Federal Court  Cour fédérale

Date: 20111004

Docket: IMM-5764-10

Citation: 2011 FC 1087

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, October 4, 2011

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

MUSTAPHA KHODJA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Preliminary

[1] The applicant acknowledges that he is inadmissible. He therefore cannot obtain permanent residence in the spouse or common-law partner in Canada class.

[2] One of the cornerstones of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), is the requirement that persons who wish to settle in Canada must, prior to their arrival in Canada, submit their application outside Canada and qualify for, and obtain, a permanent residence visa. Section 25 of the IRPA gives the Minister the flexibility to approve deserving cases for processing within Canada. This is clearly meant to be an exceptional remedy, as is made clear by the wording of that provision (*Serda v Canada (Minister of Citizenship and Immigration)*, 2006 FC 356, at paragraph 20).

[3] Given the separation of powers between the three branches of government, public policy considerations are determined by the Minister designated as responsible for the Act in that respect. Only the Minister has the discretionary authority to determine what constitutes public policy; officers cannot extend their scope and the judicial branch can only interpret the law according to the intention of Parliament (*Vidal v Canada (Minister of Employment and Immigration)* (1991), 41 FTR 118, [1991] FCJ No 63 (TD) (QL/Lexis); *Dawkins v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 639, 45 FTR 198 (TD)).

II. Introduction

[4] This is an application for judicial review of the decision by the immigration officer who rejected the application for permanent residence (APR) in Canada which the applicant submitted in the spouse or common-law partner in Canada class.

[5] The immigration officer was of the opinion that the applicant did not meet the definition of a person with a “lack of status” described in the public policy established under subsection 25(1) of

the IRPA to facilitate processing in accordance with the regulations of the spouse or common-law partner in Canada class, Appendix H of the IP 8 Immigration Manual.

[6] Counsel for both parties argued and furthered their respective positions in a very impressive manner, fulfilling their mandates completely.

[7] After a thorough analysis, the immigration officer's decision is reasonable and does not contain any reviewable error.

III. Facts

[8] The applicant is a citizen of Algeria who arrived in Canada in December 2002. He sought refugee protection, but abandoned his claim.

[9] On August 21, 2004, the applicant was deported from Canada.

[10] In Canada, on January 31, 2007, his spouse gave birth to their son, Adam Ryan Khodja, and on November 27, 2009, to Yani Khodja, who are both Canadian citizens.

[11] In February 2007, the applicant apparently came back to Canada and, on February 16, 2007, a certificate refusing authorization to return was issued against him.

[12] In April 2007, the applicant waived filing a pre-removal risk assessment (PRRA) application.

[13] On April 24, 2007, the applicant was again deported from Canada.

[14] In January 2009, the applicant purportedly returned to Canada again and, in March 2009, he filed an APR in the spouse or common-law partner in Canada class.

[15] On August 12, 2009, a negative PRRA decision was rendered against the applicant and the Federal Court refused the application for leave he submitted against this decision.

[16] On September 23, 2010, the immigration officer refused the APR. The applicant is challenging that decision in this application for judicial review before the Federal Court.

[17] On November 30, 2010, the applicant was again deported to Algeria.

IV. Issue

[18] Is the immigration officer's decision to refuse the applicant's APR unreasonable and/or does it contain any reviewable error?

V. Analysis

[19] The applicant submitted an APR in the spouse or common-law in Canada class, but did not submit an application for an exemption on humanitarian and compassionate (H&C) grounds. The officer who considered the APR assessed the applicability of the public policy whereby the condition requiring the applicant to have a legal status in Canada can be disregarded.

[20] Even if the policy is based on subsection 25(1) of the IRPA, the officer did not, on her own initiative, assess the existence of H&C grounds justifying an exemption from the legal status requirement for the applicant.

[21] Because the applicant did not present any evidence of H&C grounds, the Court cannot find that H&C grounds should have been considered in the context of the APR.

Spouse or common-law partner in Canada class

[22] By virtue of subsection 13(1) of the IRPA, "[a] Canadian citizen or permanent resident may, subject to the regulations, sponsor a foreign national who is a member of the family class". This class is established "on the basis of [a foreign national's] relationship as the spouse, common-law partner, child, parent or other prescribed family member of a Canadian citizen or permanent resident" (subsection 12(1) of the IRPA).

