Date: 20081202

Docket: IMM-193-08

Citation: 2008 FC 1339

Ottawa, Ontario, December 2, 2008

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

MARGARET MARIE MILLS

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] It is explicitly stated in the Spousal Public Policy that a deferral will not be granted to applicants who "apply under the public policy after they are deemed removal ready by the CBSA (Canadian Border Services Agency)".

[2] Persons who are not cohabiting with their sponsor at the time Citizenship and Immigration Canada (CIC) seeks to grant permanent residence "persons who have been removed or who left Canada voluntarily), are not eligible to be granted permanent residence in the Spouse or common-

law partner class and may apply in the family class (overseas)". (Emphasis added.) (Guidelines in Manual IP8 (Spousal Public Policy)

II. Judicial Procedure

[3] On January 14, 2008, the Applicant filed an Application for Leave pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), against a decision of an Immigration Officer of CIC.

[4] The Immigration Officer rejected the Applicant's sponsorship application of her husband, Mr. Lisle Kevin Anthony Durham, for permanent residence in Canada in the Spouse or common-law partner class.

III. Facts

[5] On December 21, 2007, the Immigration Officer refused the Applicant's spousal application for permanent residence as a member of the Spouse or common-law partner class, sponsored by the Applicant, Ms. Margaret Marie Mills.

[6] On December 24, 2007, the Immigration Officer refused Ms. Mills' sponsorship application of her husband, Mr. Durham, for permanent residence in Canada. It is this decision that is currently being challenged before this Court.

[7] The Immigration Officer refused Ms. Mills' application because her spouse did not meet a mandatory requirement of the Spouse or common-law partner class, namely, cohabitation with that sponsor in Canada (Paragraph 124(*a*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations)).

IV. Issue

[8] Has the Immigration Officer made an unreasonable finding?

V. Analysis

[9] Ms. Mills' Memorandum of Argument raises a sole issue with respect to the Immigration Officer's decision in this case. Ms. Mills has not shown that the Immigration Officer made an unreasonable finding pursuant to paragraph 124(*a*) of the Regulations or that the Immigration Officer acted in a manner inconsistent with the Spousal Public Policy. As Ms. Mills has not shown any good reason for concluding that the Immigration Officer committed a reviewable error, this Application should be dismissed.

Statutory, Regulatory and Policy framework

[10] Under the IRPA, there are several ways for foreign nationals to apply for permanent residence in Canada based on being in a spousal or common-law relationship with a Canadian citizen or permanent resident.

[11] The principal channel for individuals in this situation is to apply for permanent residence by making an application to become a member of the Family Class before entering Canada under Part 1, Division 1 of the IPRA and Part 7, Division 1 of the Regulations. To be eligible, individuals must satisfy the requirements of the Family Class and not be otherwise barred from/or inadmissible from obtaining a permanent resident visa required to enter and remain in Canada.

[12] The IRPA and Regulations also permit foreign nationals who are in Canada to apply for permanent residence as members of the Spouse or common-law partner class. These applications are governed by the requirements and conditions specified in Part 7, Division 2 of the Regulations (IRPA, ss. 12(1); Regulations, sections 123-129).

[13] For the purposes of this Application, section 124 is the most relevant provision in Part 7, Division 2 of the Regulations. This section imposes the following requirements on foreign nationals to become members of the Spouse or common-law partner class: (a) they must be the spouse or common-law partner of a sponsor and cohabit with that sponsor in Canada; (b) they must have temporary resident status in Canada; and (c) they must be subject to a sponsorship application.

[14] On February 18, 2005, the Minister of Citizenship and Immigration established a public policy, the Spousal Public Policy, under subsection 25(1) of the 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 Spousal Public Policy aims to facilitate the processing of genuine out-of-status spouses or common-law

partners in the Spouse or common-law partner class, by exempting foreign nationals from the requirement of being "in status" under paragraph 124(*b*) of the Regulations and in addition to the requirements under subsection 21(1) of the IRPA and subparagraph 72(1)(*e*)(i) of the Regulations in regard to inadmissibility due to a lack of status; however, the Policy also explicitly states in bold that "all the other requirements of the class apply" and that "applicants will be processed based on guidelines in [manuals] IP2 and IP8" (IRPA, ss. 25(1) and 21(1); Regulations, para. 12(*b*) and subpara. 72(1)(*e*)(i); Spousal Public Policy, sections 1, 3, 5(C)(iii)).

[15] The Spousal Public Policy also incorporates an agreement with the CBSA to grant a temporary administrative deferral of removal to applicants who qualify under the Policy. It is explicitly noted in the Policy, however, that a deferral will not be granted to applicants who "have a warrant outstanding for removal," "have previously hindered or delayed removal," or who "apply under this public policy after they are deemed removal ready by CBSA." (Emphasis added) (Spousal Public Policy, ss. 5(F).)

Reasonable and Determinative Finding Per Regulation 124(*a*)

[16] Ms. Mills argues that the Immigration Officer erred in refusing her spouse application by finding him not to meet requirements of paragraph 124(*a*) of the Regulations. Ms. Mills argues that the Immigration Officer erred in law and in fact by finding her husband not to be cohabiting with her in Canada.

[17] Ms. Mills is incorrect in asserting that the applicable standard of review for a finding pursuant to paragraph 124(*a*) of the Regulations is that of correctness.

[18] The applicable standard of review in the case at bar for a finding pursuant to paragraph 124(*a*) of the Regulations is that of reasonableness. As the Court of Appeal noted in *Smades v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 544 (QL), 53 A.C.W.S. (3d) 236 (C.A.), a case dealing with findings by the Pension Appeals Board, the issue of cohabitation and the validity of spousal relationship governed by statutory definitions is "purely one of fact". The Court of Appeal further held that "this is classically an area in which a court on judicial review cannot intervene" and stated that "[e]ven if we were to disagree with the result, it is beyond the power of this Court to intervene".

[19] The applicable standard of review for findings made pursuant to paragraph 124(*a*) of the Regulations is specified by subparagraph 18.1(4)(*d*) of the *Federal Courts Act*, R.S., 1985, c. F-7, i.e., that of unreasonableness. The Immigration Officer's findings in this case were entirely reasonable on the basis of their inherent logic (*Canada (Minister of Citizenship and Immigration) v. Dimonekene*, 2008 FCA 102, [2008] F.C.J. No. 464 (QL); *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190).

[20] The Immigration Officer made the following finding with respect to paragraph 124(*a*) of the Regulations: "Regulation 124(a) requires that in order to qualify to become a member of the Spouse or common-law partner in Canada Class, you must demonstrate that you are the spouse or common-

law partner of a sponsor and that you cohabit with your sponsor in Canada. In your case, you have not shown that you meet this requirement because you are not living with your spouse in Canada" (Decision, Applicant's Record at p. 7).

[21] This finding was reasonably open to the Immigration Officer, as the Applicant's spouse was indeed removed from Canada on June 17, 2007 and no longer cohabiting with his spouse (the Applicant) in Canada thereafter (Applicant's Record, FOSS notes at p. 10).

[22] The Applicant also argues that the Immigration Officer's interpretation of paragraph 124(*a*) of the Regulations contradicted information set out in the Policy, above.

[23] Ms. Mills' argument that the Immigration Officer acted in a manner contrary to the Spousal Public Policy is based on an untenable and improper reading of the Policy. As is indicated by the Spousal Public Policy's clear statement that barring the waiver of paragraph 124(*b*) of the Regulations, "**all the other requirements of the class apply**" and that "applicants will be processed based on guidelines in (manuals) IP2 and IP8." (Spousal Public Policy, ss. 1, 3, 5(C)(iii).)

[24] It is a statutory requirement that the applicant's spouse cohabits with the applicant (his sponsor) (Regulations, para. 124(*a*)) and must have temporary resident status in Canada that has not expired.

[25] Ms. Mills has, thus, not met the requirements of section 124 of the Regulations.

VI. Conclusion

[26] For all the above reasons, the application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS that

1. The application for judicial review be dismissed;

2. No serious question of general importance be certified.

Obiter

As specified in oral argument by the Respondent, the marriage of the couple is considered bona fide, the Applicant's husband can apply from outside Canada to be sponsored rather than be united with his spouse under the restrictive in-status provisions under which the present case unfolded (as specified in the Overview).

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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