Date: 20100719

Docket: IMM-2234-09

Citation: 2010 FC 757

Ottawa, Ontario, July 19, 2010

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

YADWINDER SINGH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION and CANADA BORDER SERVICES AGENCY

Respondents

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review whereby the Applicant seeks declaratory relief against the unwillingness of Citizenship and Immigration Canada ("CIC") to confirm his status as a permanent resident. In the alternative, the Applicant seeks a *mandamus* order compelling CIC to grant him permanent residence or, in the further alternative, compelling CIC to complete the processing of his humanitarian and compassionate ("H&C") application for permanent residence class within a defined timeframe. The Applicant also seeks his costs on a solicitor-client basis.

I. Facts

[2] The Applicant is an Indian citizen who has been married for over 14 years to a Canadian citizen with whom he has two Canadian-born children. He first arrived in Canada on January 21, 1994 and claimed refugee status. After the rejection of his refugee claim, he applied for permanent residence in Canada on H & C grounds. This application was received by CIC on December 28, 1995, and approved in principle on April 12, 1996. His application then proceeded to stage two in order to determine whether he met the statutory requirements for landing.

[3] In the summer of 1997, the Applicant decided to apply for a student visa. Since the process was shorter if he applied from outside of Canada, and because he could not enter the United States, he gave his application and his passport to a friend who was a Canadian citizen so that he could bring it to the Canadian visa office in Buffalo, New York. The visa officer serving his friend said the Canadian visa office in Buffalo could not process the application without the Applicant being present. His friend therefore returned to Canada with the application and the Applicant's passport. Upon entry into Canada, the friend was searched by a port of entry officer, who seized the Applicant's passport, telling him that he could not carry someone else's passport. The officer gave the Applicant's friend a receipt for the passport to be picked up by the Applicant.

[4] Despite the Applicant's numerous attempts to obtain his passport, he never succeeded in doing so. The evidence in the record is not clear as to what happened to the Applicant's passport. It appears to have been lost between the port of entry office in Fort Erie and the Immigration office in

Niagara Falls, although there is also an indication in the record that it may have been returned to someone believed to be the Applicant.

[5] The Applicant was called in to pick up his landing documents on December 23, 1998. The officer apparently handed the Applicant his Record of Landing and welcomed him as a new Canadian permanent resident, and asked to see his passport. When the Applicant showed him a copy of his passport and explained that his original passport had been lost, he was told that a copy was not sufficient; as a result, the officer asked the Applicant to give him back his Record of Landing.

[6] The Applicant immediately initiated an application to obtain a new passport from the Indian consulate. The passport not having been issued after several years, the Applicant inquired about the reason for the delay at the Indian consulate. He was told that the consulate could not process his application before CIC confirmed some technical information about his status in Canada. The Applicant finally obtained a new passport in January 2003, which he submitted to CIC in February 2003.

[7] By the time the second processing stage resumed, however, the Applicant's medical, criminal and security clearances had expired. The Applicant therefore submitted updated medical and criminal examinations. In a somewhat Kafkaesque turn of events, however, the Applicant's new passport and his 2004 medical examination had expired at the time these documents were

processed and CIC had finalized the security checks. Thus, CIC sent the Applicant two letters on August 31, 2005, requesting a valid passport and an updated medical examination.

[8] Unfortunately for the Applicant, CIC received information from the Canadian Border Services Agency ("CBSA") in September 2005, before the Applicant's permanent residence application was finalized, indicating that the Applicant was the subject of criminal charges for drug trafficking in the United States and that his extradition was sought by the American authorities. On April 24, 2007, the Applicant was ordered to surrender to the American authorities to face prosecution. Although he had initially filed an application for judicial review of that decision, he surrendered to the American authorities on August 14, 2009.

[9] The Applicant's file has been on hold ever since CIC learned of the criminal charges laid against him in the United States. CIC sent him a letter on May 25, 2009, requesting new and updated medical and police certificates, passport and American police certificate in order to resume the assessment of his application for permanent residence.

[10] The Applicant now seeks a declaration from this Court declaring that CIC's refusal to land him on December 23, 1998 and on February 3, 2003 was unlawful because he had allegedly met all the requirements for landing on those dates and had therefore become a permanent resident.

[11] In the alternative, the Applicant seeks an order of *mandamus* compelling CIC to grant the Applicant's application for permanent residence within thirty days of the Court's order.

[12] In the further alternative, the Applicant seeks an order of *mandamus* compelling the Respondents to complete the processing of the Applicant's application for permanent residence within thirty days of the Court's order.

[13] The application was originally directed only against the Minister of Citizenship and Immigration. But in order to have a complete record before the Court, counsel for the Applicant brought a motion for an Order directing that the CBSA be added as a respondent. This motion was granted, on consent, on March 9, 2010, and both Respondents therefore filed a Certified Tribunal Record ("CTR"). Both Respondents also filed an application for non-disclosure pursuant to section 87 of the Immigration and Refugee Protection Act (2001, c. 27) ("*IRPA")*, thereby requesting that some information be blacked out from the record for national security reasons.

