Federal Court  Cour fédérale

Date: 20150722

Dockets: IMM-7450-14
IMM-7452-14
IMM-7453-14

Citation: 2015 FC 861

Toronto, Ontario, July 22, 2015

PRESENT: The Honourable Mr. Justice Southcott

Docket: IMM-7450-14

BETWEEN:

YIN JI RACHAEL CHOW

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: IMM-7452-14

AND BETWEEN:

YIN HONG CLARA CHOW

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: IMM-7453-14

AND BETWEEN:

YIN GWAN ELISIA CHOW

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This Judgment and Reasons relate to three applications for judicial review of three identical decisions made by an Immigration Officer refusing the applicants' applications for study permits. At the hearing of these matters, counsel for the parties agreed that it is appropriate for the Court to issue one decision in relation to the three applications.

[2] For the reasons set out below, the applications for judicial review are dismissed.

I. Background

[3] The applicants are three sisters, all of whom are minors and nationals of New Zealand. Their mother is a Korean national and their father is a New Zealand national. Their parents were

in Canada on Visitor Records when they filed applications for study permits for their daughters for the 2014-2015 school year.

[4] The applicants first applied for study permits on July 7, 2014. Their applications were refused by letters dated August 6, 2014. They then submitted new applications on September 2, 2014, which were refused on October 24, 2014. Those are the decisions at issue in these proceedings.

[5] The Officer's decisions stated that the applicants were not persons described in immigration legislation who could apply for a study permit from within Canada. Rather, an application of this type must be made at a Canadian Visa office in another country.

[6] The Global Case Management System (GCMS) notes indicate that the officer decided that, as their parents were on Visitor Records, the applicants were not eligible to study in Canada under ss. 30(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA). As such, the applicants did not fall under the new ss. 215(1)(f)(i) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (IRPR) as they were not studying at the preschool, primary or secondary level. The applicants must therefore apply for study permits from outside Canada.

[7] The applicants argue that this was an unreasonable interpretation of the relevant provisions in the IRPA and the IRPR.

II. **Issue**

[8] The parties agree that the applicable standard of review is reasonableness, given that the issue is a question of statutory interpretation and a question of mixed fact and law, involving the Officer's interpretation of his or her enabling statute and regulations connected with it (*Dunsmuir v New Brunswick*, 2008 SCC 9, at para 124 [*Dunsmuir*]; *Alberta (Information and Privacy Commissioner) v Alberta Teachers Association*, 2011 SCC 61, at para 30; *McLean v British Columbia (Securities Commission)*, 2013 SCC 67, at para 21).

[9] Therefore, the sole issue in these matters is whether the Officer adopted an unreasonable interpretation of ss. 215(1)(f)(i) of the IRPR and ss. 30(2) of the IRPA.

III. **Statutory and Regulatory Provisions**

[10] The principal statutory and regulatory provisions relied on by the parties in argument are as follows:

Immigration and Refugee Protection Act, SC 2001, c 27.

Work and study in Canada	Études et emploi
30. (1) A foreign national may not work or study in Canada unless authorized to do so under this Act.	30. (1) L'étranger ne peut exercer un emploi au Canada ou y étudier que sous le régime de la présente loi.
Minor children	Enfant mineur
(2) Every minor child in Canada, other than a child of a temporary resident not authorized to work or study, is authorized to study at the pre-	(2) L'enfant mineur qui se trouve au Canada est autorisé à y étudier au niveau préscolaire, au primaire ou au secondaire, à l'exception de celui du résident

school, primary or secondary level.	temporaire non autorisé à y exercer un emploi ou à y étudier.

Immigration and Refugee Protection Regulations, SOR/2002-227.

