**Date: 20080828**

**Docket: IMM-672-08**

**Citation: 2008 FC 978**

**Toronto, Ontario, August 28, 2008**

**PRESENT: The Honourable Mr. Justice Harrington**

**BETWEEN:**

**MARK LABOK**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

**REASONS FOR ORDER AND ORDER**

[1] Mark and Elena, husband and wife, twice; first in Russia in 1955 and again in Canada in 2006. Mark, sponsored by Elena, asked that he be permitted on Humanitarian and Compassionate grounds to remain in Canada while his application for permanent residence was being processed. The authorities refused. This is a judicial review of that decision.

[2] Mark Labok and Elena Voikhansky divorced in 1976. Ms. Voikhansky and their daughter Svetlana moved to Israel and then to Canada. They are both Canadian citizens.

[3] Mr. Labok began visiting them and friends, in 1993, always returning to Russia. He last came here in 2003, filed a claim for Refugee Protection and began to co-habit with Elena whom he re-married in 2006. His refugee claim was declared abandoned.

[4] In 2006 he applied for permanent resident status. The normal rule is that such applications are to be made from outside Canada. However, section 25 of the *Immigration and Refugee Protection Act* authorises the Minister to waive requirements on Humanitarian and Compassionate ("H&C") considerations. Mr. Labok applied, with his wife's sponsorship, under the general IP 5 "Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds". It must be kept in mind that such an application does not necessarily stay the applicant's removal from Canada. An Immigration Officer pointed out to him that a new public policy, set out in a document entitled IP 8 "Spouse or Common-law partner in Canada Class", came into effect in 2005. If certain conditions are met, the Minister automatically defers removal from Canada while the application is being processed. One of the requirements however, is that the applicant hold a current valid travel document or passport.

[5] Mr. Labok, through his former counsel, wrote back to say that he had applied under IP 5 rather than IP 8 because his passport had expired and he was unable to obtain a new one from the Russian Consulate in Canada. Apparently, it was a condition precedent that he renew his internal passport, and that could only be done from within Russia.

[6] To complete the picture, following the negative H&C results, a negative Pre-Removal Risk Assessment was handed down. Mr. Labok was removal ready, but Madam Justice Dawson issued a stay order.

[7] At the hearing, counsel for Mr. Labok raised three issues: (a) the Officer failed to mention that this was a sponsorship application; (b) the Officer failed to consider why IP 8 did not apply and (c) in considering the hardship he would face in Russia, based on his Jewish religion, the Officer arbitrarily gave short shrift to a photocopy of a police report.

[8] It is not necessary for me to consider the merits of the first and third issues. I am satisfied that the Officer's analysis of Mr. Labok's situation in Canada was unreasonable. The issue is whether Mr. Labok would face an unusual and undeserved hardship, or disproportionate hardship if required to leave Canada and apply for a permanent resident visa in the normal way. The Officer found that his current marriage to a Canadian did not automatically result in the granting of a H&C application. That is true under IP 5, but not under IP 8, provided the technicalities are met. Indeed, one might wonder why a person is granted a deferral of removal if he or she has valid current travel documents, but runs a risk of removal if not.

[9] In consideration of his connections with Canada, the Officer, after mentioning the marriage, said:

> However, I find that it is reasonable for the Applicant and his wife to have anticipated that there would be a period of separation considering that the Applicant's immigration status had not been normalised at the time of their marriage.

As to the best interest of children, meaning his daughter and her children he simply said “I am not persuaded that any child’s best interests would not be met if the Applicant was required to leave Canada and apply for permanent residence in the normal manner.” There is no explanation as to why it is in Mr. Labok’s daughter’s and grandchildren’s best interests that he be removed from the life he currently enjoys with them.

[10] The creation of the public policy enunciated in IP 8 does not relieve an Officer in an IP 5 application from considering the factors raised therein simply because the applicant is technically ineligible. The program objective is to promote family unity. This is completely consistent with the objective set out in section 3 of the *Immigration and Refugee Protection Act*, ie. “to facilitate the reunion in Canada of Canadian citizens and permanent residents with their close relatives from abroad”.

[11] It was quite wrong to say that it was reasonable for Mr. Labok and his wife “to have anticipated that there would be a period of separation - - ”. While that possibility was foreseeable, it was also foreseeable that some compassion might be shown. Mr. and Mrs. Labok were entitled to hope and no adequate reason has been given why that hope was dashed. His age (75) and financial situation were mentioned, but not considered.

[12] The reasons almost suggest that it is a foregone conclusion that there is insufficient connection with Canada if the spousal application does not fall within IP 8. The Officer fettered his or her discretion. The H&C considerations which led to IP 8 were either not grasped or were

disregarded. It follows that the decision was unreasonable (*R. v. Sheppard*, [2002] 1 S.C.R. 869, particularly at paragraphs 31 and 32).

## ORDER

The application for judicial review is granted. The matter is referred back to another decision maker for a fresh determination. There is no question to certify.

"Sean Harrington"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-672-08 |
| **STYLE OF CAUSE:** | *MARK LABOK* v. *THE MINISTER OF CITIZENSHIP AND IMMIGRATION* |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | AUGUST 27, 2008 |
| **REASONS FOR ORDER AND ORDER:** | HARRINGTON J. |
| **DATED:** | AUGUST 28, 2008 |

**APPEARANCES:**

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| Leanne Briscoe | FOR THE RESPONDENT |

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