II. Issues

[14] There are only two issues to be decided by this Court in the context of this application for judicial review. First, should an order for declaratory relief be issued by this Court to the effect that the Applicant met all the legal requirements for landing on December 23, 1998 and/or on June 28, 2002, and that the CIC acted illegally in refusing to land him as a permanent resident? Second, should the Court order the Respondents either to grant the Applicant's application for permanent residence, or to complete the processing of his application, within 30 days of this Court's order? These questions raise both jurisdictional and factual issues for which there are scant precedents. Moreover, the first question must be dealt with in the context of two different legal regimes, since

prior to the coming into force of the *IRPA* and its Regulations, (*Immigration and Refugee Protection Regulations,* SOR/2002-227, hereafter "*IRPR"*) on June 28, 2002, the *Immigration Act* (R.S.C., 1985, c. I-2) and the *Immigration Regulations (*SOR/78-172) ("*Regulations*") governed the Applicant's application for permanent residence.

[15] Before addressing these issues, however, I shall deal briefly with the Respondents' motions for non-disclosure that were made pursuant to section 87 of the *IRPA.* After holding an *ex parte* and *in camera* hearing of that motion, and a further teleconference hearing with counsel for both parties, I granted the Respondents' motion on May 7, 2010 subject to my direction given at the *in camera* hearing that paragraph 4 of p. 2 of the supplementary record be unredacted except for two words. At the time, I gave only brief oral reasons for that decision, and indicated that I would provide fuller reasons as part of my decision on the merit of the judicial review application. Accordingly, the first part of my analysis will be devoted to this issue.

III. The legislative scheme

[16] Pursuant to subsection 14(2) of the *Immigration Act* an officer shall grant landing to an immigrant, defined in section 2 of that *Immigration Act* as "a person seeking landing", when the officer is satisfied, following an examination, that it would not be contrary to the Act or Regulations to grant landing:

14. (2) Where an immigration officer is satisfied that it would not be contrary to this Act or the regulations to grant landing to an immigrant whom the officer has examined, the	14. (2) L'agent d'immigration qui convaincu, après l'interrogatoire d'un immigrant, que l'octroi du droit d'établissement ne contreviendrait pas, dans son

officer shall	cas, à la présente loi ni à ses règlements est tenu :
(a) grant landing to that immigrant; or	a) soit de lui accorder ce droit ;
(b) authorize that immigrant to come into Canada on condition that the immigrant be present for further examination by an immigration officer within such time and at such place as the immigration officer who examined the immigrant may direct.	b) soit de l'autoriser à entrer au Canada à condition qu'il se présente, pour interrogatoire complémentaire, devant un agent d'immigration dans le délai et au lieu fixés.

[17] Pursuant to subsection 14(1) of the *Regulations*, an immigrant must be in possession of a valid and subsisting passport or travel document issued to him or her by their country of origin:

14. (1) Subject to subsection (2), every immigrant shall be in possession of (a) a valid and subsisting passport issued to that immigrant by the country of which he is a citizen or national, other than a diplomatic, official or other similar passport;	14. (1) Sous réserve du paragraphe (2), tout immigrant doit avoir a) un passeport en cours de validité, autre qu'un passeport diplomatique, officiel ou autre passeport semblable, qui lui a été délivré par le pays dont il est citoyen ou ressortissant;

[18] Since the coming into force of the *IRPA* and the *IRPR* on June 28, 2002, the following legislative provisions apply to the Applicant's application for permanent residence. First of all, a foreign national, which is defined in section 2 as "a person who is not a Canadian citizen or a permanent resident", becomes a permanent resident pursuant to subsection 21(1) of the *IRPA* if an officer is satisfied that the foreign national meets the requirements of the legislation:

21. (1) A foreign national	21. (1) Devient résident

becomes a permanent resident if an officer is satisfied that the foreign national has applied for that status, has met the obligations set out in paragraph 20(1)(a) and subsection 20(2) and is not inadmissible.	permanent l'étranger dont l'agent constate qu'il a demandé ce statut, s'est déchargé des obligations prévues à l'alinéa 20(1)a) et au paragraphe 20(2) et n'est pas interdit de territoire.

[19] Pursuant to subsection 72(1) of the *IRPR*, a foreign national in Canada becomes a permanent resident if it is established through an examination that he or she meets the requirements of the legislation:

Obtaining status	**Obtention du statut**
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 :
(a) they have applied to remain in Canada as a permanent resident as a member of a class referred to in subsection (2);	a) il en a fait la demande au titre d'une des catégories prévues au paragraphe (2);
(b) they are in Canada to establish permanent residence;	b) il est au Canada pour s'y établir en permanence;
(c) they are a member of that class;	c) il fait partie de la catégorie au titre de laquelle il a fait la demande;
(d) they meet the selection criteria and other requirements applicable to that class;	d) il satisfait aux critères de sélection et autres exigences applicables à cette catégorie;
(e) except in the case of a foreign national who has	e) sauf dans le cas de l'étranger ayant fourni un

submitted a document accepted under subsection 178(2) or of a member of the protected temporary residents class,

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 accompanying or not, are not inadmissible,

(i) ni lui ni les membres de sa famille — qu'ils l'accompagnent ou non — ne sont interdits de territoire,

(ii) they hold a document described in any of paragraphs 50(1)(a) to (h), and

(ii) il est titulaire de l'un des documents visés aux alinéas 50(1)a) à h),

(iii) they hold a medical certificate, based on the most recent medical examination to which they were required to submit under these Regulations within the previous 12 months, that indicates that their health condition is not likely to be a danger to public health or public safety and, unless subsection 38(2) of the Act applies, is not reasonably expected to cause excessive demand; and

(iii) il est titulaire d'un certificat médical attestant, sur le fondement de la plus récente visite médicale à laquelle il a été requis de se soumettre aux termes du présent règlement dans les douze mois qui précèdent, que son état de santé ne constitue vraisemblablement pas un danger pour la santé ou la sécurité publiques et, sauf si le paragraphe 38(2) de la Loi s'applique, ne risque pas d'entraîner un fardeau excessif;

(f) in the case of a member of the protected temporary residents class, they are not inadmissible.

f) dans le cas de l'étranger qui fait partie de la catégorie des résidents temporaires protégés, il n'est pas interdit de territoire.

[20] In the case of a foreign national who, like the Applicant, has obtained an exemption under section 25 of the *IRPA* to apply for permanent residence from within Canada, section 68 of the *IRPR* provides that the foreign national becomes a permanent resident if it is established through an examination that he or she is not inadmissible and holds a passport or other document listed in section 50 of the *IRPR*:

Applicant in Canada	**Demandeur au Canada**
68. If an exemption from paragraphs 72(1)(a), (c) and (d) is granted under subsection 25(1) of the Act with respect to a foreign national in Canada who has made the applications referred to in section 66, the foreign national becomes a permanent resident if, following an examination, it is established that the foreign national meets the requirements set out in paragraphs 72(1)(b) and (e) and	68. Dans le cas où l'application des alinéas 72(1)a), c) et d) est levée en vertu du paragraphe 25(1) de la Loi à l'égard de l'étranger qui se trouve au Canada et qui a fait les demandes visées à l'article 66, celui-ci devient résident permanent si, à l'issue d'un contrôle, les éléments ci-après, ainsi que ceux prévus aux alinéas 72(1)b) et e), sont établis :
(a) in the case of a foreign national who intends to reside in the Province of Quebec and is not a member of the family class or a person whom the Board has determined to be a Convention refugee, the competent authority of that Province is of the opinion that the foreign national meets the selection criteria of the Province;	a) dans le cas où l'étranger cherche à s'établir dans la province de Québec, n'appartient pas à la catégorie du regroupement familial et ne s'est pas vu reconnaître, par la Commission, la qualité de réfugié, les autorités compétentes de la province sont d'avis qu'il répond aux critères de sélection de celle-ci;
(b) the foreign national is not otherwise inadmissible; and	b) il n'est pas par ailleurs interdit de territoire;
(c) the family members of the foreign national, whether	c) les membres de sa famille, qu'ils l'accompagnent ou non,

accompanying or not, are not inadmissible.	ne sont pas interdits de territoire.

[21] Section 50 of the *IRPR* provides a list of acceptable documents of which a foreign national must be in possession to become a permanent resident:

Documents — permanent residents	**Documents : résidents permanents**
50. (1) In addition to the permanent resident visa required of a foreign national who is a member of a class referred to in subsection 70(2), a foreign national seeking to become a permanent resident must hold	50. (1) En plus du visa de résident permanent que doit détenir l'étranger membre d'une catégorie prévue au paragraphe 70(2), l'étranger qui entend devenir résident permanent doit détenir l'un des documents suivants :
(a) a passport, other than a diplomatic, official or similar passport, that was issued by the country of which the foreign national is a citizen or national;	a) un passeport — autre qu'un passeport diplomatique, officiel ou de même nature — qui lui a été délivré par le pays dont il est citoyen ou ressortissant;
(b) a travel document that was issued by the country of which the foreign national is a citizen or national;	b) un titre de voyage délivré par le pays dont il est citoyen ou ressortissant;
(c) an identity or travel document that was issued by a country to non-national residents, refugees or stateless persons who are unable to obtain a passport or other travel document from their country of citizenship or nationality or who have no country of citizenship or nationality;	c) un titre de voyage ou une pièce d'identité délivré par un pays aux résidents non-ressortissants, aux réfugiés au sens de la Convention ou aux apatrides qui sont dans l'impossibilité d'obtenir un passeport ou autre titre de voyage auprès de leur pays de citoyenneté ou de nationalité, ou qui n'ont pas de pays de citoyenneté ou de nationalité;

(d) a travel document that was issued by the International Committee of the Red Cross in Geneva, Switzerland, to enable and facilitate emigration;	d) un titre de voyage délivré par le Comité international de la Croix-Rouge à Genève (Suisse) pour permettre et faciliter l'émigration;
(e) a passport or travel document that was issued by the Palestinian Authority;	e) un passeport ou un titre de voyage délivré par l'Autorité palestinienne;
(f) an exit visa that was issued by the Government of the Union of Soviet Socialist Republics to its citizens who were compelled to relinquish their Soviet nationality in order to emigrate from that country;	f) un visa de sortie délivré par le gouvernement de l'Union des républiques socialistes soviétiques à ses citoyens obligés de renoncer à leur nationalité afin d'émigrer de ce pays;
(g) a British National (Overseas) passport that was issued by the Government of the United Kingdom to persons born, naturalized or registered in Hong Kong; or	g) un passeport intitulé « British National (Overseas) Passport », délivré par le gouvernement du Royaume-Uni aux personnes nées, naturalisées ou enregistrées à Hong Kong;
(h) a passport that was issued by the Government of Hong Kong Special Administrative Region of the People's Republic of China.	h) un passeport délivré par les autorités de la zone administrative spéciale de Hong Kong de la République populaire de Chine.

[22] Finally, it appears from section 13 of the *IRPR* that a passport or any other document may be produced only by producing the original document:

Production of documents	Production de documents
13. (1) Subject to subsection (2), a requirement of the Act or these Regulations to produce a document is met	13. (1) Sous réserve du paragraphe (2), la production de tout document requis par la Loi ou le présent règlement s'effectue selon l'une des méthodes suivantes :

(a) by producing the original document;	a) la production de l'original;
(b) by producing a certified copy of the original document; or	b) la production d'un double certifié conforme;
(c) in the case of an application, if there is an application form on the Department's website, by completing and producing the form printed from the website or by completing and submitting the form on-line, if the website indicates that the form can be submitted on-line.	c) dans le cas d'une demande qui peut être produite sur un formulaire reproduit à partir du site Web du ministère, la production du formulaire rempli, ou l'envoi de celui-ci directement sur le site Web du ministère s'il y est indiqué que le formulaire peut être rempli en ligne.
Exception	**Exception**
(2) Unless these Regulations provide otherwise, a passport, a permanent resident visa, a permanent resident card, a temporary resident visa, a temporary resident permit, a work permit or a study permit may be produced only by producing the original document.	(2) Sauf disposition contraire du présent règlement, les passeports, visas de résident permanent, cartes de résident permanent, visas de résident temporaire, permis de séjour temporaire, permis de travail et permis d'études ne peuvent être produits autrement que par présentation de l'original.

[23] When determining whether the declaratory relief sought by the Applicant should be granted, the applicable legal regime will vary depending on the date upon which CIC's refusal to land the Applicant is being considered. To the extent that the date upon which the Applicant argues he should have been landed is that of December 23, 1998, the requirements to be applied are those found in the *Immigration Act* and the *Regulations*. If, on the other hand, the Court examines

whether the Applicant should have been landed on February 3, 2003, it is the *IRPA* and the *IRPR* that must be applied.

[24] No such issue as to the relevant legislation arises when considering the application for an order of *mandamus*. Section 190 of the *IRPA* indicates clearly that Parliament intended the new Act to apply retrospectively, as it specifically provides that the *IRPA* shall apply to all pending applications:

Application of this Act 190. Every application, proceeding or matter under the former Act that is pending or in progress immediately before the coming into force of this section shall be governed by this Act on that coming into force.	**Application de la nouvelle loi** 190. La présente loi s'applique, dès l'entrée en vigueur du présent article, aux demandes et procédures présentées ou instruites, ainsi qu'aux autres questions soulevées, dans le cadre de l'ancienne loi avant son entrée en vigueur et pour lesquelles aucune décision n'a été prise.

[25] Consequently, if a *mandamus* order requiring the Respondents to complete the processing of the Applicant's application were to be granted, the application would have to be made in accordance with the new legislative scheme: *Dragan v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 211, [2003] F.C.J. No. 260.

IV. Analysis

A. The Respondents' Motion for Non-Disclosure

[26] Rule 17 of the *Federal Courts Immigration and Refugee Protection Rules* (SOR/93-22) ("*Rules*") *requires* the tribunal to include in the CTR "all papers relevant to the matter that are in the

possession or control of the tribunal". Section 87 of *IRPA* allows for the non-disclosure of information if its disclosure would be injurious to national security or to the safety of any person.

[27] In *Mohammed v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1310, [2006] F.C.J. No. 1630, this Court held that "the decision as to whether something can be withheld or not should be made by the Court and not by the Respondent alone" (at para. 19). Similarly, in *Mekonen v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1133, [2007] F.C.J. No. 1469, the Court held that "it is for the Court and not the tribunal to decide what information can be withheld from an applicant…" (at para. 10).

[28] The combined effect of Rule 17 of the *Rules* and this Court's decisions in *Mohammed*, above, and *Mekomen*, above, is that a section 87 motion is required to be filed in all cases where information is redacted from the CTR for reasons of national security.

[29] As provided for in paragraph 83(1)(c) of the *IRPA*, upon the request of the Minister, a judge shall hear information or other evidence, in the absence of the public, and the Applicant and his counsel if, in the judge's opinion, its disclosure could be injurious to national security or endanger the safety of any person. The evidence that is adduced in support of this application through the secret affidavit and the attachments thereto must be heard in the absence of the public, the Applicant and his counsel because disclosure of the evidence would be injurious to the national security or endanger the safety of any person.

[30] Pursuant to sections 87 and 87.1, and paragraph 83(1)(b), the Court may appoint a special advocate to represent the interests of the permanent resident or foreign national if the Court is of the opinion that considerations of fairness and natural justice so require. In the case at bar, counsel for the Applicant made no such request.

[31] After having held an *in camera* and *ex parte* hearing with counsel for the Respondents, during which the witness who filed the secret affidavit in support of the motion was questioned, counsel for the Applicant and for the Respondents were invited to make submissions by way of teleconference. As previously mentioned, it is at the end of this process that I granted the motion brought by the Respondents, with the caveat that one paragraph of the supplementary record be disclosed save for two words.

[32] The state has a considerable interest in protecting national security and the security of its intelligence services. The disclosure of confidential information could have a detrimental effect on the ability of investigative agencies to fulfil their mandates in relation to Canada's national security. Although overturned by the Supreme Court on other grounds, the Federal Court found in *Almrei v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 420, [2004] F.C.J. No. 509, that the Court has a duty to ensure the confidentiality of information if, in the opinion of the judge, its disclosure would be injurious to national security or endanger the safety of any person. Quoting from paragraph 25 of the United Kingdom House of Lords decision in *Regina v. Shayler*, [2002] U.K. H.L.J. 11, Justice Edmond Blanchard stated (at para. 58):

> There is much domestic authority pointing to the need for a security or intelligence service to be secure. The commodity in which such a

> service deals is secret and confidential information. If the service is not secure those working against the interests of the state, whether terrorists, other criminals or foreign agents, will be alerted, and able to take evasive action; its own agents may be unmasked; members of the service will feel unable to rely on each other; those upon whom the service relies as sources of information will feel unable to rely on their identity remaining secret; and foreign counties will decline to entrust their own secrets to an insecure recipient…

In *Henrie v. Canada (Security Intelligence Review Committee)*, [1989] 2 F.C. 229 (T.D.); aff'd in (1992) 5 Admin. L.R. (2d) 269 (C.A.), this Court recognized the rule that information related to national security ought not to be disclosed as an important exception to the principle that the court process should be open and public:

> There are, however, very limited and well defined occasions where the principle of complete openness must play a secondary role and where, with regard to the admission of evidence, the public interest in not disclosing the evidence may outweigh the public interest in disclosure. This frequently occurs where national security is involved for the simple reason that the very existence of our free and democratic society as well as the continued protection of the rights of litigants ultimately depend on the security and continued existence of our nation and of its institutions and laws.

[33] The notion of the sometimes competing interests of the public's right to an open system and the state's need to protect information and its sources was discussed by the Supreme Court of Canada in *Ruby v. Canada (Solicitor General)*, 2002 SCC 75, [2002] S.C.J. No. 73. In that case, the Supreme Court acknowledged that the state has a legitimate interest in preserving Canada's supply of intelligence information received from foreign sources and noted that the inadvertent release of such information would significantly injure national security.

[34] Disclosure of confidential information related to national security or which would endanger the safety of any person could cause damage to the operations of investigative agencies. In the hands of an informed reader, seemingly unrelated pieces of information, which may not in themselves be particularly sensitive, can be used to develop a more comprehensive picture when compared with information already known by the recipient or available from another source. In *Henrie*, above, Justice David Addy also stated (at paras. 29-30):

> By contrast, in security matters, there is a requirement to not only protect the identity of human sources of information but to recognize that the following types of information might require to be protected with due regard of course to the administration of justice and more particularly to the openness of its proceedings: information pertaining to the identity of targets of the surveillance whether they be individuals or groups, the technical means and sources of surveillance, the methods of operation of the Service, the identity of certain members of the Service itself, the telecommunications and cipher systems and, at times, the very fact that a surveillance is being or is not being carried out. This means for instance that evidence, which of itself might not be of any particular use in actually identifying the threat, might nevertheless require to be protected if the mere divulging of the fact that C.S.I.S. is in possession of it would alert the targeted organization to the fact that it is in fact subject to electronic surveillance or to a wiretap or to a leak from some human source within the organization.
>
> It is of some importance to realize that an "informed reader", that is, a person who is both knowledgeable regarding security matters and is a member of or associated with a group which constitutes a threat or a potential threat to the security of Canada, will be quite familiar with the minute details of its organization and of the ramifications of its operations regarding which our security service might well be relatively uninformed. As a result, such an informed reader may at times, by fitting a piece of apparently innocuous information into the general picture which he has before him, be in a position to arrive at some damaging deductions regarding the investigation of a particular threat or of many other threats to national security.

[35] Having reviewed the redacted information, and having duly considered the secret affidavit as well the explanations given by the deponent at the *in camera* and *ex parte* hearing, I have come to the conclusion that the redactions sought were necessary in order to protect national security as well as the security of persons mentioned in the secret material. Moreover, the redacted portions of the Certified Tribunal Record are minimal in content and do not seriously prejudice the Applicant's ability to know and comprehend the case he has to meet. In any event, the resolution of this application does not turn on the security clearances of the Applicant. It is for all of these reasons that the motion of the Respondents pursuant to s. 87 of the *IRPA* was granted.

B. The Application for Declaratory Relief

[36] Counsel for the Applicant seeks a declaration from this Court that he was landed on December 23, 1998 (the date on which the Applicant attended CIC Etobicoke office for his landing examination), on June 28, 2002 (the date on which the *IRPR* came into force) or in February 2003 (the date on which he submitted a passport obtained from the Indian consulate in replacement of the lost one). On each of these dates, the Applicant submitted that he met all the legal requirements for landing and therefore became a permanent resident.

[37] Counsel for the Respondents, for his part, argued that the Applicant could not be granted permanent residence on either of these dates because he could not satisfy an officer that he met all the requirements of the legislation. On December 23, 1998, he was not in possession of a valid and subsisting passport as required by subsection 14(1) of the former *Regulations*, while in February 2003, his medical, criminal and security clearances had expired.

[38] There is no doubt that this Court has jurisdiction to grant declaratory relief. Section 18.1(3) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, permits the Court to make whatever declaration is appropriate including both positive and negative declarations. The preconditions to be met before declaratory relief can be granted have been spelled out by the Supreme Court of Canada in the following terms:

> Declaratory relief is a remedy neither constrained by form nor bounded by substantive content, which avails persons sharing a legal relationship, in respect of which a "real issue" concerning the relative interests of each has been raised and falls to be determined.
>
> *Canada v. Solosky*, [1980] 1 S.C.R. 821, at p. 830.

[39] In the present case, these preconditions are clearly met. First of all, the parties obviously share a legal relationship ever since the Applicant made his application for permanent residence in 1995. When a person applies for permanent residence, a legal relationship is created as between that person and CIC. For instance, an applicant has a duty to truthfully answer all questions asked by the visa officer (*IRPA*, s. 16(1); *Immigration Act*, s. 12(4)), and to undergo a medical examination (*IRPA*, s. 16(2); *Immigration Act*, s. 11) and an examination by the visa officer (*IRPA*, s. 18; *Immigration Act*, s. 12(1)). CIC, on the other hand, as a duty to grant landing to immigrants who meet all legal requirements (*IRPA*, s. 21; *Immigration Act*, s. 5(2) and 14(2)).

[40] Furthermore, the issue at stake is clearly a real one in that it affects the parties' interests and has not been resolved yet. Indeed, the issue is not academic or hypothetical; what is at stake is the Applicant's status in Canada and the possibility to re-enter Canada if he is ever found guilty of the

charges that have been laid against him in the United States. This is not to say that the declaration sought by the Applicant would automatically provide any relief to the Applicant. Disregard of a declaratory judgment does not amount to contempt, as such a declaratory judgment merely states an existing legal situation: *L.C.U.C. v. Canada (Canada Post Corp.)* (1986), 8 F.T.R. 93 (T.D.). For a declaratory order to have any practical and immediate effect, it would have to be accompanied by an order in the nature of a *mandamus.* I shall return to that question shortly. Suffice it to say that even if the Court were not prepared to compel the Respondents to perform any specific duty, there would still be merit in declaring the law. As the Supreme Court stated in another context, government officials and administrative boards are not above the law, and if an official acts contrary to statute, the courts are entitled to so declare: see *Canada v. Kelso*, [1981] 1 S.C.R. 199, at p. 210.

[41] I have to agree with counsel for the Respondents that the Applicant could not be landed on February 23, 2003, or indeed at any point in time after the coming into force of *IRPA*, as an officer could not be satisfied that he was not inadmissible. Through no fault of his own, Mr. Singh's medical, criminal and security clearances had expired and needed to be reinitiated when he submitted a valid passport. That being said, this was a most unfortunate state of affairs. For all those years, the Applicant was on a kind of merry-go-round, as one clearance after another had to be redone since their validity periods never all coincided. This is clearly an example of the bureaucracy at its worst, and one can only sympathize with the Applicant's Kafkaesque experience. But from a strictly legal point of view, it is impossible to conclude that the various officials who dealt with Mr. Singh's application after he obtained a new passport erred in applying the requirements of the law.

[42] The same cannot be said with respect to the refusal to land him on December 23, 1998. It is not in dispute that the only reason his Record of Landing was taken back from him on that date was his inability to present a valid and subsisting passport. At that point, Mr. Singh had met all the other requirements of the *Immigration Act* and its attendant *Regulations*.

[43] The requirement to be in possession of a valid and subsisting passport is found in subsection 14(1) of the *Regulations*, reproduced above at paragraph 17 of these reasons. Being in possession of something generally refers to the control over an object. However, depending of the legal context, a person may be considered in possession of something if that person holds a legal right to assume immediate control over an object: see *Ready John Inc. v. Canada (Department of Public Works and Government Services)*, 2004 FCA 222, [2004] F.C.J. No. 1002 at paras. 42-45. In the specific context of the *Immigration Act*, interpreting the regulatory requirement found in subsection 14(1) as the physical control of the passport by the Applicant would make no sense. The purpose of that subsection is clearly to verify that an immigrant wishing to come to Canada is a citizen of another country and to ascertain the identity of the immigrant before landing him. This is confirmed by an amendment made to the legal regime governing refugees in 1992 (S.C. 1992, ch. 49). Pursuant to s. 38 of that statute, section 46.04 of the *Immigration Act* was modified. The modified paragraph 46.04(8) states:

> (8) An immigration officer shall not grant landing either to an applicant under subsection (1) or to any dependant of the applicant until the applicant is in possession of a valid and subsisting passport or travel document or a satisfactory identity document.

[44] Moreover, the French version of subsection 14(1) of the former *Immigration Regulations* stipulates that an immigrant "doit avoir" a valid passport. This expression is clearly much broader than "being in possession of" in the English version. To have a valid passport doesn't necessarily mean to physically hold on the passport, but rather to be the bearer of that document or to have the legal use of it. It should have been sufficient for the Applicant to demonstrate that he was the legal bearer of a valid passport; this is obviously done in general by showing the passport itself, but there may be circumstances where the showing of the physical passport may not be necessary in order to meet this requirement.

[45] In the specific context of this case, the interpretation of subsection 14(1) proposed by the Respondents would not only make no sense but would also bring about a terrible injustice on the Applicant. Mr. Singh would be made to suffer for the loss of his passport by officials of the Respondents. Besides, the Respondents had a copy of his passport in the file, which showed that it was valid until 2001. In those very exceptional circumstances, it would be absurd and not in keeping with the wording and the spirit of subsection 14(1) to find that the Applicant could only satisfy the requirement set out in that provision by having with him the passport itself that was issued to him by the Indian authorities.

[46] Counsel for the Respondents cited section 13 of the *IRPR* to bolster his argument. Section 13 of the *IRPR* prescribes an evidentiary rule to the effect that, if the "production" of a document is required by the legislation, it is the original document that must be "produced". Quite apart from the fact that section 13 of the *IRPR* finds no equivalent in the *Immigration Act* or in the former

Regulations, it must be borne in mind that section 14(1) of the former *Regulations* did not speak of a requirement to produce but to hold a valid passport. These are two different requirements. The requirement to hold (in French "être titulaire de") a document is more than an evidentiary rule; it goes to the substance of being entitled to a valid passport issued by one's country of citizenship.

[47] For all of those reasons, I am therefore of the view that CIC erred in law in finding that the Applicant did not comply with the requirement enunciated in s. 14(1) of the former *Immigration Regulations*, and in refusing to land the Applicant on December 23, 1998.

C. ***The Application for Mandamus***

[48] The necessary conditions to be met for the issuance of a writ of *mandamus* have been set out by the Federal Court of Appeal in *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742, at para. 45; aff'd [1994] 3 S.C.R. 1100) and aptly summarized by my colleague Justice Danièle Tremblay-Lamer in the following terms:

> (1) there is a public legal duty to the applicant to act;
>
> (2) the duty must be owed to the applicant;
>
> (3) there is a clear right to the performance of that duty, in particular:
>
> (a) the applicant has satisfied all conditions precedent giving rise to the duty;
>
> (b) there was a prior demand for performance of the duty, a reasonable time to comply with the demand, and a subsequent refusal which can be either expressed or implied, e.g. unreasonable delay; and
>
> (4) there is no other adequate remedy.
>
> *Conille v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 F.C. 33, (T.D.) at para. 8

[49] In the case at bar, the Applicant seeks two alternative *mandamus* orders. The first order sought is to direct CIC to grant the Applicant his permanent residence within 30 days of the Court's order. Alternatively, the Applicant seeks an order compelling CIC to complete the processing of the Applicant's application within 30 days of the Court's order.

[50] There is no doubt in my mind that the Applicant has met all the requirements for the issuance of a *mandamus* order. It is clear that CIC has a public legal duty to process the Applicant's permanent residence application. Section 5(2) of the former *Immigration Act* imposed on CIC a clear obligation to grant landing to an applicant for permanent residence who meets the relevant statutory requirements, and the same is true by virtue of section 11(1) of *IRPA*: see, for example, *Dragan*, above, at para. 40; *Vaziri v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1159, [2006] F.C.J. No. 1458 at para. 41.

[51] I also find that the Applicant had a right to the performance of that duty. He submitted a completed application accompanied by all required supporting documents and paid the required processing fees. The record also shows that the Applicant and his counsel repeatedly contacted the Respondents to request updates or a final decision to be made. Yet, more than 14 years after he filed his application, a decision has yet to be made. The Respondents are correct in pointing out that the Applicant, due to the outstanding criminal charges that have been laid against him in the fall of 2005, cannot now satisfy an officer that he is not inadmissible under section 36 of *IRPA*. The fact remains that, prior to those charges having been laid, he had waited almost ten years for his

application to be processed. If such a long period of time does not amount to an unreasonable delay, I truly wonder what does.

[52] In light of the foregoing, I am of the view that the Applicant is entitled to an order in the nature of a *mandamus*. There is, however, authority for the proposition that while *mandamus* will be issued to compel the performance of a duty, it cannot dictate the result to be reached: see, for example, *Schwartz Hospitality Group Ltd. v. Canada (Minister of Canadian Heritage)*, 2001 FCT 112, at para. 34. Indeed, the jurisprudence is to the effect that issuing specific directions may sometimes be warranted, but only in very limited and exceptional circumstances. As stated by the Federal Court of Appeal in *Rafuse v. Canada (Pension Appeals Board)*, 2002 FCA 31, [2002] F.C.J. No. 91 at par. 14:

> While the directions that the Court may issue when setting aside a tribunal's decision include directions in the nature of a directed verdict, this is an exceptional power that should be exercised only in the clearest of circumstances: *Xie, supra*, at paragraph 18. Such will rarely be the case when the issue in dispute is essentially factual in nature (*Ali v. Canada (Minister of Employment and Immigration)*, [1994] 3 F.C. 73 (T.D.)), particularly when, as here, the tribunal has not made the relevant finding.
>
> See also: *Johnson v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1262, [2005] F.C.J. No. 1523, at paras. 20-22; *Xie v. Canada (Minister of Employment and Immigration)* (1994), 75 F.T.R. 125 (F.C.T.D.) at para. 18.

[53] In the case at bar, the issue of the Applicant's inadmissibility was apparently resolved in his favour at the time of his interview on December 23, 1998. Had it not been for the error of the officer in determining that the Applicant did not hold a valid passport because it had been seized at the visa office in Buffalo and never returned to him, the Applicant would most probably have been

landed on that date. The evidence in that respect, however, is not devoid of all ambiguity, and does not allow the Court to bypass the assessment of an immigration officer and to substitute its decision to that of the Minister and those who are entrusted with his delegated authority.

[54] Accordingly, the decision not to land the Applicant on December 23, 1998 is quashed, and the Applicant's file is remitted back to the Respondents to be processed in accordance with the law as it stood on that date and on the basis of the Applicant's record at the time. The processing of the Applicant's file shall also be made in light of these reasons, and in particular in light of the declaratory order with respect to s. 14(1) of the *Immigration Act*. Because of the long delays through which the Applicant already had to go through, the redetermination shall be made within 90 days of the release of this Court's order.

[55] Counsel proposed no question for certification, and none will be certified.

[56] Counsel for the Applicant seeks his costs on a solicitor-client basis. I agree with the Respondents that there is no justification for such an award. That being said, I am prepared to grant costs on a party to party basis to the Applicant. I am of the view that the long delay in processing the Applicant's file amounts to "special circumstances" for the purpose of Rule 22 of the *Federal Courts Immigrations and Refugee Protection Rules*, SOR/93-22. Accordingly, the Respondents are jointly ordered to pay $2,000 to the Applicant.

ORDER

THIS COURT ORDERS that this application for judicial review be granted. More specifically, the Court makes the following two orders:

- The Court declares that the requirement to hold a valid passport found in s. 14(1) of the *Regulations* adopted under the former *Immigration Act* did not require an Applicant to actually have in his or her possession a hard copy of his or her passport, when it can be established by other means that the Applicant holds a valid passport;
- The Court further orders CIC to process the application for landing of the Applicant within 90 days of the release of this Order, in accordance with the law as it stood on December 23, 1998 and as interpreted in the reasons for this Order, and on the basis of the Applicant's record on that date.
- The Respondents are ordered to pay the Applicant a lump sum of $2,000.00.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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