[23] The intent of the family class program is to facilitate the reunion in Canada of Canadian citizens and permanent residents with their close relatives and family members. Foreign nationals who apply as members of the "family class" for permanent residence visas are given preferential treatment under Canadian immigration law and policy. For example, their applications are processed, as a matter of policy, on a priority basis (*Sultana v Canada (Minister of Citizenship and Immigration)*, 2009 FC 533, [2010] 1 FCR 175, at paragraph 18).

[24] According to section 124 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (IRPR), three conditions are imposed on applicants who apply for permanent residence in such a class: (1) the applicant must be the spouse or common-law partner of a sponsor and cohabit with that sponsor in Canada; (2) the applicant must have temporary resident status in Canada; and (3) the applicant must be the subject of a sponsorship application.

The applicant submitted an APR in the spouse or common-law partner in Canada class

[25] In this case, it is clearly apparent in the tribunal record that the applicant submitted an APR in the spouse or common-law partner in Canada class.

[26] However, the applicant does not have temporary resident status in Canada.

[27] The following excerpts from the public policy are of interest in this case:

1. Purpose	**1. Objet**
The Minister has established a public policy under subsection 25(1) of the *Immigration and Refugee Protection Act* (*IRPA*), setting the criteria under which spouses and common-law partners of Canadian citizens and permanent residents in Canada who do not have legal immigration status will be assessed for permanent residence. The objective of this policy is to facilitate family reunification and facilitate processing in cases where spouses and common-law partners are already living together in Canada.	Le Ministre a établi une politique d'intérêt public en vertu du paragraphe 25(1) de la *Loi sur l'immigration et la protection des réfugiés* (*LIPR*) dans laquelle il expose les critères d'évaluation de la demande de résidence permanente des personnes qui n'ont pas de statut d'immigration légal et qui sont des époux et des conjoints de fait de citoyens canadiens et de résidents permanents au Canada. L'objectif de cette politique est de faciliter le regroupement familial ainsi que le traitement des cas des époux

	et des conjoints de fait qui vivent déjà ensemble au Canada.
. . .	[...]
3. Policy	**3. Politique**
. . .	[...]
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 class1. 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 requirements of the class apply and applicants will be processed based on guidelines in IP2 and IP8. [Emphasis added.]	Le L25 est utilisé pour faciliter le traitement dans la catégorie des époux ou conjoints de fait au Canada de tous les cas d'époux ou de conjoints de fait authentiques qui sont sans statut et où un engagement a été présenté. Les demandes CH de conjoint, en attente, qui sont assorties d'un engagement seront aussi traitées dans cette catégorie1. L'effet de cette politique est de dispenser le demandeur de l'obligation prévue au *R124b*) d'avoir un statut d'immigration et des exigences prévues au L21(1) et au R72(1)*e*)(i) de ne pas être interdit de territoire pour absence de statut; cependant, toutes les autres exigences de la catégorie s'appliquent et les cas des demandeurs seront traités en fonction des lignes directrices de l'IP2 et de l'IP8. [La Cour souligne].

[28] It is apparent from this excerpt that, in accordance with the public policy, applicants are exempt from the requirement of having a legal status and cannot be inadmissible due to a lack of status. However, all of the other requirements of the class apply.

[29] Legal temporary resident status in Canada is set out in section 5.27 of the IP 8 Immigration Manual:

5.27. Legal temporary resident status in Canada	**5.27. Statut juridique de résident temporaire au Canada**
Under the current Regulations, applicants in this spouse or common-law partner in Canada class must have a valid temporary resident status on the date of application and on the date they receive permanent resident status to be eligible to be members of the class.	En vertu du Règlement actuel, pour que les demandeurs puissent faire partie de la catégorie des époux ou conjoints de fait au Canada, ils doivent détenir un statut de résident temporaire valide à la date de la demande et à la date à laquelle ils obtiennent le statut de résident permanent.
However, under the spousal policy, applicants who lack status as defined under the public policy (see "What is lack of status under the public policy" below) may be granted permanent residence so long as they meet all the other requirements of the class (i.e., they are not inadmissible for reasons other than "lack of status.")	Cependant, dans le cadre de la politique sur les époux, les demandeurs sans statut, conformément à la définition contenue dans cette politique (voir la section intitulée « Qu'entend-on par "personne sans statut" aux fins de la politique d'intérêt public? »), peuvent obtenir la résidence permanente à condition qu'ils répondent à toutes les autres exigences de la catégorie (p. ex. ils ne sont pas interdits de territoire pour des raisons autres que celles liées à l'« absence de statut »).
. . .	[...]
What is "lack of status" under the public policy?	**Qu'entend-on par « personne sans statut » aux fins de la politique d'intérêt public?**
For the purposes of the current public policy, persons with a "lack of status" refers to those in the following situations:	Aux fins de cette politique d'intérêt public, une « personne sans statut » s'entend de celle qui se trouve dans l'une des

situations suivantes :

• persons who have overstayed a visa, visitor record, work permit, student permit or temporary resident permit;

• personne qui dépasse la durée du séjour autorisée par son visa, sa fiche de visiteur, son permis de travail, son permis d'études ou son permis de séjour;

• persons who have worked or studied without being authorized to do so as prescribed by the Act;

• personne qui a travaillé ou étudié sans y être autorisé aux termes de la Loi;

• persons who have entered Canada without a visa or other document required by the Regulations;

• personne qui est entrée au Canada sans le visa ou les autres documents requis aux termes du Règlement;

• 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).

• personne qui est entrée au Canada sans un passeport valide ou un titre de voyage (les documents valides doivent être acquis au moment où CIC accorde la résidence permanente).

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

• personnes qui ne se sont pas présentées à l'examen à leur arrivée au Canada, mais qui s'y sont soumis par la suite.

<u>"Lack of status" does not refer to any other inadmissibilities including, but not limited to:</u>

<u>« Personne sans statut » ne s'entend pas d'une personne qui est interdite de territoire pour toute autre raison, notamment :</u>

<u>• failure to obtain any required permission to enter Canada after being removed</u>;

<u>• ne pas avoir obtenu l'autorisation requise d'entrer au Canada après avoir été renvoyée</u>;

. . .

[...]

[Emphasis added.]

[La Cour souligne].

[30] What therefore emerges from these texts is that, under the public policy, APR applicants in the "spouse or common-law partner in Canada" class who lack status may be granted permanent residence so long as they meet all the other requirements of the class, including the requirement to not be inadmissible for reasons other than lack of status.

[31] The applicant therefore does not meet the requirements of the public policy.

[32] In this case, the applicant is a foreign national who is inadmissible because he was deported from Canada and returned without requesting authorization to return to Canada.

[33] Subsection 52(1) of the IRPA reads as follows:

52. (1) If a removal order has been enforced, the foreign national shall not return to Canada, unless authorized by an officer or in other prescribed circumstances.	**52.** (1) L'exécution de la mesure de renvoi emporte interdiction de revenir au Canada, sauf autorisation de l'agent ou dans les autres cas prévus par règlement.

[34] Subsection 226(1) of the IRPR reads as follows:

226. (1) For the purposes of subsection 52(1) of the Act, and subject to subsection (2), a deportation order obliges the foreign national to obtain a written authorization in order to return to Canada at any time after the deportation order was enforced.	**226.** (1) Pour l'application du paragraphe 52(1) de la Loi, mais sous réserve du paragraphe (2), la mesure d'expulsion oblige l'étranger à obtenir une autorisation écrite pour revenir au Canada à quelque moment que ce soit après l'exécution de la mesure.

[35] The applicant acknowledges that he is inadmissible. He therefore cannot obtain permanent residence in the spouse or common-law partner in Canada class. He nevertheless argues that the

officer who assessed his APR should have assessed the H&C grounds thoroughly. It must therefore be concluded that the officer assessed the applicability of the public policy in accordance with the requirements of the law and the intention of Parliament.

Scope of subsection 25(1) of the IRPA

[36] One of the cornerstones of the IRPA is the requirement that persons who wish to settle in Canada must, prior to their arrival in Canada, submit their application outside Canada and qualify for, and obtain, a permanent residence visa. Section 25 of the IRPA gives the Minister the flexibility to approve deserving cases for processing within Canada. This is clearly meant to be an exceptional remedy, as is made clear by the wording of that provision (*Serda*, above).

Public interest

[37] Given the separation of powers between the three branches of government, public policy considerations are determined by the Minister designated as responsible for the Act in that respect. Only the Minister has the discretionary authority to determine what constitutes public policy; officers cannot extend their scope and the judicial branch can only interpret the law according to the intention of Parliament (*Vidal* and *Dawkins*, above).

H&C grounds and best interests of the child

[38] Further to *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, by the Supreme Court of Canada, the IRPA introduced the legal requirement to consider the best interests of a child directly affected by a decision made in accordance with subsection 25(1) when

assessing the circumstances of a foreign national who is submitting an application pursuant to this subsection.

[39] The Federal Court of Appeal, in *Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125, [2002] 4 FC 358, found that an officer must seriously consider the best interests of children in the circumstances; this does not result in a *prima facie* presumption that the best interests of children must always prevail.

[40] The applicant acknowledged in his memorandum that he did not qualify for the spouse or common-law partner in Canada class because he was inadmissible.

[41] The officer did not [TRANSLATION] “fall back on” subsection 25(1) of the IRPA. The officer assessed the application submitted in the spouse or common-law partner in Canada class according to the requirements of the public policy established by the Minister.

[42] Accordingly, the officer noted that the applicant did not meet the requirement of holding temporary resident status in Canada as set out in paragraph 124(*b*) of the IRPR and assessed the application in accordance with the requirements of the policy on spouses.

[43] When the officer noted that the applicant did not meet the requirements of the policy on spouses, she stopped processing the application and rendered her decision.

[44] The exemption set out in the public policy arises from the Minister's discretionary authority (*Rakheja v Canada (Minister of Citizenship and Immigration)*, 2009 FC 633, at paragraph 33).

[45] However, in addition to the fact that there was no form requesting that H&C considerations be evaluated, the applicant's APR contained no submission to that effect.

[46] Consequently, it was reasonable for the officer to assess the application according to the public policy established at subsection 25(1) of the IRPA to facilitate processing in accordance with the regulations of the spouse or common-law partner in Canada class.

The applicant did not present evidence of H&C grounds

[47] The applicant alleges that the officer should have reviewed and considered each reference to the child.

[48] Concerning the requirement for an officer to consider the interests of a child in the context of an APR, the Federal Court of Appeal, in *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38, [2004] 2 FCR 635, stated the following:

> [5] An immigration officer considering an H & C application must be "alert, alive and sensitive" to, and must not "minimize", the best interests of children who may be adversely affected by a parent's deportation: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 75. However, this duty only arises when it is sufficiently clear from the material submitted to the decision-maker that an application relies on this factor, at least in part. Moreover, an applicant has the burden of adducing proof of any claim on which the H & C application relies. Hence, if an applicant provides no evidence to support the claim, the officer may conclude that it is baseless. [Emphasis added.]

[49] It was reasonable for the officer to fail to mention all of the references to the child scattered throughout the record because there was nothing apparent that enabled her to find that the applicant wanted her to consider the best interests of the child or any other H&C ground.

[50] It is not incumbent on the officer to alert the applicant to insufficiencies in the evidence (*Samsonov v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1158).

[51] In his APR, the applicant did not at any point demonstrate or allege in his forms or submissions that H&C circumstances concerning the best interests of his child or any other grounds had to be considered.

[52] Moreover, in his submissions, he indicated instead that he was not allowed to be in the presence of children.

[53] The applicant was convicted of theft on August 16, 2004. He is inadmissible to Canada in accordance with paragraph 36(2)(*a*) of the IRPA.

[54] Finally, this Court has already determined that APRs in the spouse or common-law partner in Canada class are not tantamount to H&C applications (*Ali v Canada (Minister of Citizenship and Immigration)*, 2007 FC 902, 313 FTR 151, at paragraph 22).

VI. Conclusion

[55] In light of the foregoing, the Court dismisses the applicant's application for judicial review.

JUDGMENT

THE COURT ORDERS that the applicant's application for judicial review be dismissed.

No question of general importance arises for certification.

"Michel M.J. Shore"
Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5764-10
STYLE OF CAUSE:	MUSTAPHA KHODJA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	September 7, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	SHORE J.
DATED:	October 4, 2011

APPEARANCES:

Stéphane Handfield	FOR THE APPLICANT
Margarita Tzavelakos	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Stéphane Handfield, Counsel Montréal, Quebec	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT