used to facilitate the processing of all genuine out-of-status spouses or common-law partners in the *Spouse or Common-law Partner in Canada* class where an undertaking has been submitted. Pending H&C spousal applications with undertakings will also be processed through this class. The effect of the policy is to exempt applicants from the requirement under R124(b) to be in status and the requirements under A21(1) and R72(1)(e)(i) to not be inadmissible due to a lack of status; however, all other requirments of the class apply and applicants will be processed based on guidelines in IP2 and IP8.

One of the other requirements for an applicant in this class is that he or she must not be inadmissible to Canada under section 41 of IRPA.

[28] The applicant came to Canada, not at a border crossing but at another location by simply crossing the border into Canada. Regulation 27(2) states that a person entering Canada, as did the applicant, "must appear without delay for examination at the port of entry nearest to that place". Section 18 of IRPA states that every person seeking to enter Canada must appear for examination to ascertain whether the person has a right to enter Canada or is or may become authorized to enter and remain in Canada. According to the filed evidence, the applicant has never presented himself for examination but rather his presence in Canada became known solely as a result of a CIC enforcement officer's review of a criminal court docket and subsequent immigration detention of the applicant.

[29] The applicant was in violation of the Act and Regulations for failing to appear for examination after entering Canada. The Minister's public policy statement dated February 18, 2005 exempted certain applicants from the requirement to be "in status" in order to apply for permanent

residence as members of the Spouse in Canada Class under the Spousal Policy. The exemptions for lack of status listed in the policy were:

> persons who have overstayed a visa, visitor record, work permit, student permit or temporary resident permit;
>
> persons who have worked or studied without being authorized to do so as prescribed by the Act;
>
> persons who have entered Canada without a visa or other document required by the Regulations; and
>
> persons who have entered Canada without a valid passport or travel document (provided valid documents are acquired by the time CIC seeks to grant permanent residence.

[30] The applicant does not fit within any of these exemptions. The policy was amended on October 6, 2006 to waive the following requirement for applications covered by the policy:

> . . . persons who did not present themselves for examination when initially entering Canada but who did so subsequently.

This amendment would apply to the applicant if it had been in force at the time of his application and if he had presented himself for examination.

[31] I am of the view that the officer did not err in determining that the applicant did not qualify under the Spousal Policy because he entered Canada without authorization and without appearing for examination at a port of entry.

[32] **Issue 2**

Did the applicant apply under subsection 25(1) of IRPA?

I have reviewed the applicant's application and I am of the view that it did not include a request for an exemption on H&C grounds from any criteria under IRPA or the Regulations.

[33] **Issue 3**

Did the officer fetter his discretion by adhering to the Spousal Policy, which restricted him from considering whether the H&C factors outweighed the applicant's inadmissibility?

Since I have concluded that the applicant's Spouse in Canada application was not an H&C application, I find that the officer's determination did not constitute a fettering of discretion. The applicant's three previous permanent residence applications were accompanied by H&C applications. The officer's decision was not unreasonable.

[34] The application for judicial review is therefore dismissed.

[35] The parties will have one week from the date of my decision to submit any proposed serious question of general importance for my consideration for certification and a further one week for any reply.

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

The *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.:

18.(1) Every person seeking to enter Canada must appear for an examination to determine whether that person has a right to enter Canada or is or may become authorized to enter and remain in Canada.	18.(1) Quiconque cherche à entrer au Canada est tenu de se soumettre au contrôle visant à déterminer s'il a le droit d'y entrer ou s'il est autorisé, ou peut l'être, à y entrer et à y séjourner.
25.(1) The Minister shall, upon request of a foreign national who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.	25.(1) Le ministre doit, sur demande d'un étranger interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.
41. A person is inadmissible for failing to comply with this Act (a) in the case of a foreign national, through an act or omission which contravenes, directly or indirectly, a	41. S'agissant de l'étranger, emportent interdiction de territoire pour manquement à la présente loi tout fait — acte ou omission — commis directement ou indirectement en contravention avec la présente

provision of this Act; and . . .	loi et, s'agissant du résident permanent, le manquement à l'obligation de résidence et aux conditions imposées.

The *Immigration and Refugee Protection Regulations*, S.O.R./2002-227:

27.(1) Unless these Regulations provide otherwise, for the purpose of the examination required by subsection 18(1) of the Act, a person must appear without delay before an officer at a port of entry.	27.(1) Sauf disposition contraire du présent règlement, la personne qui cherche à entrer au Canada doit sans délai, pour se soumettre au contrôle prévu au paragraphe 18(1) de la Loi, se présenter à un agent à un point d'entrée.
(2) Unless these Regulations provide otherwise, a person who seeks to enter Canada at a place other than a port of entry must appear without delay for examination at the port of entry that is nearest to that place.	(2) Sauf disposition contraire du présent règlement, si la personne cherche à entrer au Canada à un point autre qu'un point d'entrée, elle doit se présenter au point d'entrée le plus proche.
72.(1) A foreign national in Canada becomes a permanent resident if, following an examination, it is established that	72.(1) L'étranger au Canada devient résident permanent si, à l'issue d'un contrôle, les éléments suivants sont établis :
. . .	. . .
(e) except in the case of a foreign national who has submitted a document accepted under subsection 178(2) or of a member of the protected temporary residents class,	e) sauf dans le cas de l'étranger ayant fourni un document qui a été accepté aux termes du paragraphe 178(2) ou de l'étranger qui fait partie de la catégorie des résidents temporaires protégés:
(i) they and their family members, whether	(i) ni lui ni les membres de sa famille — qu'ils

accompanying or not, are not inadmissible,	l’accompagnent ou non — ne sont interdits de territoire,
. . .	. . .

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3745-06
STYLE OF CAUSE:	MOHAMMED SAIYAD ALI - and - THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	March 28, 2007
REASONS FOR JUDGMENT:	O'KEEFE J.
DATED:	September 14, 2007

APPEARANCES:

Darryl W. Larson	FOR THE APPLICANT
Banafsheh Sokhansanj	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Embarkation Law Group Vancouver, British Columbia	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General	FOR THE RESPONDENT