No permit required	Permis non exigé
186. A foreign national may work in Canada without a work permit	186. L'étranger peut travailler au Canada sans permis de travail
…	…
(v) if they are the holder of a study permit and	v) s'il est titulaire d'un permis d'études et si, à la fois:
(i) they are a full-time student enrolled at a designated learning institution as defined in section 211.1,	(i) il est un étudiant à temps plein inscrit dans un établissement d'enseignement désigné au sens de l'article 211.1,
(ii) the program in which they are enrolled is a post-secondary academic, vocational or professional training program, or a vocational training program at the secondary level offered in Quebec, in each case, of a duration of six months or more that leads to a degree, diploma or certificate, and	(ii) il est inscrit à un programme postsecondaire de formation générale, théorique ou professionnelle ou à un programme de formation professionnelle de niveau secondaire offert dans la province de Québec, chacun d'une durée d'au moins six mois, menant à un diplôme ou à un certificat,
(iii) although they are permitted to engage in full-time work during a regularly scheduled break between academic sessions, they work no more than 20 hours per week during a regular academic session; or	(iii) il travaille au plus vingt heures par semaine au cours d'un semestre régulier de cours, bien qu'il puisse travailler à temps plein pendant les congés scolaires prévus au calendrier;
(w) if they are or were the	w) s'il est ou a été titulaire

holder of a study permit who has completed their program of study and

(i) they met the requirements set out in paragraph (v), and

(ii) they applied for a work permit before the expiry of that study permit and a decision has not yet been made in respect of their application.

d'un permis d'études, a terminé son programme d'études et si, à la fois :

(i) il a satisfait aux exigences énoncées à l'alinéa v),

(ii) il a présenté une demande de permis de travail avant l'expiration de ce permis d'études et une décision à l'égard de cette demande n'a pas encore été rendue.

No permit required

188. (1) A foreign national may study in Canada without a study permit

…

(c) if the duration of their course or program of studies is six months or less and will be completed within the period for their stay authorized upon entry into Canada;

…

Permis non exigé

188. (1) L'étranger peut étudier au Canada sans permis d'études dans les cas suivants :

…

c) il suit un cours ou un programme d'études d'une durée maximale de six mois qu'il terminera à l'intérieur de la période de séjour autorisée lors de son entrée au Canada;

…

Application before entry

213. Subject to sections 214 and 215, in order to study in Canada, a foreign national shall apply for a study permit before entering Canada

Demande avant l'entrée au Canada

213. Sous réserve des articles 214 et 215, l'étranger qui cherche à étudier au Canada doit, préalablement à son entrée au Canada, faire une demande de permis d'études.

Application on entry

214. A foreign national may apply for a study permit when

Demande au moment de l'entrée

214. L'étranger peut faire une demande de permis d'études au moment de son entrée au

entering Canada if they are

(a) a national or a permanent resident of the United States;
(b) a person who has been lawfully admitted to the United States for permanent residence;
(c) a resident of Greenland; or
(d) a resident of St. Pierre and Miquelon.

Canada dans les cas suivants :
a) il est un national ou résident permanent des États-Unis;
b) il a été légalement admis aux États-Unis à titre de résident permanent;
c) il est résident du Groenland;
d) il est résident de Saint-Pierre-et-Miquelon

Application after entry

215. (1) A foreign national may apply for a study permit after entering Canada if they

(a) hold a study permit;

(b) apply within the period beginning 90 days before the expiry of their authorization to engage in studies in Canada under subsection 30(2) of the Act, or paragraph 188(1)(a) of these Regulations, and ending 90 days after that expiry;

(c) hold a work permit;

(d) are subject to an unenforceable removal order;

(e) hold a temporary resident permit issued under subsection 24(1) of the Act that is valid for at least six months;

(f) are a temporary resident who

(i) is studying at the preschool, primary or secondary level,

Demande après l'entrée au Canada

215. (1) L'étranger peut faire une demande de permis d'études après son entrée au Canada dans les cas suivants :

a) il est titulaire d'un permis d'études;

b) il a été autorisé à étudier au Canada en vertu du paragraphe 30(2) de la Loi ou de l'alinéa 188(1)a) du présent règlement et la demande est faite dans la période commençant quatre-vingt-dix jours avant la date d'expiration de l'autorisation et se terminant quatre-vingt-dix jours après cette date;

c) il est titulaire d'un permis de travail;

d) il fait l'objet d'une mesure de renvoi qui ne peut être exécutée;

e) il est titulaire, aux termes du paragraphe 24(1) de la Loi, d'un permis de séjour temporaire qui est valide pour au moins six mois;

f) il est un résident temporaire qui, selon le cas :

(i) poursuit des études au niveau préscolaire, primaire ou

(ii) is a visiting or exchange student who is studying at a designated learning institution, or	secondaire, (ii) est un étudiant en visite ou participe à un programme d'échange dans un établissement d'enseignement désigné,
(iii) has completed a course or program of study that is a prerequisite to their enrolling at a designated learning institution; or	(iii) a terminé un cours ou un programme d'études exigé pour s'inscrire à un établissement d'enseignement désigné;
(g) are in a situation described in section 207.	g) il se trouve dans l'une des situations visées à l'article 207.

