Date: 20080404

Docket: IMM-2887-06

Citation: 2008 FC 445

Ottawa, Ontario, April 4, 2008

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

SAFRAZ ALLY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT

[1] This is an application made pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001 c. 27 [Act] for judicial review of a decision of a visa officer (Officer) dated May 9, 2006, (Decision) in which the Applicant was denied permanent residence under the Spouse or Common-law partner in Canada Class.

BACKGROUND

[2] The Applicant, Mr. Ally, is a Hindu and his wife, Ms. Jahan Mookshah, is a Moslem. They both grew up in Guyana where they attended high school together and dated between 1996 and 2000. Although they wished to marry, they were prevented from doing so by their respective families. Their relationship ended when Mr. Ally moved to the United States; Ms. Mookshah later moved to Canada.

[3] Mr. Ally and Ms. Mookshah met again by chance in Etobicoke in 2003 and were eventually married at a religious ceremony in June 2004, a marriage that was legalized in November 2004. On January 4, 2005, Ms. Mookshah gave birth to a girl. Mr. Ally states that he lived with his wife during these times and visited the United States approximately one week every six months. They initially rented an apartment in Toronto but later purchased a home together in Brampton in January 2006.

[4] Difficulties arose between Mr. Ally and Ms. Mookshah on March 17, 2006 when Mr. Ally refused to drive his wife to work. Adding to the tension between them was the presence of Ms. Mookshah's mother, and the fact that during the argument, Mr. Ally had told Ms. Mookshah's mother to leave the house.

[5] Later that day, these tensions rose to a boiling point when Mr. Ally was overheard complaining on the telephone about the morning's events and about his wife's family. Accusations

began circulating between family members and Mr. Ally pushed his wife. She returned his threats with those of her own and brandished a kitchen knife. Mr. Ally grabbed the knife from her hand and threw it in the sink. As Mr. Ally left the house he and his wife threatened to kill one another.

[6] Following this incident, Ms. Mookshah called the police and made a statement. That same day, Mr. Ally was charged by Peel Regional Police with assault and uttering threats. Mr. Ally states that he was subsequently released on bail on the condition that he stay away from his wife and reside with his uncle while in Canada. There is no evidence to confirm this bail agreement either in the tribunal record or in Mr. Ally's record.

DECISION UNDER REVIEW

[7] By letter dated May 9, 2006, Mr. Ally was informed that his application for permanent residence was denied. The Officer's rationale is explained in the following paragraph:

> In your case, you have not shown that you meet [the cohabitation] requirement; specifically, we have received information that you have been charged with assault and threats by Peel Regional Police; conditions of your bail release state that you must stay away from your wife and reside with your uncle when in Canada. Your application for permanent residence as a member of the Spouse or Common-law partner in Canada Class is, therefore, dismissed.

[8] The accompanying FOSS notes add little to this rationale. They simply confirm that Mr. Ally made a statement to an officer at a Canadian border crossing to the effect that the conditions of his bail required him to stay away from his spouse, and that this would prevent "cohabitation" as

required for permanent residence under paragraph 124(a) of the *Immigration and Refugee Protection Regulations*.

RELEVANT LEGISLATION

[9] "Common-law partner" is defined by the Regulations as follows:

1. (1) […] "common-law partner" means, in relation to a person, an individual who is cohabiting with the person in a conjugal relationship, having so cohabited for a period of at least one year. (conjoint de fait)	**1. (1)** […] « conjoint de fait » Personne qui vit avec la personne en cause dans une relation conjugale depuis au moins un an. (common-law partner)
[…]	[…]

[10] Regulation 124 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 is at issue in this application:

124. A foreign national is a member of the spouse or common-law partner in Canada class if they	**124.** Fait partie de la catégorie des époux ou conjoints de fait au Canada l'étranger qui remplit les conditions suivantes :
(*a*) are the spouse or common-law partner of a sponsor and cohabit with that sponsor in Canada;	*a*) il est l'époux ou le conjoint de fait d'un répondant et vit avec ce répondant au Canada;
(*b*) have temporary resident status in Canada; and	*b*) il détient le statut de résident temporaire au Canada;
(*c*) are the subject of a sponsorship application.	*c*) une demande de parrainage a été déposée à son égard.

ISSUES

[11] The Applicant challenges the Decision of the Officer on three grounds:

1. Is it a legitimate expectation of the Applicant and his spouse that they be given an opportunity at an immigration interview to explain the circumstances surrounding the allegation of assault and utterance of threats and the bail order that was imposed that prevented them from living with each other?

2. Did the Officer, in failing to allow the Applicant and his spouse to comment on the extrinsic evidence that there was a bail order prohibiting contact between them, commit a procedural error or otherwise breach the rules of natural justice?

3. Was the Officer correct in making a finding of non-cohabitation in the previous two years when, as a matter of common sense, the bail order was only a temporary order restricting cohabitation until the allegations made against the Applicant had been determined by a court of law?

REASONS

Standard of Review

[12] The Applicant submits that the issues raised all involve questions of procedural fairness. He suggests, therefore, that this Court should accord no deference to the Officer's Decision. I agree that questions of procedural fairness do not require a standard of review analysis (*Sketchley v. Canada (Attorney General)*, [2006] 3 F.C.R. 392, 2005 FCA 404) and should be reviewed under a standard of correctness.

[13] The first two questions – the right to respond to concerns raised by a visa officer and the right to an interview – are properly framed as procedural fairness questions. However, in my view, the question of whether Mr. Ally was cohabiting with his wife for the purposes of paragraph 124(a) is a question of mixed fact and law, as it involves an application of the particular facts in this case to the applicable legislation (the *Immigration and Refugee Protection Regulations*).

[14] Recently, in *Dunsmuir v. New Brunswick*, 2008 SCC 9 [*Dunsmuir*], the Supreme Court of Canada shifted the standard of review analysis applicable to administrative decisions from three to two standards: reasonableness and correctness. In determining the appropriate standard of review in a given case, the Court provided the following guidance:

> […] questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while many legal issues attract a standard of correctness. Some legal issues,

> however, attract the more deferential standard of reasonableness (*Dunsmuir* at para. 51).

[15] It has already been determined that the first two questions involve issues of procedural fairness and are therefore reviewable on a standard of correctness.

> First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of defence to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review (*Dunsmuir* at para. 62).

[16] With respect to the third question, it is necessary to conduct the standard of review analysis to determine the proper standard of review. The factors considered in this analysis are: "(1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal" [*Dunsmuir* at para. 64].

[17] All four factors militate in favour of some deference in this case. First, there is no privative clause or absolute right of appeal, only judicial review which is contingent upon the Federal Court granting leave. Second, the overall purpose of the enabling legislation, which is polycentric in nature, is to regulate the admission of persons into Canada. Third, the question at issue is one of mixed fact and law. Finally, although the visa officer has expertise in assessing applications for permanent residence, in my view, a visa officer has no greater expertise than the Court in determining whether, according to the law, a couple is or is not cohabiting.

1. Is it a legitimate expectation of the Applicant and his spouse that they be given an opportunity at an immigration interview to explain the circumstances surrounding the allegation and the bail order that was imposed that prevented them from living with each other?

[18] The Applicant submits that the Officer was required to disclose the information he received regarding his bail conditions and then provide the Applicant and/or his spouse with an opportunity to respond to the concerns that arose. Relying on *Belharkat v. Canada (Minister of Citizenship and Immigration)* (2001), 17 Imm. L.R. (3d) 74, 2001 FCT 1295, the Applicant submits that where an officer relies on extrinsic evidence, without advising and allowing a response, the officer commits a breach of procedural fairness.

[19] The Minister submits that the Officer in this case did not rely on any extrinsic evidence; it was the Applicant's own statement to the effect that he was no longer living with his wife that demonstrated that he was prohibited by court order from living with her. In support of this argument, the Minister relies on the reasons of Justice Rothstein in *Dasent v. Canada (Minister of Citizenship and Immigration)*, [1995] 1 F.C. 720, [1994] F.C.J. No. 1902 to the effect that "extrinsic evidence" is evidence of which an applicant is unaware because it comes from an outside source. The Respondent argues that this is not the case here; the Officer was entitled to rely on the notes that appeared on the file from a previous examination of the Applicant by another officer to whom he disclosed information regarding the bail order.

[20] In this case, it is my view that the evidence was clearly brought forward by the Applicant himself. On April 17, 2006, the Applicant entered Canada at the Fort Erie border crossing from the United States where, on being questioned, he admitted he had been released on express bail conditions that he stay away from his wife and reside with his uncle when in Canada. The Applicant cannot be surprised that these events, of which he was fully aware, factored negatively in his spousal application. I see no reviewable error on this point. This was not extrinsic evidence; it was evidence provided by the Applicant and if the Applicant was not aware of its significance for the Decision that was made, that is not a ground of procedural unfairness. The cases cited by the Applicant on this point all involve decisions where evidence from other persons was considered that did not appear on the file. Those cases are *Belharkat*, above, *Dasent*, above, *Malkine v. Canada (Minister of Citizenship and Immigration)* (1999), 177 F.T.R. 200, [1999] F.C.J. No. 1604, and *Amoateng v. Canada (Minister of Citizenship and Immigration)* (1994), 90 F.T.R. 51, [1994] F.C.J. No. 2000. In the present case, the Applicant is really saying that, as events have subsequently turned out, he has reconciled with his wife so that the fact of their previous separation and the bail requirement can be regarded as temporary. But this does not make the evidence that the Applicant gave to a previous officer extrinsic. It was merely incomplete in terms of what subsequently happened between this couple. The Officer was entitled to rely upon information that appeared in the file even though it was information provided by the Applicant to another officer.

2. Did the Officer, in failing to allow the Applicant and his spouse to comment on the extrinsic evidence that there was a bail order prohibiting contact between them, commit a procedural error or otherwise breach the rules of natural justice?

[21] I have already concluded that the evidence was not extrinsic. The Applicant submits that the Officer should have convened an interview in order for him to address the concerns that arose from his bail conditions. This would have permitted the Applicant and/or his spouse to explain that his conditions were merely temporary. Without this information, the Officer could only reach a conclusion that was not supported by the evidence, which demonstrated that, in fact, both the Applicant and Ms. Mookshah wished to continue living together.

[22] The Minister contends that there is no obligation on an officer to notify an Applicant about his concerns and allow the Applicant to respond to those concerns. The onus was on the Applicant to address the circumstances behind his application and meet the requirements of Regulation 124.

[23] After reviewing the relevant jurisprudence, it is clear to me that it is settled law that the onus is on an Applicant to prove her or his case. In *Prasad v. Canada (Minister of Citizenship and Immigration)* (1996), 34 Imm. L.R. (2d) 91, [1996] F.C.J. No. 453, Justice Muldoon stated at paragraph 7:

> The onus is on the applicant to satisfy the visa officer fully of all the positive ingredients in the applicant's application. It is not for the visa officer to wait and to offer the applicant a second, or several opportunities to satisfy the visa officer on necessary points which the applicant may have overlooked.

However, recent jurisprudence of this Court has indicated that, at times, an interview might be necessary, particularly where the *bona fides* of a marriage is in question. See, for example, *Chitterman v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 765. Moreover, section 10.2 of IP8 "Spouse or Common-law Partner in Canada Class" suggests that an interview should take place if an officer doubts the genuineness of the submitted documents.

[24] Recently, Justice O'Keefe held that an interview should have been conducted by the officer in *Hakrama v. Canada (Minister of Citizenship and Immigration)* (2007), 308 F.T.R. 84, 2007 FC 85 for the following reasons, found at paragraph 23:

> Upon review of the officer's notes and the file material, I cannot determine what facts would support the officer's finding that the marriage was not *bona fide*. The fact that a couple do not have a joint bank account or do not have both of their names on utility bills does not mean that their marriage is not *bona fide*. There were documents before the officer which indicated that the couple were married and lived together. <u>If the officer doubted the credibility of the documentary evidence presented to show that the couple were in a *bona fide* marriage, the officer should have called them in for an interview, since there was no factual evidence to show that they were not married.</u>
>
> [my emphasis]

Justice O'Keefe did confirm, however, that his decision to require an interview should not be regarded as absolute, and much would depend on the circumstances of each case. (see *Hakrama* at paragraph 25).

[25] In this case, I do not think that an interview was required. There were no credibility concerns. There was evidence before the Officer that lead him to legitimately question the relationship between the Applicant and Ms. Mookshah. The Applicant was obviously aware of his bail conditions, admitting to their existence when crossing the border on April 17, 2006. Having submitted an application for spousal sponsorship, he cannot now be surprised that a court order preventing him from co-habiting or otherwise contacting his wife raised a serious concern on the part of the Officer. This should have been an obvious concern to which the Applicant should have provided an explanation immediately. The onus was on the Applicant to address this issue, but he chose to leave the Officer with a less than complete picture of the significance of his bail conditions. There was nothing to alert the Officer that he should look further into this matter and convene an interview. In my view, then, the Officer committed no reviewable error in this regard.

3. Was the Officer correct in making a finding of non-cohabitation in the previous two years when, as a matter of common sense, the bail order was only a temporary order restricting cohabitation until the allegations made against the Applicant had been determined by a court of law?

[26] The Applicant submits that he cohabited with Ms. Mookshah for some two years prior to the Decision of the Officer. In order to arrive at a contrary conclusion, then, he says that the Officer ought to have made a complete analysis of all of the circumstances behind the bail order and further provided the Applicant with an opportunity to address those concerns. This was not done, and the Applicant says that the failure to do so constitutes a reviewable error.

[27] The Minister simply argues that a successful Applicant must meet the requirements of Regulation 124 and a refusal based on the fact that the Applicant did not cohabit with his spouse was in accordance with that Regulation. Having failed to meet one of the requirements, he is not otherwise admissible under the Act.

[28] In *Laabou v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1269, Justice Shore stated at paragraph 27:

> Section 124 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations), imposes three conditions on Applicants applying for permanent residence in this class: (1) they are the spouse or common-law partner of a sponsor and cohabit with that sponsor in Canada; (2) they have temporary resident status in Canada; and (3) they are the subject of a sponsorship application. Failure to meet one of these conditions is fatal to the Applicant's application for permanent residence.
>
> [emphasis mine]

Although there is no evidence before this Court of the bail conditions to which the Applicant was subjected, he does not deny the fact that he was prevented from contacting his wife or residing with her. The only question is whether it was reasonable for the Officer to conclude that this bail condition was sufficient to establish that the Applicant and Ms. Mookshah were not cohabitating.

[29] Section 5.35 of OP2, "Processing Members of the Family Class", is instructive on this issue:

> **5.35. What is cohabitation?**
>
> "Cohabitation" means "living together." Two people who are cohabiting have combined their affairs and set up their household

together in one dwelling. To be considered common-law partners, they must have cohabited for at least one year. This is the standard definition used across the federal government. It means continuous cohabitation for one year, **not intermittent cohabitation adding up to one year**. The continuous nature of the cohabitation is a universal understanding based on case law.

While cohabitation means living together continuously, from time to time, one or the other partner may have left the home for work or business travel, family obligations, and so on. The separation must be temporary and short.

The following is a list of indicators about the **nature of the household** that constitute evidence that a couple in a conjugal relationship is cohabiting:

• Joint bank accounts and/or credit cards;
• Joint ownership of residential property;
• Joint residential leases;
• Joint rental receipts;
• Joint utilities accounts (electricity, gas, telephone);
• Joint management of household expenditures;
• Evidence of joint purchases, especially for household items;
• Correspondence addressed to either or both parties at the same address;
• Important documents of both parties show the same address, e.g., identification documents, driver's licenses, insurance polices, etc.;
• Shared responsibility for household management, household chores, etc.;
• Evidence of children of one or both partners residing with the couple;
• Telephone calls.

These elements may be present in varying degrees and not all are necessary to prove cohabitation. This list is not exhaustive; other evidence may be taken into consideration.

[emphasis in original]

[30] It is important to keep in mind that I am not deciding this matter *de novo*. The evidence before the Officer was the evidence on the Applicant's file. Many things have happened since to bring the Applicant and his wife back together, and it is indeed unfortunate that their sponsorship application should have been jeopardized by a period of separation that, in hindsight, turns out not to have been permanent.

[31] But when the Officer made his Decision, the evidence was before him that the couple were not cohabiting and there was a court order in place and criminal charges pending. There was nothing that would suggest to the Officer that the situation was only temporary. The onus was upon the Applicant to establish that section 124 of the Regulations was satisfied and that any separation was only temporary and short. The Applicant simply did not do this.

[32] The Applicant now says that all of this was the Officer's fault. But the fact is that the Applicant and his spouse jeopardized their application through their domestic dispute and the conditions of separation that grew out of that dispute.

[33] That is indeed unfortunate and it is gratifying to see that the family is reunited. But any problems they now face were not the result of a reviewable error made by the Officer. They were a function of the situation in which the couple placed themselves at a crucial time in their lives when they were seeking permanent residence in Canada for the Applicant. They may have been ignorant of the law and the problems they were causing themselves, but the onus was upon them, as it is upon others, to ensure that they comply with the Act. The evidence is clear that a knife was

brandished and threats to kill each other were made. Ms. Mookshah went so far as to call the police and made a statement, and bail conditions were imposed. This was all very serious and even though the couple have decided they belong together this was not a situation that was explained to the Officer and was therefore unknown to the Officer at the material time when the Decision was made.

[34] Sadly in this case, because I know that this family needs additional income, I cannot find a reviewable error on the part of the Officer. I have to look at this Decision, not with all of the benefit of the hindsight that this couple have derived from their subsequent reconciliation, but in light of the materials and facts that were before the Officer when the Decision was made. At that time, the Officer had no way of knowing what would happen in the future or how this couple might resolve their differences. It was not unreasonable for the Officer to conclude that cohabitation for purposes of Regulation 124 had not been established.

[35] Counsel are requested to serve and file any submissions with respect to certification of a question of general importance within seven days of receipt of these Reasons for Judgment. Each party will have a further period of three days to serve and file any reply to the submission of the opposite party. Following that, a Judgment will be issued.

"James Russell"

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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