IV. **Argument**

A. *Applicants' Submissions*

[11] The applicants note that, under ss. 30(1) of the IRPA, no foreign national is eligible to study in Canada "unless authorized to do so under the Act", which is why the applicants applied for study permits. Ss. 30(2) creates an exception for children at the pre-school, primary or secondary level who do not require a study permit. However, this exception does not apply to minor children of temporary residents who are not themselves authorized to work or study. The applicants submit that this means that such children must apply for study permits in order to study in Canada, which is what the applicants did.

[12] The applicants then turn to their argument that the Officer erred in the interpretation of ss. 215(1)(f)(i) of the IRPR. The Officer has interpreted this provision to mean that the applicants would have to have been actively studying at a school to apply for a study permit pursuant to this

provision, which allows for application after entering Canada. Otherwise, s. 213 of the IRPR provides that application must be made before entering Canada.

[13] The applicants submit that this is an untenable interpretation of ss. 215(1)(f)(i). They note that, when interpreting a statute, "the words of an Act are to be read in their entire context and in there grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Rizzo & Rizzo Shoes Ltd (Re),* [1998] 1 SCR 27 at para 21). Additionally, an "enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects" (*Interpretation Act,* RSC, 1985, c I-21, s 12). The applicants submit that the newly enacted ss. 215(1)(f)(i) of the IRPR must benefit from a liberal interpretation, because it is meant to act as an exception to the general rule that foreign nationals must apply for a study permit before entering Canada.

[14] The interpretation favoured by the applicants is that the words "is studying at the preschool, primary or secondary level" in ss. 215(1)(f)(i) refer to the level at which the child will be studying, not to a requirement that the child be currently actively studying. In oral submissions, the applicants' counsel also argued that the fact the applicants were enrolled in school, albeit not yet entitled to enter the classroom, was sufficient to consider them to be studying for purposes of ss. 215(1)(f)(i).

[15] The applicants argue that this provision cannot logically be taken to require that the child already be attending school in Canada when applying for the study permit. They contend this

would happen in only three scenarios: the child already has a study permit obtained outside of Canada, the child is the minor child of a temporary resident who is authorized to work or study in Canada, or the child is illegally attending school without a permit. None of these scenarios apply to the applicants or to other minor children in circumstances similar to the applicants. The applicants argue that the Officer's interpretation therefore renders this provision meaningless and defeats the objective of the enactment.

[16] The applicants refer to such objective being to allow minor children such as the applicants, who are already in Canada but do not fall under the exemption in ss. 30(2) of the IRPA, to apply for a study permit from within the country. In support of their contention as to the objective of the new ss. 215(1)(f)(i), the applicants refer to a Notice dated February 12, 2014 issued by the Government of Canada following publication of the relevant regulatory amendments in the Canada Gazette (SOR/2014-14 January 29, 2014, *Regulations Amending the Immigration and Refugee Protection Regulations*), which referred to the amendments as aiming to strengthen Canada's status as a study destination of choice for prospective international students.

[17] The applicants also refer to the Regulatory Impact Analysis Statement (RIAS) that accompanied the amendments as noting that strong support had been expressed for increasing the pool of those foreign nationals eligible to apply for a study permit from within Canada.

B. *Respondent's Submissions*

[18] The respondent argues that the Officer reasonably found that the applicants did not meet the criteria of ss. 215(1)(f)(i) of the IRPR given that they were not studying at the preschool, primary or secondary level at the time of the application. The subsection states that the application for the study permit can be made from within Canada if the person is studying at the preschool, primary or secondary level. A plain and ordinary reading of the provision leads to the same conclusion as the Officer.

[19] The respondent also relies on the RIAS to support the proposition that the new provision was not intended to apply to persons such as the applicants, but rather to allow students already properly studying in Canada without a study permit to apply for a permit from within Canada. In reliance on the RIAS, the respondent notes that ss. 215(1)(f) would apply to students studying pursuant to ss. 30(2) who need to apply for a study permit once they reach the age of majority, students studying in Canada for less than six months (as permitted without a permit pursuant to ss. 188(1)(c) of the IRPR) who want to continue their studies in Canada, or students who do not need a study permit but who still desire one as tangible proof of authorization to study or to derive certain benefits under the IRPA or the IRPR (such as the right to work under ss. 186(v) or (w) of the IRPR without a work permit).

[20] Therefore, the fact that the applicants, or others in the applicants' circumstances, do not qualify for the exemption under ss. 215(1)(f)(i) does not render the Officer's interpretation unreasonable.

V. **Analysis**

[21] Pursuant to ss. 30(1) of the IRPA, the default position is that a foreign national requires authorization to study in Canada. Ss. 30(2) provides an exception allowing for children to study at the pre-school, primary or secondary level, except for children of temporary residents who are not authorized to work or study in Canada. In this case, the parties agree that the applicants are children of temporary residents not authorized to work or study in Canada, given that their parents are in Canada on Visitor Records. Therefore, the exception in ss. 30(2) does not apply to the applicants.

[22] Where a study permit is required by a foreign national, the default position under s. 213 of the IRPR is that the application for the permit must be made before entering Canada. Ss. 214 and 215 of the IRPR create exceptions to this requirement and allow, in certain circumstances, for application to be made when entering Canada or after entering Canada.

[23] Where the parties diverge is whether the new ss. 215(1)(f)(i) of the IRPR, which came into force on June 1, 2014, applies to the applicants and whether the Officer should have granted them study permits pursuant to this regulation. The Court finds, for the reasons that follow, that it was reasonable for the Officer to come to the conclusion that ss. 215(1)(f)(i) did not apply to the applicants, and that they therefore had to apply for the study permits from outside Canada.

[24] Based on a grammatical and ordinary meaning (*Bell Express Vu v Rex*, [2002] 2 SCR 559 at para 26) of ss. 215(1)(f)(i), which reads “is studying at the preschool, primary or secondary

level", it was reasonable for the Officer to interpret this subsection as applying only to a temporary resident who is currently studying at the preschool, primary or secondary level. There is nothing in this provision or in the rest of the IRPA or IRPR that would make this interpretation unreasonable. While this interpretation is narrower than the interpretation the applicants would prefer, it is harmonious with the scheme of the IRPA and the other provisions of the IRPA and the IRPR that limit the right of foreign nationals, who want to study in Canada on a temporary basis, to apply from within Canada.

[25] As detailed above, the respondent has cited examples of circumstances where foreign nationals who are lawfully studying in Canada would benefit from this provision by being entitled to apply for a study permit to continue their studies without having to leave Canada. As such, the new ss. 215(1)(f)(i) is not rendered meaningless by the Officer's interpretation as the applicants contend.

[26] Both parties also referred the Court to the applicable RIAS as an interpretive aid. As noted by the Federal Court of Appeal in *Astral Media Radio Inc v Society of Composers, Authors & Music Publishers of Canada,* 2010 FCA 16, at para 23:

> Although not a part of the Regulations, the Regulatory Impact Analysis Statement issued by the Board to accompany the Regulations may be taken into account by the Court in interpreting them.

[27] The portion of the RIAS that relates to the question in the case at hand reads as follows:

> *Regulatory amendments to in-Canada study permit applications*
>
> Certain foreign nationals who wish to apply for a study permit to attend a designated institution after they have entered Canada as a

> temporary resident, including those studying at the pre-school, primary or secondary level, exchange or visiting students, or those who have completed a course or program of study that is a condition for acceptance at a designated institution, are authorized under the new Regulations to apply for a study permit from within Canada instead of being required to leave the country to apply from abroad. This change facilitates the transition from visitor to study permit holder for minor students once they reach the age of majority, exchange or visiting students at a designated institution who wish to transfer to that institution permanently to complete their studies, and those students who wish to transition from a short term preparatory to a longer-term college or university program. (emphasis added)

[28] The language of the RIAS highlighted above, which appears to relate to ss. 215(1)(f)(i), supports the respondent's argument that this subsection applies to students studying pursuant to subsection 30(2) who need to apply for a study permit once they reach the age of majority. It does not support the applicants' argument that this subsection applies to foreign nationals in the circumstances of the applicants who wish to study, or have enrolled to study, at a pre-school, primary or secondary level.

[29] The applicants submit that the Officer's interpretation of the provision is unreasonable because it does not apply to the applicants or other minor children in circumstances similar to the applicants. With respect, the applicants' argument is flawed because it relies on a premise that the objective of the enactment is to allow all minor children such as the applicants, who are already in Canada but do not fall under the exemption in ss. 30(2) of the IRPA, to apply for a study permit from within the country. However, the applicants have provided no compelling support for this premise.

[30] The applicants disagree with the Officer's interpretation of the statute, but this is not a basis to overturn the decision. The interpretation of the Officer still renders subsection 215(1)(f)(i) of the IRPR remedial, albeit in a narrower way than the interpretation suggested by the applicants. This does not mean that the Officer's interpretation falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para 47).

VI. **Conclusion**

[31] Given the reasons above, and the Court's resulting conclusion that the Officer's interpretation of the relevant provisions is reasonable, the applications for judicial review are dismissed.

VII. **Certified Question**

[32] The applicants requested that the following question be certified for appeal to the Federal Court of Appeal as a serious question of general importance:

> Whether the provision in section 215(1)(f)(i) of the *Immigration and Refugee Protection Regulations*, which states:
>
> 215. (1) A foreign national may apply for a study permit after entering Canada if they … (f) are a temporary resident who (i) *is* studying at the preschool, primary or secondary *level* (emphasis added)
>
> should be restricted to those students who are actually/physically studying at a preschool, primary or secondary institution in Canada (as per a literal, restrictive interpretation of the words "is studying") or whether the section is to be interpreted to define the exemption to cover the study "level" of the individuals who are granted an exemption by virtue of this section from the

> requirement to apply for a study permit from outside Canada because they study at "the preschool, primary or secondary level".

[33] Pursuant to ss. 74(d) of the IRPA, only a "serious question of general importance" can be certified. As submitted by the applicants in reliance on *Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168 at paragragh 9, to be certified a question must (i) be dispositive of the appeal and (ii) transcend the interests of the immediate parties to the litigation, as well as contemplate issues of broad significance or general importance.

[34] The applicants submit that this test is met because (i) the applications would be allowed if the interpretation of ss. 215(1)(f)(i) for which the applicants contend were to be adopted; and (ii) such interpretation will affect applications for study permits beyond those of the three applicants.

[35] The respondent opposes the request for certification on the basis that the question is not one of general importance but rather is a question of construction, confined to just one component of the regulatory amendments made by SOR/2014-14, which can be addressed by well-established principles of statutory interpretation.

[36] While I agree with the applicants that their proposed interpretation of ss. 215(1)(f)(i) of the IRPR would be dispositive of an appeal, I agree with the respondent's position that the proposed question is not a serious question of general importance. In so concluding, I note Justice Strayer's description, in *Gittens v Minister of Public Safety and Emergency Preparedness*, 2008 FC 526 at para 6, of serious questions being those that raise matters of

significant doubt. I am not convinced that the question proposed by the applicants raises such a matter.

[37] Rather, I find this matter to be similar to that considered by Justice Mainville in *Jin v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1234, which turned on the interpretation of a ministerial instruction that was given legislative effect pursuant to the IRPA and published in the Canada Gazette. The Court observed at para 24 that ss. 74(d) of the IRPA is not to be invoked lightly (*Varela v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145 at para 23) and concluded that the interpretation of the ministerial instruction on the narrow facts of that case was not of general importance.

JUDGMENT

THIS COURT'S JUDGMENT is that the applications for judicial review are dismissed. No question is certified for appeal.

"Richard F. Southcott"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Cecil L. Rotenberg, Q.C.	FOR THE APPLICANTS
Nur Mohammed-Ally	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Cecil L. Rotenberg, Q.C. Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT