Federal Court  Cour fédérale

Date: 20170426

Docket: IMM-3178-16

Citation: 2017 FC 409

Ottawa, Ontario, April 26, 2017

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

SAJU BEGUM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

and

ONTARIO COUNCIL OF AGENCIES SERVING IMMIGRANTS AND SOUTH ASIAN LEGAL CLINIC OF ONTARIO

Intervenors

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] for judicial review of the decision of the Immigration Appeal Division of the Immigration and Refugee Board of Canada [IAD], dated July 7, 2016 [Decision], which denied the Applicant's appeal to sponsor her father, mother, and five siblings for permanent residence in Canada as members of the family class.

II. BACKGROUND

[2] The Applicant is a 43-year-old Canadian citizen. She was born in Bangladesh and entered Canada in 1994 under the sponsorship of her husband. They are still married and have five children.

[3] In 2004, the Applicant and her family visited her parents and siblings in Bangladesh. Two years after the visit, the Applicant was diagnosed with "adjustment disorder with mixed anxiety and depressed features, mild in severity." In 2012, she was diagnosed with depression by her family physician and prescribed psychotropic medication, which she no longer takes.

[4] On October 30, 2008, the Applicant's father applied for permanent residence in Canada under the Parent-Grandparent Program [PGP] with the Applicant as the sponsor. The Applicant's husband was initially a co-sponsor but was removed when it was determined that he had

previously sponsored family members who had received social welfare during the sponsorship. At the time of the application, the Applicant was aware her case would be used as a test case to challenge the minimum necessary income [MNI] requirement under the governing regulations.

[5] A visa officer refused the application on September 19, 2011 on the basis that the Applicant did not meet the MNI requirement. The Applicant filed an appeal of the refusal to the IAD on September 30, 2011.

[6] Prior to the hearing of the appeal, the *Immigration and Refugee Protection Regulations*, SOR/222-2007 [*Regulations*] were amended effective January 1, 2014. The amended s 133(1)(j) of the *Regulations* increased the MNI required to sponsor a parent or grandparent from solely the low-income cut-offs [LICO] to the LICO plus 30 per cent, and also required the sponsor to meet the MNI requirement for each of the three consecutive taxation years preceding the date of the application. Notably, the *Regulations* did not contain transition provisions.

[7] On July 8, 2014, the Applicant filed a Notice of Constitutional Question [NCQ] and argued that s 133(1)(j) of the *Regulations* infringed ss 7 and 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act*, 1982 (UK), 1982, c 11 [*Charter*] and could not be saved by s 1 of the *Charter*.

[8] The hearing was held over the course of six days and occurred in two stages. At the first stage, the IAD considered the sponsorship appeal and heard testimony from the Applicant and her two eldest daughters. At the second stage, the IAD considered the constitutional validity of s

133(1)(j) and heard testimony from expert and other witnesses. Intervener status was granted to the South Asian Legal Clinic of Ontario [SALCO] and Ontario Council of Agencies Serving Immigrants [OCASI]. The IAD also reviewed substantial documentary evidence from both parties.

III. DECISION UNDER REVIEW

[9] The Decision by a Member of the IAD on July 7, 2016 determined that the refusal was valid in law and fact; additionally, the IAD found that there were not sufficient humanitarian and compassionate [H&C] considerations to warrant special relief in all the circumstances of the case.

(1) Sponsorship Appeal

[10] Since the Applicant did not challenge the validity of the visa officer's decision except for the constitutional challenge, the IAD first reviewed whether special relief was merited in light of the circumstances of the case. In its review, the IAD set out the factors that should be considered, including additional evidence that was not before the visa officer and the objectives of the *IRPA*.

[11] The IAD considered that the Applicant's husband had co-signed the application in 2008 but was removed when it was determined that he had previously sponsored family members who had received social welfare during the sponsorship, which welfare remained unpaid. Additionally, both the Applicant and her husband had received social welfare. Accordingly, the

IAD based the Decision on the Applicant as the sole sponsor with no co-signer and found this weighed against the appeal.

[12] The MNI impediment and the financial position of the sponsor was the next consideration. The IAD applied ss 133(1)(j) and 134 of the amended *Regulations* for a 14-member family. The applicable MNI ranged from $137,189 to $140,597 in 2013 to 2015. By comparison, the Applicant's estimated income was $10,000 in both 2014 and 2015. As the Applicant had not overcome this obstacle to admissibility at the time of the hearing, the IAD also applied the higher threshold from *Chirwa v Canada (Minister of Canada)*, [1970] IABD No 1.

[13] The IAD considered the Applicant's testimony regarding the financial situation of her family in Canada, which included the following facts: she had babysat for one year and earned $200 per week; she had a taxi licence but did not work as a taxi driver; she received social welfare from May 1995 to January 2000; she had no savings; and her husband earned $10,000 per year and had received social welfare from May 1995 to January 2000. The Applicant also provided information regarding the financial prospects of her parents and siblings, including the following facts: her parents owned a farm in Bangladesh that could be rented out as a source of income; her parents and siblings had enough money to live in Canada for six months without support; her siblings were educated and qualified for many jobs; and she and her parents could establish a catering business. However, the Applicant's testimony was not supported with documentation.

[14] The IAD also noted the almost complete absence of documentation regarding the income of the Applicant and her husband, and for their financial assets and liabilities for the previous five years. Since the refusal was based on the Applicant's financial circumstances and the appeal was meant to consider financial matters, the IAD found that the absence of evidence regarding her financial situation weighed heavily against the Applicant.

[15] The IAD then discussed the Applicant's family in Canada and Bangladesh. The IAD noted that the Applicant had been in Canada since 1994 and had five children. The Applicant's husband had previously sponsored his own parents and siblings to Canada but the Applicant testified they were estranged. She also testified that, while she had no friends or extended family in Canada, she had a strong relationship with her family in Bangladesh, with whom she communicated daily via telephone, Skype, letters, and cards.

[16] With regards to hardship, the IAD considered the Applicant's testimony that she had been diagnosed with depression and required her family to immigrate to Canada to help her deal with this illness. The Applicant explained that two years after she and her family in Canada had visited Bangladesh, she began to feel anxiety. A psychologist diagnosed the Applicant with depression and recommended she be permitted to sponsor her family to come to Canada. The Applicant felt that future visits to Bangladesh, which were not financially viable for the entire family, would not reduce her depression, nor would it help if her parents were to visit for only six months. The IAD noted that she did not take her prescribed anti-depressant medication and would not travel to Bangladesh alone. Additionally, the IAD found no evidence of specific

hardship other than general separation. As a result, the IAD felt the Applicant's concerns could be partially alleviated through communications and visits.

[17] In consideration of the best interests of the children, the IAD heard testimony from the Applicant's two eldest daughters about the 2004 visit to Bangladesh. The daughters emphasized the closeness of the family and their continued communication. The IAD also considered the Applicant's testimony that her parents and family could assist in raising the children and provide them with a heritage context. The IAD accorded substantial weight to the circumstances and interests of the Applicant's children but found insufficient evidence to overcome the negative factors in the case.

[18] The IAD then assessed the other circumstances of the case and noted that the Applicant had: failed to provide complete evidence about the primary issue in the appeal; failed to demonstrate complete adequate assistance to her parents and siblings if they were to live in Canada; failed to present evidence to show her parents and siblings would be self-sufficient; and had relied on social assistance and subsidized accommodation. Additionally, the IAD noted that her husband's sponsored family had also been dependent on social assistance.

[19] In weighing the factors of the Applicant's case, the IAD found the threshold to be high. Physical separation was not sufficient to invoke special relief and there was insufficient evidence about hardship or any unusual and serious circumstances that might permit the imposition of special relief. The IAD was puzzled that the Applicant had failed to provide the basic documentation required to assess the appeal's essential issue of her financial circumstances, but

had made much effort to present evidence about the principles of general economic discrimination. As a result, the IAD found the negative factors outweighed the positive ones.

(2) Constitutional Challenge

[20] The Applicant had submitted that the MNI requirement to sponsor her parents and siblings violated her constitutional rights. On this issue, the IAD granted intervener status to SALCO and OCASI. The constitutional hearing was joined with the appeal of *Alavehzadeh v Canada (Minister of Citizenship and Immigration)*, [2016] IADD No 800. At the constitutional hearing, the IAD heard expert witness testimony from Dr. Galabuzi, Professor Mykitiuk, and Dr. Chuang. Two additional witnesses, Debbie Douglas, and Fraser Fowler, also provided testimony. Substantial documentary evidence was also submitted.

[21] The IAD considered Dr. Galabuzi's opinion testimony and evidence about the impact of MNI on sponsorship, which was that the MNI requirement resulted in a differential impact on sponsors of family members due to racial and gender inequalities in the Canadian labour market and differential access to the income structure. He found that the causes of economic disparity experienced by racialized groups and women would persist and were unlikely to change in the near future. Dr. Galabuzi confirmed that the MNI requirement disproportionately affected family sponsorship for racialized groups that were already disadvantaged because of reduced access to the labour market. However, he conceded that racialization was not the singular factor. Dr. Galabuzi agreed his research was primarily based on the concept of LICO as a measure of poverty and that the difference between racialized and non-racialized poverty was determined from income tax filing data, which the IAD noted the Applicant had provided little evidence of.

[22] In its assessment of Dr. Galabuzi's evidence, the IAD noted that he had not researched sponsorship MNI-based approval and refusal rates or trends, nor had he examined healthcare costs by isolating parents and grandparents. Dr. Galabuzi also stated that reliance on social assistance in general had decreased, mostly due to government action. The IAD found that Dr. Galabuzi's primary conclusion was that MNI and economic factors were overemphasized in the legislation; however, many of the factors that he preferred to be considered over MNI could be raised before the IAD pursuant to the s 67(1)(c) of the *IRPA*, and that some of his other observations had already been incorporated by the government into legislation and regulations concerning sponsorship criteria.

[23] The IAD then considered Professor Mykitiuk's opinion testimony and evidence about the social and economic issues affecting family and parenting for people with disabilities and the impact of Canadian law on people with disabilities. Professor Mykitiuk concluded that the MNI requirement had a disproportionately adverse impact on persons with disabilities. However, the IAD found no evidence that the Applicant should be considered as disabled. Additionally, the IAD noted that Professor Mykitiuk had not specifically researched immigration and disability, poverty, and immigration issues or the effect of disability on family class immigration applications. The IAD also noted that Professor Mykitiuk did not relate her opinions and comments to the Applicant's particular circumstances. As a result, the IAD found the link to the Applicant's circumstances tenuous and noted that most of Professor Mykitiuk's observations were usually addressed when reconsidering special relief in MNI cases.

[24] The third expert witness, Dr. Chuang, provided opinion testimony and evidence about family relationships, particularly those associated with cultural affiliations and immigration groups, and concluded that family played a critical role in maintaining an individual's well-being. In regards to MNI, Dr. Chuang was of the opinion that the MNI requirement deprived Canadians, particularly women, low-income groups, and racialized individuals, of an important part of their lives, and she felt that the need and value for family members was more important than the economic component for sponsorship. As with Professor Mykitiuk's testimony, the IAD found that Dr. Chuang's concerns were often and usually addressed when considering the availability of special relief, along with acknowledging the importance of family reunification in MNI cases. Furthermore, the IAD found that her evidence, while moderately helpful, was sometimes inconsistent with that of the other appellant witnesses and primarily reinforced propositions generally accepted in sponsorship cases.

[25] The IAD also heard evidence from Ms. Douglas, the executive director of the OCASI, an intervener in the case. Ms. Douglas testified that family reunification is essential for the successful integration of immigrants and that the increased MNI for parents and grandparents is prohibitive for racialized groups and women. She disagreed that the PGP generated costs to Canadian taxpayers and felt that the availability of other visas or immigration routes was not a viable response to an increased MNI. The IAD found that Ms. Douglas advocated that there should be no economic considerations for immigration and that she inferred that an immigrant to Canada had a valid expectation that their parents and grandparents could join them later without regulatory interference.

[26] The IAD then heard testimony from Mr. Fowler, who had been the Assistant Director of the Social Policy and Programs Division of the Immigration Branch at Citizenship and Immigration Canada [CIC] since March 2013. Mr. Fowler provided information about the alternative visas available, such as the "super visa," and the 2011 redesign of the PGP. The Applicant also questioned Mr. Fowler about the Regulatory Impact Analysis Statement [RIAS] that had been issued with the amended *Regulations*.

[27] Both the Applicant and Respondent filed affidavits containing documents that included statistics that were contrary to the other party's position. In particular, the Homeward Affidavit, filed on behalf of the Respondent, contained material about selected countries' parental sponsorship programs and additional Canadian provincial healthcare programs. The Interveners also filed an affidavit containing relevant documents that emphasized the needs and interdependence of extended families in South Asian society.

[28] In comparing the two versions of the *Regulations*, the IAD found that the amended version was applicable to the appeal and that the constitutional evidence and submissions that had been submitted also applied to the amended version. The IAD concluded that the Applicant had not shown that the differential treatment was a result of discrimination on a prohibited ground or engaged the principles of fundamental justice. The IAD also noted that the Applicant often attacked the presence of any financial barrier to immigration and her efforts were directed at governmental policy and inadequate government grounds under s 1 of the *Charter*. With regards to the constitutional witnesses, the IAD found that they seldom related their opinions and observations to the specific characteristics of the Applicant.

[29] The IAD also found that s 27 of the *Charter*, which references multicultural heritage, served as an interpretive guide and noted that it was reflected in immigration objectives, such as s 3(b) of the *IRPA*. However, the IAD disagreed with the Applicant's submission that the evidence in the appeal showed that the MNI requirement weakened the multicultural makeup of Canadian society. Additionally, the IAD noted that the MNI requirement was not required to sponsor many immediate family members.

[30] As to the matter of whether s 133(1)(j) of the *Regulations* violated s 15 of the *Charter*, the IAD did not find that the Applicant had established that the impugned section created a distinction based on an enumerated or any analogous grounds. The IAD found the testimony on behalf of the Applicant to be broad, tenuous, non-definitive, often contradictory, and sometimes not directly applicable to the Applicant. Furthermore, the IAD found the evidence to be nebulous and that it did not demonstrate a causal connection that produced a disproportionate impact or an adverse effect.

[31] Since the IAD did not find the Applicant had passed the first stage of the test for s 15 of the *Charter*, it did not examine whether the distinction was discriminatory.

[32] With regards to whether s 133(1)(j) of the *Regulations* violated s 7 of the *Charter*, the IAD was not persuaded that the Applicant's inability to sponsor her parents and any resulting stress was an infringement of her constitutional rights, since s 7 of the *Charter* does not contain a right to family reunification and the MNI requirement was only one component that must be placed in context with the other diverse assessment requirements for immigration. The IAD also

found that the evidence about psychological harm suffered by the Applicant was not sufficient to engage s 7 of the *Charter*.

[33] The IAD's assessment of the MNI requirement was that it was not fundamentally unfair to the Applicant because the evidence provided did not demonstrate a sufficient causal connection between s 133(1)(j) of the *Regulations* and a deprivation of her liberty and security. Furthermore, the IAD found that procedural fairness was accorded through s 67(3) of the *IRPA*, which mandates an examination of the H&C circumstances when considering the MNI qualifications.

[34] While the IAD found it unnecessary to determine whether s 133(1)(j) of the *Regulations* was justified by s 1 of the *Charter*, the IAD acknowledged the legislative context. A sponsor is required to assume responsibility, including an undertaking to assume financial responsibility, for the sponsored immigrant, which is measured by the MNI. In the event that the MNI is not met, s 67 of the *IRPA* allows H&C considerations to overcome such a deficiency. The IAD noted that the availability of this special relief and its legal implications were hardly explored by the Applicant.

[35] In summary, the IAD found that the Applicant had not met the evidentiary and persuasive burden to establish a constitutional violation. The IAD also concluded that the visa officer's decision was valid in law and fact and there were insufficient H&C considerations to warrant special relief. Accordingly, the IAD dismissed the appeal.

IV. ISSUES

[36] The Applicant submits that the following are at issue in this application:

a) Did the IAD err in law by applying ss 133(1)(j) and 134 of the *Regulations*, as amended on January 1, 2014, to the Applicant's appeal?

b) Did the IAD breach the principle of procedural fairness by applying the amended ss 133(1)(j) and 134 of the *Regulations* without first advising the Applicant?

c) Did the IAD err in law by finding that the impugned section does not violate s 15 of the *Charter*?

d) Did the IAD err in law by finding that the impugned section does not violate s 7 of the *Charter*?

e) Did the IAD make an unreasonable decision by:

   i) Ignoring evidence and/or misconstruing evidence;

   ii) Failing to take into account the best interests of the child; and

   iii) Failing to provide reasons that are intelligible, justified, or transparent?

[37] The Respondent submits that the following are at issue in this application:

a) Does the MNI requirement violate s 7 of the *Charter*?

b) Does the MNI requirement violate s 15 of the *Charter*?

c) Was the IAD's Decision dismissing the Applicant's appeal on H&C grounds unreasonable?

V. STANDARD OF REVIEW

[38] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a

satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[39] The first issue raised by the Applicant as to whether s 133(1)(j)(i) of the amended *Regulations* applies to the IAD's determination of appeals of decisions that were made prior to January 1, 2014 has been determined by this Court to engage procedural fairness and to attract a correctness standard: *Patel v Canada (Minister of Citizenship and Canada)*, 2016 FC 1221 at para 18 [*Patel*].

[40] The second issue regarding whether the application of s 133(1)(j)(i) of the amended *Regulations* without first advising the Applicant is a matter of procedural fairness and will also be reviewed under the correctness standard: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43 [*Khosa*].

[41] Where a decision-maker is interpreting its own statute or statutes closely connected to its function with which it has particular familiarity, the applicable standard of review is presumed to be reasonableness: *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 at para 22. The presumption is overcome if the question at issue falls into one of the categories to which the correctness standard applies: constitutional questions, questions of law

that are of central importance to the legal system as a whole and that are outside of the adjudicator's expertise, questions regarding the jurisdictional lines between two or more competing specialized tribunals, and the exceptional category of true questions of jurisdiction. See *Dunsmuir*, above, at paras 58-61, and *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 30. When a tribunal is determining the constitutionality of a law, the standard of review is correctness: *Canadian National Railway Co v Canada (Attorney General)*, 2014 SCC 40 at para 55. As such, the third and fourth issues regarding whether the IAD erred in finding that s 133(1)(j)(i) of the *Regulations* does not violate ss 7 and 15 of the *Charter* will be reviewed under the correctness standard.

[42] The fifth issue concerns the IAD's assessment of the evidence and the exercise of its H&C discretion and has been held to be reviewable on a standard of reasonableness: *Patel*, above, at para 19 and *Khosa*, above, at para 59.

[43] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at para 47, and *Khosa*, above. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

VI. STATUTORY PROVISIONS

[44] The following provisions from the *IRPA* are relevant in this proceeding:

Humanitarian and compassionate considerations — request of foreign national	**Séjour pour motif d'ordre humanitaire à la demande de l'étranger**
25 (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	25 (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.
Right to appeal — visa refusal of family class	**Droit d'appel : visa**
63 (1) A person who has filed in the prescribed manner an	63 (1) Quiconque a déposé, conformément au règlement,

application to sponsor a foreign national as a member of the family class may appeal to the Immigration Appeal Division against a decision not to issue the foreign national a permanent resident visa.	une demande de parrainage au titre du regroupement familial peut interjeter appel du refus de délivrer le visa de résident permanent.

[45] The following provisions from the *Regulations* that were amended and in effect January 1, 2014 [amended *Regulations*] are relevant in this proceeding:

Requirements for sponsor	**Exigences : répondant**
133 (1) A sponsorship application shall only be approved by an officer if, on the day on which the application was filed and from that day until the day a decision is made with respect to the application, there is evidence that the sponsor	133 (1) L'agent n'accorde la demande de parrainage que sur preuve que, de la date du dépôt de la demande jusqu'à celle de la décision, le répondant, à la fois :
…	…
(j) if the sponsor resides	j) dans le cas où il réside :
(i) in a province other than a province referred to in paragraph 131(b),	(i) dans une province autre qu'une province visée à l'alinéa 131b) :
(A) has a total income that is at least equal to the minimum necessary income, if the sponsorship application was filed in respect of a foreign national other than a foreign national referred to in clause (B), or	(A) a un revenu total au moins égal à son revenu vital minimum, s'il a déposé une demande de parrainage à l'égard d'un étranger autre que l'un des étrangers visés à la division (B),
(B) has a total income that is at least equal to the minimum necessary income, plus 30%, for each of the three	(B) a un revenu total au moins égal à son revenu vital minimum, majoré de 30 %, pour chacune des trois années

consecutive taxation years immediately preceding the date of filing of the sponsorship application, if the sponsorship application was filed in respect of a foreign national who is

(I) the sponsor's mother or father,

(II) the mother or father of the sponsor's mother or father, or

(III) an accompanying family member of the foreign national described in subclause (I) or (II), and

…

Income calculation rules

134 (1) Subject to subsection (3), for the purpose of clause 133(1)(j)(i)(A), the sponsor's total income shall be calculated in accordance with the following rules:

(a) the sponsor's income shall be calculated on the basis of the last notice of assessment, or an equivalent document, issued by the Minister of National Revenue in respect of the most recent taxation year preceding the date of filing of the sponsorship application;

(b) if the sponsor produces a document referred to in paragraph (a), the sponsor's income is the income earned as reported in that document less the amounts referred to in subparagraphs (c)(i) to (v);

d'imposition consécutives précédant la date de dépôt de la demande de parrainage, s'il a déposé une demande de parrainage à l'égard de l'un des étrangers suivants :

(I) l'un de ses parents,

(II) le parent de l'un ou l'autre de ses parents,

(III) un membre de la famille qui accompagne l'étranger visé aux subdivisions (I) ou (II),

…

Règles de calcul du revenu

134 (1) Sous réserve du paragraphe (3) et pour l'application de la division 133(1)j)(i)(A), le revenu total du répondant est calculé selon les règles suivantes :

a) le calcul du revenu se fait sur la base du dernier avis de cotisation qui lui a été délivré par le ministre du Revenu national avant la date de dépôt de la demande de parrainage, à l'égard de l'année d'imposition la plus récente, ou tout document équivalent délivré par celui-ci;

b) si le répondant produit un document visé à l'alinéa a), son revenu équivaut à la différence entre la somme indiquée sur ce document et les sommes visées aux sous-alinéas c)(i) à (v);

(c) if the sponsor does not produce a document referred to in paragraph (a), or if the sponsor's income as calculated under paragraph (b) is less than their minimum necessary income, the sponsor's Canadian income for the 12-month period preceding the date of filing of the sponsorship application is the income earned by the sponsor not including

c) si le répondant ne produit pas de document visé à l'alinéa a) ou si son revenu calculé conformément à l'alinéa b) est inférieur à son revenu vital minimum, son revenu correspond à l'ensemble de ses revenus canadiens gagnés au cours des douze mois précédant la date du dépôt de la demande de parrainage, exclusion faite de ce qui suit :

(i) any provincial allowance received by the sponsor for a program of instruction or training,

(i) les allocations provinciales reçues au titre de tout programme d'éducation ou de formation,

(ii) any social assistance received by the sponsor from a province,

(ii) toute somme reçue d'une province au titre de l'assistance sociale,

(iii) any financial assistance received by the sponsor from the Government of Canada under a resettlement assistance program,

(iii) toute somme reçue du gouvernement du Canada dans le cadre d'un programme d'aide pour la réinstallation,

(iv) any amounts paid to the sponsor under the Employment Insurance Act, other than special benefits,

(iv) les sommes, autres que les prestations spéciales, reçues au titre de la Loi sur l'assurance-emploi,

(v) any monthly guaranteed income supplement paid to the sponsor under the Old Age Security Act, and

(v) tout supplément de revenu mensuel garanti reçu au titre de la Loi sur la sécurité de la vieillesse,

(vi) any Canada child benefit paid to the sponsor under the Income Tax Act; and

(vi) les allocations canadiennes pour enfants reçues au titre de la Loi de l'impôt sur le revenu;

(d) if there is a co-signer, the income of the co-signer, as calculated in accordance with paragraphs (a) to (c), with any

d) le revenu du cosignataire, calculé conformément aux alinéas a) à c), avec les adaptations nécessaires, est, le

modifications that the circumstances require, shall be included in the calculation of the sponsor's income.

cas échéant, inclus dans le calcul du revenu du répondant.

Exception

Exception

(1.1) Subject to subsection (3), for the purpose of clause 133(1)(j)(i)(B), the sponsor's total income shall be calculated in accordance with the following rules:

(1.1) Sous réserve du paragraphe (3) et pour l'application de la division 133(1)j)(i)(B), le revenu total du répondant est calculé selon les règles suivantes :

(a) the sponsor's income shall be calculated on the basis of the income earned as reported in the notices of assessment, or an equivalent document, issued by the Minister of National Revenue in respect of each of the three consecutive taxation years immediately preceding the date of filing of the sponsorship application;

a) le calcul du revenu du répondant se fait sur la base des avis de cotisation qui lui ont été délivrés par le ministre du Revenu national à l'égard de chacune des trois années d'imposition consécutives précédant la date de dépôt de la demande de parrainage, ou de tout document équivalent délivré par celui-ci;

(b) the sponsor's income is the income earned as reported in the documents referred to in paragraph (a), not including

b) son revenu équivaut alors à la somme indiquée sur les documents visés à l'alinéa a), exclusion faite de ce qui suit :

(i) any provincial allowance received by the sponsor for a program of instruction or training,

(i) les allocations provinciales reçues au titre de tout programme d'éducation ou de formation,

(ii) any social assistance received by the sponsor from a province,

(ii) toute somme reçue d'une province au titre de l'assistance sociale,

(iii) any financial assistance received by the sponsor from the Government of Canada under a resettlement assistance program,

(iii) toute somme reçue du gouvernement du Canada dans le cadre d'un programme d'aide pour la réinstallation,

(iv) any amounts paid to the sponsor under the *Employment*

(iv) les sommes, autres que les prestations spéciales, reçues au

Insurance Act, other than special benefits,

(v) any monthly guaranteed income supplement paid to the sponsor under the *Old Age Security Act*, and

(vi) any Canada child benefit paid to the sponsor under the *Income Tax Act*; and

(c) if there is a co-signer, the income of the co-signer, as calculated in accordance with paragraphs (a) and (b), with any modifications that the circumstances require, shall be included in the calculation of the sponsor's income.

titre de la *Loi sur l'assurance-emploi*,

(v) tout supplément de revenu mensuel garanti reçu au titre de la *Loi sur la sécurité de la vieillesse*,

(vi) les allocations canadiennes pour enfants reçues au titre de la *Loi de l'impôt sur le revenu*;

c) le revenu du cosignataire, calculé conformément aux alinéas a) et b), avec les adaptations nécessaires, est, le cas échéant, inclus dans le calcul du revenu du répondant.

Updated evidence of income

(2) An officer may request from the sponsor, after the receipt of the sponsorship application but before a decision is made on an application for permanent residence, updated evidence of income if

(a) the officer receives information indicating that the sponsor is no longer able to fulfil the obligations of the sponsorship undertaking; or

(b) more than 12 months have elapsed since the receipt of the sponsorship application.

Preuve de revenu à jour

(2) L'agent peut demander au répondant, après la réception de la demande de parrainage mais avant qu'une décision ne soit prise sur la demande de résidence permanente, une preuve de revenu à jour dans les cas suivants :

a) l'agent reçoit des renseignements montrant que le répondant ne peut plus respecter les obligations de son engagement à l'égard du parrainage;

b) plus de douze mois se sont écoulés depuis la date de réception de la demande de parrainage.

Modified income calculation rules

(3) When an officer receives

Règles du calcul du revenu modifiées

(3) Lorsque l'agent reçoit la

the updated evidence of income requested under subsection (2), the sponsor's total income shall be calculated in accordance with subsection (1) or (1.1), as applicable, except that

preuve de revenu à jour demandée aux termes du paragraphe (2), le revenu total du répondant est calculé conformément aux paragraphes (1) ou (1.1), le cas échéant, sauf dans les cas suivants :

(a) in the case of paragraph (1)(a), the sponsor's income shall be calculated on the basis of the last notice of assessment, or an equivalent document, issued by the Minister of National Revenue in respect of the most recent taxation year preceding the day on which the officer receives the updated evidence;

a) dans le cas de l'alinéa (1)a), le calcul du revenu du répondant se fait sur la base du dernier avis de cotisation qui lui a été délivré par le ministre du Revenu national à l'égard de l'année d'imposition la plus récente précédant la date de la réception, par l'agent, de la preuve de revenu à jour, ou de tout autre document équivalent délivré par celui-ci;

(b) in the case of paragraph (1)(c), the sponsor's income is the sponsor's Canadian income earned during the 12-month period preceding the day on which the officer receives the updated evidence; and

b) dans le cas de l'alinéa (1)c), son revenu correspond à l'ensemble de ses revenus canadiens gagnés au cours des douze mois précédant la date de la réception, par l'agent, de la preuve de revenu à jour;

(c) in the case of paragraph (1.1)(a), the sponsor's income shall be calculated on the basis of the income earned as reported in the notices of assessment, or an equivalent document, issued by the Minister of National Revenue in respect of each of the three consecutive taxation years immediately preceding the day on which the officer receives the updated evidence.

c) dans le cas de l'alinéa (1.1)a), le calcul du revenu du répondant se fait sur la base des avis de cotisation qui lui ont été délivrés par le ministre du Revenu national à l'égard de chacune des trois années d'imposition consécutives précédant la date de la réception, par l'agent, de la preuve de revenu à jour, ou de tout autre document équivalent délivré par celui-ci.

[46] The following provisions from the *Regulations* that were in effect December 31, 2013 [pre-2014 *Regulations*] are relevant in this proceeding:

Requirements for sponsor	**Exigences : répondant**
133 (1) A sponsorship application shall only be approved by an officer if, on the day on which the application was filed and from that day until the day a decision is made with respect to the application, there is evidence that the sponsor	133 (1) L'agent n'accorde la demande de parrainage que sur preuve que, de la date du dépôt de la demande jusqu'à celle de la décision, le répondant, à la fois :
…	…
(j) if the sponsor resides	j) dans le cas où il réside :
(i) in a province other than a province referred to in paragraph 131(b), has a total income that is at least equal to the minimum necessary income, and	(i) dans une province autre qu'une province visée à l'alinéa 131b), a eu un revenu total au moins égal à son revenu vital minimum,
(ii) in a province referred to in paragraph 131(b), is able, within the meaning of the laws of that province and as determined by the competent authority of that province, to fulfil the undertaking referred to in that paragraph; and	(ii) dans une province visée à l'alinéa 131b), a été en mesure, aux termes du droit provincial et de l'avis des autorités provinciales compétentes, de respecter l'engagement visé à cet alinéa;
…	…
Income calculation rules	**Règles de calcul du revenu**
134 (1) For the purpose of subparagraph 133(1)(j)(i), the total income of the sponsor shall be determined in accordance with the following rules:	134 (1) Pour l'application du sous-alinéa 133(1)j)(i), le revenu total du répondant est déterminé selon les règles suivantes :

(a) the sponsor's income shall be calculated on the basis of the last notice of assessment, or an equivalent document, issued by the Minister of National Revenue in respect of the most recent taxation year preceding the date of filing of the sponsorship application;

a) le calcul du revenu se fait sur la base du dernier avis de cotisation qui lui a été délivré par le ministre du Revenu national avant la date de dépôt de la demande de parrainage, à l'égard de l'année d'imposition la plus récente, ou tout document équivalent délivré par celui-ci;

(b) if the sponsor produces a document referred to in paragraph (a), the sponsor's income is the income earned as reported in that document less the amounts referred to in subparagraphs (c)(i) to (v);

b) si le répondant produit un document visé à l'alinéa a), son revenu équivaut à la différence entre la somme indiquée sur ce document et les sommes visées aux sous-alinéas c)(i) à (v);

(c) if the sponsor does not produce a document referred to in paragraph (a), or if the sponsor's income as calculated under paragraph (b) is less than their minimum necessary income, the sponsor's Canadian income for the 12-month period preceding the date of filing of the sponsorship application is the income earned by the sponsor not including:

c) si le répondant ne produit pas de document visé à l'alinéa a) ou si son revenu calculé conformément à l'alinéa b) est inférieur à son revenu vital minimum, son revenu correspond à l'ensemble de ses revenus canadiens gagnés au cours des douze mois précédant la date du dépôt de la demande de parrainage, exclusion faite de ce qui suit :

(i) any provincial allowance received by the sponsor for a program of instruction or training,

(i) les allocations provinciales reçues au titre de tout programme d'éducation ou de formation,

(ii) any social assistance received by the sponsor from a province,

(ii) toute somme reçue d'une province au titre de l'assistance sociale,

(iii) any financial assistance received by the sponsor from the Government of Canada under a resettlement assistance

(iii) toute somme reçue du gouvernement du Canada dans le cadre d'un programme d'aide pour la réinstallation,

program,	
(iv) any amounts paid to the sponsor under the *Employment Insurance Act*, other than special benefits,	(iv) les sommes, autres que les prestations spéciales, reçues au titre de la *Loi sur l'assurance-emploi*,
(v) any monthly guaranteed income supplement paid to the sponsor under the *Old Age Security Act*, and	(v) tout supplément de revenu mensuel garanti reçu au titre de la *Loi sur la sécurité de la vieillesse*,
(vi) any Canada child tax benefit paid to the sponsor under the *Income Tax Act*; and	(vi) les prestations fiscales canadiennes pour enfants reçues au titre de la *Loi de l'impôt sur le revenu*;
(d) if there is a co-signer, the income of the co-signer, as calculated in accordance with paragraphs (a) to (c), with any modifications that the circumstances require, shall be included in the calculation of the sponsor's income.	d) le revenu du cosignataire, calculé conformément aux alinéas a) à c), avec les adaptations nécessaires, est, le cas échéant, inclus dans le calcul du revenu du répondant.
Change in circumstances	**Changement de situation**
(2) If an officer receives information indicating that the sponsor is no longer able to fulfil the sponsorship undertaking, the Canadian income of the sponsor shall be calculated in accordance with paragraph (1)(c) on the basis of the 12-month period preceding the day the officer receives that information rather than the 12-month period referred to in that paragraph.	(2) Dans le cas où l'agent reçoit des renseignements montrant que le répondant ne peut plus respecter son engagement à l'égard du parrainage, le revenu canadien du répondant est calculé conformément à l'alinéa (1)c) comme si la période de douze mois était celle qui précède le jour où l'agent a reçu les renseignements au lieu de la période de douze mois visée à cet alinéa.

[47] The following provisions from the *Interpretation Act*, RSC 1985, c I-21 [*Interpretation Act*] are relevant in this proceeding:

Effect of repeal

43 Where an enactment is repealed in whole or in part, the repeal does not

(a) revive any enactment or anything not in force or existing at the time when the repeal takes effect,

(b) affect the previous operation of the enactment so repealed or anything duly done or suffered thereunder,

(c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed,

(d) affect any offence committed against or contravention of the provisions of the enactment so repealed, or any punishment, penalty or forfeiture incurred under the enactment so repealed, or

(e) affect any investigation, legal proceeding or remedy in respect of any right, privilege, obligation or liability referred to in paragraph (c) or in respect of any punishment, penalty or forfeiture referred to in paragraph (d), and an investigation, legal proceeding or remedy as described in paragraph (e) may be instituted, continued or enforced, and the punishment, penalty or forfeiture may be imposed as if the enactment

Effet de l'abrogation

43 L'abrogation, en tout ou en partie, n'a pas pour conséquence :

a) de rétablir des textes ou autres règles de droit non en vigueur lors de sa prise d'effet;

b) de porter atteinte à l'application antérieure du texte abrogé ou aux mesures régulièrement prises sous son régime;

c) de porter atteinte aux droits ou avantages acquis, aux obligations contractées ou aux responsabilités encourues sous le régime du texte abrogé;

d) d'empêcher la poursuite des infractions au texte abrogé ou l'application des sanctions — peines, pénalités ou confiscations — encourues aux termes de celui-ci;

e) d'influer sur les enquêtes, procédures judiciaires ou recours relatifs aux droits, obligations, avantages, responsabilités ou sanctions mentionnés aux alinéas c) et d). Les enquêtes, procédures ou recours visés à l'alinéa e) peuvent être engagés et se poursuivre, et les sanctions infligées, comme si le texte n'avait pas été abrogé.

had not been so repealed.

Repeal and substitution

44 Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,

(a) every person acting under the former enactment shall continue to act, as if appointed under the new enactment, until another person is appointed in the stead of that person;

(b) every bond and security given by a person appointed under the former enactment remains in force, and all books, papers, forms and things made or used under the former enactment shall continue to be used as before the repeal in so far as they are consistent with the new enactment;

(c) every proceeding taken under the former enactment shall be taken up and continued under and in conformity with the new enactment in so far as it may be done consistently with the new enactment;

(d) the procedure established by the new enactment shall be followed as far as it can be adapted thereto

Abrogation et remplacement

44 En cas d'abrogation et de remplacement, les règles suivantes s'appliquent :

a) les titulaires des postes pourvus sous le régime du texte antérieur restent en place comme s'ils avaient été nommés sous celui du nouveau texte, jusqu'à la nomination de leurs successeurs;

b) les cautions ou autres garanties fournies par le titulaire d'un poste pourvu sous le régime du texte antérieur gardent leur validité, l'application des mesures prises et l'utilisation des livres, imprimés ou autres documents employés conformément à ce texte se poursuivant, sauf incompatibilité avec le nouveau texte, comme avant l'abrogation;

c) les procédures engagées sous le régime du texte antérieur se poursuivent conformément au nouveau texte, dans la mesure de leur compatibilité avec celui-ci;

d) la procédure établie par le nouveau texte doit être suivie, dans la mesure où l'adaptation en est possible :

(i) in the recovery or enforcement of fines, penalties and forfeitures imposed under the former enactment,

(i) pour le recouvrement des amendes ou pénalités et l'exécution des confiscations imposées sous le régime du texte antérieur,

(ii) in the enforcement of rights, existing or accruing under the former enactment, and

(ii) pour l'exercice des droits acquis sous le régime du texte antérieur,

(iii) in a proceeding in relation to matters that have happened before the repeal;

(iii) dans toute affaire se rapportant à des faits survenus avant l'abrogation;

(e) when any punishment, penalty or forfeiture is reduced or mitigated by the new enactment, the punishment, penalty or forfeiture if imposed or adjudged after the repeal shall be reduced or mitigated accordingly;

e) les sanctions dont l'allégement est prévu par le nouveau texte sont, après l'abrogation, réduites en conséquence;

(f) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

f) sauf dans la mesure où les deux textes diffèrent au fond, le nouveau texte n'est pas réputé de droit nouveau, sa teneur étant censée constituer une refonte et une clarification des règles de droit du texte antérieur;

(g) all regulations made under the repealed enactment remain in force and are deemed to have been made under the new enactment, in so far as they are not inconsistent with the new enactment, until they are repealed or others made in their stead; and

g) les règlements d'application du texte antérieur demeurent en vigueur et sont réputés pris en application du nouveau texte, dans la mesure de leur compatibilité avec celui-ci, jusqu'à abrogation ou remplacement;

(h) any reference in an unrepealed enactment to the former enactment shall, with respect to a subsequent transaction, matter or thing, be read and construed as a reference to the provisions of the new enactment relating to the same subject-matter as the former enactment, but where there are no provisions in the new enactment relating to the same subject-matter, the former enactment shall be read as unrepealed in so far as is necessary to maintain or give effect to the unrepealed enactment.	h) le renvoi, dans un autre texte, au texte abrogé, à propos de faits ultérieurs, équivaut à un renvoi aux dispositions correspondantes du nouveau texte; toutefois, à défaut de telles dispositions, le texte abrogé est considéré comme étant encore en vigueur dans la mesure nécessaire pour donner effet à l'autre texte.

[48] The following provisions from the *Charter* are relevant in this proceeding:

Guarantee of Rights and Freedoms	**Garantie des droits et libertés**
1 The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.	1 La Charte canadienne des droits et libertés garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.
…	…
Life, liberty and security of person	**Vie, liberté et sécurité**
7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles	7 Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes

of fundamental justice.

de justice fondamentale.

Equality before and under law and equal protection and benefit of law

15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Égalité devant la loi, égalité de bénéfice et protection égale de la loi

15 (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Programmes de promotion sociale

(2) Le paragraphe (1) n'a pas pour effet d'interdire les lois, programmes ou activités destinés à améliorer la situation d'individus ou de groupes défavorisés, notamment du fait de leur race, de leur origine nationale ou ethnique, de leur couleur, de leur religion, de leur sexe, de leur âge ou de leurs déficiences mentales ou physiques.

VII. ARGUMENTS

A. *Applicant*

(1) Error of Law: Retroactive Application of the amended *Regulations*

[49] The Applicant submits that the IAD erred in applying the amended *Regulations* to her appeal. On November 4, 2011, a series of ministerial instructions provided that completed sponsorship applications received by November 4, 2011 would be processed as usual. The RIAS that accompanied the amended *Regulations* also provided that such applications would be assessed based on the *Regulations* that were in force at the time of submission. As the Applicant submitted her application in 2008, her appeal should have been decided under the pre-2014 *Regulations*.

[50] The Applicant acknowledges that the issue of the retroactive application of an immigration regulation to sponsorship applications filed before the amendment was decided in *Gill v Canada (Citizenship and Immigration)*, 2012 FC 1522 at para 18 [*Gill*]. However, the Applicant notes that *Gill*, at para 2, stated the applicant did not "identify any principle of law upon which the Court can rely to keep alive her hope of sponsoring her husband for permanent residence in Canada." Additionally, *Gill* relied on *Kahlon v Canada (Minister of Employment and Immigration)*, [1989] FCJ No 104, which established the principle that hearings before the IAD are *de novo*, but also stated that there was no issue with respect to the retrospective application of the amended regulations in that particular case. The Applicant cites several subsequent judgments that go against the latter statement in *Kahlon*, including *Elahi v Canada*

(Minister of Citizenship and Immigration), 2011 FC 858 at paras 22-23, where Justice Mosley directed the IAD to apply the previous test on the basis that "fairness…demands that the law be applied as it was when the original decision was made."

[51] The Applicant argues that had she been given an opportunity to address the issue of whether the amended *Regulations* were applicable to her appeal, she would have made the argument that there are principles of law to substantiate that she had an accrued right of appeal that entitled her to have her appeal decided on the basis of the pre-2014 *Regulations*. In support of her position, the Applicant cites ss 43(c) and 44(c) of the *Interpretation Act*. The Applicant contends that since her right to appeal accrued prior to the date the amended *Regulations* came into force, s 43(c) of *the Interpretation Act* requires the pre-2014 *Regulations* be applied to her appeal.

[52] In the alternative, the Applicant submits that the new enactment is substantially different from the pre-2014 *Regulations* such that conformity with the new enactment cannot be achieved consistently; accordingly, the pre-2014 *Regulations* must apply to her appeal as per s 44(c) of the *Interpretation Act*. The Applicant supports her position by citing *R v Puskas*, [1998] 1 SCR 1207 at paras 6 and 13, in which the Supreme Court of Canada [SCC] held that the possibility of an appeal is a substantive right and that the determination of accrued appeal rights occurs when the judgment sought to be appealed from is rendered.

[53] The Applicant also relies on three general rules of temporal application from the common law: the strong presumption that new legislation is not intended to be retroactive in its

application; the weaker presumption that that new legislation is not to interfere with vested rights; and that the legislature does not intend to confer power on subordinate authorities to make regulations or orders that are retroactive or interfere with vested rights. The presumption of retrospectivity requires the legislation to be purely procedural without impact on substantive rights; a right to appeal is considered a substantive right. Furthermore, statutes that attach benevolent consequences to a prior event do not attract the presumption against retrospective or retroactive operation: *Canada (Attorney General) v Southern Music Inc*, [1996] AJ No 1244 at para 6.

[54] The Applicant also points to additional jurisprudence that supports her arguments. In *Pearce v Canada (National Parole Board)*, 2012 FC 923 at para 47 [*Pearce*], the Court found that the applicant in that case "had an accruing right or privilege under common law and s 43 of the *Interpretation Act* to have his parole application reviewed by the Board under the repealed accelerated parole provisions." The SCC case of *R v Dineley*, 2012 SCC 58 at paras 11 and 25 [*Dineley*], also addressed the matter of whether amendments should apply retroactively and found that the key task in determining the temporal application of the amendments is dependent on whether they affect substantive rights; additionally, where prior legislation does not contemplate the gathering of evidence that is required by new legislation, the new legislation can only be prospective.

[55] Based on the principles from *Pearce*, and *Dineley*, both above, the Applicant submits that the amended *Regulations* are substantive changes to the sponsorship requirements that are inconsistent with the pre-2014 *Regulations* because they triple the period for demonstrating the

sponsor's ability to meet the MNI, increase the MNI from LICO to LICO plus 30 per cent, and add new evidentiary requirements. The Applicant could not have gathered the evidence to meet the new sponsorship requirements under s 134 of the amended *Regulations* as such evidence was not contemplated by the pre-2014 *Regulations*. As such, the amendments clearly affect her substantive rights.

[56] The Applicant further submits that the application of the general principles of statutory interpretation under the common law and *Interpretation Act* support her position that her appeal right became accrued either when she received the negative decision or when she filed an appeal to the IAD; accordingly, the pre-2014 *Regulations* should have been applied to her appeal.

(2) Breach of Procedural Fairness

[57] The Applicant submits that the IAD failed to observe the principle of procedural fairness by failing to advise her that the amended *Regulations* would be applied in the assessment of her sponsorship appeal. This lack of notice is glaring because the Applicant's appeal was presented as a test case to challenge the MNI requirement under the pre-2014 *Regulations* and all the arguments made by the parties were directed at the pre-2014 *Regulations*. Thus, the IAD failed to raise a critical issue with the Applicant and denied her the opportunity to reply, which this Court has found to be a breach of procedural fairness: *Zhang v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1031.

(3) Error of Law: Constitutional Challenge

[58] The Applicant submits that the IAD also committed serious legal errors in rejecting her arguments that s 133(1)(j) of the amended *Regulations* violates the *Charter*. For example, the Applicant had argued that the LICO requirement was only introduced in 1978, that the Respondent had not produced evidence to support the rationale for its introduction, and that Mr. Fowler's evidence regarding the 2014 amendments to the *Regulations* could not be used as evidence for the pre-2014 LICO requirements. This position was misconstrued in the Decision when the IAD stated that Mr. Fowler's evidence did not support the rationale provided by the government for the 2014 income requirements. Similarly, the IAD misquoted Mr. Fowler for stating that his evidence drew on previous policies to bring insight for the 2014 changes when Mr. Fowler meant the pre-2014 LICO requirement.

[59] The IAD also erroneously decided that the amended *Regulations* applied to the Applicant's case and, without reasons and contrary to both parties' submissions, that the constitutional evidence and submissions applied as much to the amended *Regulations* as the pre-2014 *Regulations*. This misconstrues one of the Applicant's most fundamental *Charter* arguments and constitutes a reviewable error.

(a) *Section 15 of the Charter*

[60] The Applicant submits that the interpretation of s 15 of the *Charter* has undergone several changes in the jurisprudence and that the current test is set out in *Withler v Canada*, 2011 SCC 12 at para 66 [*Withler*], which focusses on a contextual analysis of substantive inequality

rather than a formalized approach requiring a mirror comparator group. The SCC in *Withler* emphasized that equality is not about sameness, since s 15(1) protects the right to be free from discrimination rather than the right to identical treatment, and that a violation of s 15(1) is established when the claimant shows the law creates a distinction based on an enumerated or analogous ground that creates a disadvantage by perpetuating prejudice or stereotyping. If this distinction is established, the claim should proceed to the second stage, which calls for an inquiry into the actual impact of the impugned law or action.

[61] The examination of s 15 of the *Charter* by this Court also emphasizes the need for contextual analysis. Justice Mactavish emphasized such an analysis in *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651 [*Canadian Doctors*]:

> [719] Since *Kapp*, the Supreme Court has reminded us of the importance of looking beyond the impugned government action in a section 15 Charter analysis, and of the need to examine the larger social, political and legal context of the legislative distinction in issue: see *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9 at paras. 193-194, [2009] 1 S.C.R. 222.
>
> [720] Indeed, in *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396 [*Withler*], the Supreme Court stated that "[a]t the end of the day there is only one question: Does the challenged law violate the norm of substantive equality in s. 15(1) of the Charter?": above at para. 2.
>
> [721] Most recently, in *Quebec (Attorney General) v. A.*, 2013 SCC 5, [2013] 1 S.C.R. 61 [A.G. v. A.], Justice Abella noted that "the main consideration must be *the impact* of the law on the individual or the group concerned". She also observed that the purpose of section 15 was "to eliminate the exclusionary barriers faced by individuals in the enumerated or analogous groups in gaining meaningful access to what is generally available": at para. 319, citing *Andrews*, emphasis in the original.

[62] Based on this line of jurisprudence, the Applicant urged the IAD to adopt an intersectional approach (sex, race and disability) so as to fully capture her experience of discrimination based on the intersectionality of different grounds. The Applicant submitted that the MNI requirement, while neutral on its face, had a disproportionate impact on her as a racialized woman with a disability because members of racialized communities, women, and people with disabilities experience higher unemployment rates, earn less income, are more likely to live in poverty, and are thus less likely to be able to meet the MNI requirement.

[63] Drawing on evidence provided by expert witnesses to demonstrate her claim, the Applicant argued that s 133(1)(j) of the *Regulations* creates a distinction based on enumerated grounds that perpetuates the pre-existing disadvantage experienced by the Applicant due to her race, sex, and disability. The presence of family members would alleviate childcare responsibilities, provide emotional and physical support, improve her wellbeing, and provide her with the opportunity to participate in the labour market and earn a higher income. The MNI requirement denied her the family support she required to be economically independent, and ensured she would not earn enough income to meet the MNI requirement.

[64] However, rather than engaging in the approach directed by the SCC, the IAD chose not to analyze the substantial socio-economic evidence in the context of s 15 of the *Charter* and simply stated that “The historical development of immigration legislation and statistical evidence about race and the labour market she presented is mostly too indirect for this appeal…There was no evidence that she had been denied employment due to discrimination.” In addition to dismissing the larger contextual evidence, the IAD insisted that the Applicant must provide evidence that

she was denied employment due to discrimination, which is not a requirement of the test set out in *Withler*, above. The IAD's rejection of Professor Mykitiuk's evidence on the basis that she did not relate her opinions and comments to the Applicant's circumstances also misapprehends the test, which has the aim of preventing discriminatory conduct and impact rather than underlying attitude or motive.

[65] The IAD also disregarded the SCC's direction by finding that the statistical evidence was broad, tenuous, non-definitive, and not sufficiently substantive to produce a "real" comparator group or demonstrate the actual impact of s 133(1)(j) of the *Regulations* on that group. The reliance on a comparator group is outdated and it is not clear what the IAD sought in the terms of the "real" comparator group.

[66] The Applicant submits that although she provided documentary and testimonial evidence that confirmed she was low-income, relied on her husband's income, and had a limited employment history since entering Canada, the IAD found that she had provided very little information about her income. The Applicant is unable to meet the MNI requirement because she has very little income and the dismissal of the s 15 *Charter* claim mischaracterizes the Applicant's lack of income as a lack of evidence about her income.

[67] Another error made by the IAD is the conflation of the s 15 *Charter* arguments and H&C considerations. The IAD rejected Dr. Galabuzi's evidence about the contributions made by parents and grandparents in the form of family support and social development by stating that those factors could be raised pursuant to s 67(1)(c) of the *IRPA*. Similarly, the IAD rejected

Professor Mykitiuk's evidence for the same reason. As a result, the IAD injected s 1 *Charter* considerations into its s 15 analysis, which is not the test. Once an applicant has discharged the burden of demonstrating a distinction based on enumerated or analogous grounds that creates a disadvantage for an individual or group by perpetuating prejudice or stereotyping, the burden shifts to the government to justify the distinction under s 1 of the *Charter*. Thus, the Applicant submits that the IAD erred by requiring her to rebut the s 1 justification in her s 15 argument.

[68] The Applicant also takes issue with the IAD's insistence that she provide specific evidence to demonstrate that she is a racialized person before assessing whether the impugned section created a distinction. "Racialized" is a term used to describe a group of people who are designated as different and subjected to differential and unequal treatment as a result; presently, this includes visible minorities who are non-Caucasian in race or non-white in colour, including people of South Asian origin such as the Applicant. By refusing to acknowledge the Applicant's racial status, the IAD failed to conduct a proper s 15 analysis.

(b) *Section 7 of the Charter*

[69] With regards to s 7 of the *Charter*, the Applicant set out before the IAD the two-stage analysis as required by the SCC: first, she addressed the values at stake and whether they engaged interests protected by s 7; and second, she addressed the possible limitations of those values when considered in conformity with fundamental justice. While a sufficient causal connection between the state-caused effect and the prejudice suffered by the claimant is required, the standard does not require that the impugned government action or law be the only or

dominant cause of the prejudice suffered by the claimant: *Canada (Attorney General) v Bedford*, 2013 SCC 72 at paras 75-76 [*Bedford*].

[70] On the issue of liberty, the Applicant maintains she has a fundamental right to decide with whom she wishes to live and the kind of relationship she wishes to maintain with her family. She also has a fundamental right to impart to her children cultural and family values as handed down by her own parents consistent with their ethnic and familial background. Thus, the Applicant argued that s 133(1)(j) of the *Regulations* violated her right to liberty by denying her the right to sponsor her parents to Canada, thereby preventing her from creating the kind of home and family relationship that she seeks to provide for herself and her children.

[71] As to the matter of security, s 7 protects the physical and psychological integrity of the individual, including against state-imposed psychological trauma and stress and anxiety resulting from the disruption of family: *R v Morgentaler*, [1988] 1 SCR 30 at para 173. Additionally, the SCC has found that state removal of a child from parental custody is an interference with the psychological integrity of the parent and amounts to a gross intrusion into the private and intimate sphere of the parent-child relationship: *New Brunswick (Minister of Health and Community Services) v G (J)*, [1999] 3 SCR 46 at para 61. The Applicant argues that the state has intruded into her family by preventing her from bringing her parents and siblings to Canada, which directly and negatively impacts her psychological wellbeing.

[72] The Applicant also urged the IAD to recognize equality as a principle of fundamental justice and argued that while she could appeal her refusal to the IAD pursuant to s 63(1) of the

IRPA, the IAD's jurisdiction was arbitrary and replicated the underlying inequality of s 133(1)(j) of the *Regulations*. The deciding factor in an appeal is whether a sponsor has the ability to meet the MNI requirement, and the applicable standard is lower for those who do meet the MNI requirement because undue hardship is not required. This appeal process privileges those who are economically well-off and reinforces the inequality created by the MNI requirement, which is in conflict with the principle of fundamental justice.

[73] In the Decision, the IAD found that s 7 of the *Charter* does not contain a right to family reunification and that non-citizens do not have an unqualified right to enter or remain in Canada; *Medovarski v Canada (Minister of Citizenship and Immigration); Esteban v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51 [*Medovarski*] was cited in support of this finding. The majority of the IAD's response to the Applicant's s 7 arguments revolves around the analysis of why the MNI requirement is consistent with government objectives and why the MNI requirement is needed to ensure family members do not rely on social assistance. The Applicant submits that this is an error because such a discussion is only relevant in a s 1 analysis.

[74] The IAD failed to engage with the first-stage analysis. It should have addressed the values at stake with respect to the individual and whether these interests were protected by s 7. Instead, the IAD summarily dismissed the Applicant's claim by finding that her evidence about psychological harm was not sufficient to engage s 7, despite medical evidence that she continues to suffer from depression as a result of the separation from her family.

[75] Similarly, the IAD's second-stage analysis was perfunctory. The IAD merely stated that there was inconclusive and conflicting evidence to find the MNI requirement was unfair, which constitutes a failure to discharge the duty to provide adequate and transparent reasons to support its finding. There was no explanation for the rejection of Ms. Douglas' evidence, including the OCASI surveys.

[76] The conclusion that procedural fairness was accorded through s 67(3) of the *IRPA* also fails to take into account the evidence that demonstrates bias in the appeal process because that process allows greater success for sponsors who are able to meet the MNI requirement at the time of the hearing. Thus, the IAD failed to address the Applicant's argument and evidence about equality as a principle of fundamental justice in the Decision.

(c) *Section 1 of the Charter*

[77] The *R v Oakes*, [1986] 1 SCR 103 [*Oakes*] test involves a process of reasoned demonstration that evaluates, on a balance of probabilities, the evidence presented by the Crown, which must be cogent and persuasive, make clear to the Court the consequences of imposing or not imposing the limits, and inform on the alternative measures for implementing the objectives that were available to legislators. The Applicant submitted to the IAD that the Respondent had failed to discharge its burden under s 1 of the *Charter* due to the lack of evidence that connected the imposition of the MNI requirement to its objective. Additionally, the Applicant argued that the impairment of her rights was not minimal and the law was grossly disproportionate for the purposes it purported to achieve.

[78] The IAD did not explore the Applicant's arguments in reference to s 1 of the *Charter* due to the lack of constitutional infringement. However, the Decision states that the availability of special relief was hardly explored by the Applicant, which is contrary to the Applicant's submissions. The Applicant had argued that the relief under s 67(3) of the *IRPA* was not sufficient because it privileged those who are economically well-off and reinforced the inequality created by the MNI requirement. The existence of the appeal process also does not help because the MNI requirement bars many potential sponsors from submitting an application in the first place.

[79] In support of her position, the Applicant provided extensive evidence with regard to the evolution of the law on PGP sponsorships, such as the legislative history that demonstrates there was no income requirement prior to 1978, and the Senate and Parliamentary report that advised against the income requirement. The Applicant argued that the report disproves the Respondent's claim that the MNI requirement was created to keep the costs of the program in check and that the public felt the costs outweighed the benefits. In its Decision, the IAD failed to consider the legislative history or refer to the report.

(4) Unreasonable Decision

[80] Finally, the Applicant takes issue with the IAD's finding that there were insufficient H&C circumstances to warrant special relief. The IAD's Decision was unreasonable because it ignored and misconstrued evidence, failed to consider the best interests of the child, and failed to provide adequate reasons for the Decision.

[81] According to relevant jurisprudence, this Court may infer that a decision-maker has made an erroneous finding of fact without regard to the evidence from a failure to mention in the reasons evidence that is relevant to the finding and which points to a different conclusion: *Cepeda-Guiterrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 at para 15. Such errors made without regard to the evidence and which significantly affect the decision justify judicial intervention, even if it is not obvious that those errors were made in a perverse or capricious fashion: *Maqsood v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 1699 at para 18. This Court has also found that the IAD cannot overlook key evidence that contradicts its findings without addressing such contradictory evidence; if such evidence is not referred to, it will be assumed to have been ignored: *Ivanov v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1055 at para 23.

[82] In the present case, the Applicant submitted substantial evidence with regard to a number of issues, including her severe depression resulting from the family separation. The IAD ignored a medical report that diagnosed the Applicant with severe anxiety and depression, as well as the Applicant's explanation for discontinuing the psychotropic medication, and blamed the Applicant for disregarding medical advice to take medicine. The IAD also acknowledged that the Applicant became tearful and visibly upset when discussing her parents and her separation from them, yet found no evidence about the hardship caused by family separation. Furthermore, the IAD ignored the fact that the Applicant's psychological issues began after her visit to Bangladesh by finding that the Applicant refused to consider alternatives to family reunification such as temporary visits.

[83] The IAD also repeatedly took issue with the Applicant's failure to provide information about her income and employment record, while ignoring the Applicant's explanation that she had no income and a limited employment history. The appeal was based on the Applicant's request for special relief, yet the IAD focused only on the Applicant's inability to meet the MNI requirement, as demonstrated by comments referring to the financial situation as the primary concern and issue in the appeal.

[84] The Applicant also contends that the IAD failed to consider the best interests of the child. The Applicant and two of her children provided testimony that demonstrated why the Applicant's parents and siblings were needed in Canada, yet the IAD's assessment of this issue was simply: "However, the [Applicant]'s youngest child is now twelve and the two older ones are already in university." This ignores the fact that the Applicant has five children who were all under the age of 18 at the time the sponsorship application was submitted. The dismissal of the best interests of the child because several of the children had reached the age of majority applies the wrong approach in considering the best interests of the child, which is a crucial and requisite factor. This complete disregard renders the Decision unreasonable.

[85] The Applicant also takes the position that the reasons in the Decision were inadequate. The jurisprudence demonstrates that matters should be returned to the IAD on the basis of inadequacy of reasons if the major points in issue are not addressed, or there is a failure to analyze relevant issues: *Ranu v Canada (Minister of Citizenship and Immigration)*, 2011 FC 87 at paras 14-17; *Santhakumaran v Canada (Citizenship and Immigration)*, 2015 FC 1166 at para

20. The IAD cannot simply state that it evaluated the evidence cumulatively without explaining why in its analysis: *Petrovic v Canada (Citizenship and Immigration)*, 2016 FC 637 at para 16.

[86] Also, the Decision is filled with disjointed and incoherent statements that render it unintelligible. Examples include referencing the Applicant's anxiety after she visited Bangladesh and then questioning why the Applicant's husband was not a co-sponsor, as well as stating that the expert witnesses had provided conflicting evidence, without explaining what the conflicts were or asking the experts to explain the inconsistencies. The Applicant submits that this failure to provide intelligible, transparent, and coherent reasons that are grounded on the evidence before the IAD makes the Decision unreasonable.

B. *Intervenors*

[87] The Intervenors submit that the Decision is unreasonable because the findings are based on a mere summary of the parties' submissions. Reasons must address the major points in issue, set out the reasoning process, and reflect consideration of the main relevant factors: *VIA Rail Canada Inc v Lemonde*, [2000] FCJ No 1685 at para 22.

(1) Section 7 of the *Charter*

[88] The Intervenors submit that the IAD erred by failing to engage in the proper two-stage analysis set out in *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519 at para 148 [*Rodriguez*], which requires: addressing the position that there was a deprivation of the right to life, liberty or security of the person with respect to the applicant; and assessing whether any

deprivation is contrary to the principles of fundamental justice. Instead, the Decision considers only the legislative objectives in the conclusion that the Applicant failed to demonstrate that she was capable of providing for the sponsored parents due to her inability to meet the MNI requirement. The Intervenors argue that this is an improper application of the test due to the disregard of the submitted evidence, including the Intervenors' argument that s 133(1)(j) of the *Regulations* breaches the liberty and security of the person by interfering with psychological integrity.

[89] The Intervenors further submit that the IAD erred by failing to apply the relevant test in its analysis of overbreadth and arbitrariness. Overbreadth analysis requires an examination of the means chosen by the state in its relation to its purpose. The Decision, however, lacks analysis regarding the government's stated purpose and means of achieving said purpose. Additionally, fundamental justice requires that laws impair fundamental rights only so far as necessary to achieve specific objectives set by the legislature passing them. Yet the Decision does not explain how s 133(1)(j) of the *Regulations* meets that purpose without having a disproportionate effect on an individual's rights under s 7 of the *Charter* or why only the MNI requirement would allow a sponsor to demonstrate the ability to support their family members. Accordingly, the Intervenors argue that s 133 of the *Regulations* is overbroad in its effects on the Applicant's right under s 7 of the *Charter* to make fundamental personal choices and be free from state-induced psychological harm.

[90] Additionally, the Decision ignores the expert evidence on the correlation and significance of increased labour market participation and familial support for racialized communities, women,

and people with disabilities. The Applicant is restricted from joining the labour market due to a lack of support from her parents; thus, the IAD should have assessed the evidence against the contextual impact on the Applicant in its reasons.

[91] Furthermore, the Intervenors submit that the IAD erred by failing to analyze arbitrariness. The Intervenors had argued that the impugned provision is arbitrary on account of the lack of connection between the MNI and the objective of preventing detrimental effects on the parties to a PGP sponsorship application, especially since the MNI has detrimentally affected the Applicant. The Decision, however, only comments on the Intervenors' argument on arbitrariness; there is no analysis on the issues of arbitrariness, which is a separate and distinct principle of fundamental justice.

(2) Section 15 of the *Charter*

[92] The Intervenors also submit that the IAD erred by failing to apply the relevant law, as summarized by the Applicant above, in the conclusion that the impugned provision does not violate s 15 of the *Charter*. The IAD failed to consider additional, analogous grounds of discrimination, such as marital status. Under s 133(4) of the *Regulations*, a sponsor is exempted from the MNI requirement if the sponsored person is a spouse, common-law or conjugal partner, or dependent child. Consequently, the Intervenors submit that this provision discriminates against a sponsor by providing advantageous treatment for sponsors who are married or have dependent children.

[93] In *Miron v Trudel*, [1995] 2 SCR 418 at para 72, Justice McLachin found that defining legislative purposes in terms of the purported discriminatory ground would inevitably lead to the conclusion that the relevance negates discrimination per s 15 of the *Charter* without any analysis of the impact of the legislation on those allegedly disadvantaged by the distinction. Although the stated purpose of s 133 of the *Regulations* is to balance family reunification with successful settlement and benefits to Canada, the Intervenors argue that the imposition of MNI negatively impacts all potential family class sponsors without foreign national partners or children by encumbering their ability to reunite with family. Instead, the benefit of reunification is given to sponsors with foreign national family members who are partners or children, thereby providing great significance to the concept of a traditional or nuclear family structure and discriminating on the ground of marital status.

[94] The Intervenors say that the effect of the MNI requirement and the exception under s 133(4) of the *Regulations* disproportionately discriminates against potential sponsors, which is contrary to the protections in s 15 of the *Charter* and without regard to the interpretive guidelines in s 27 of the *Charter*, which requires recognition of multicultural familial modes.

C. *Respondent*

(1) The Applicable Regulations

[95] The Respondent submits that the IAD did not err in applying the amended *Regulations* to the H&C analysis. Chief Justice Crampton confirmed in *Gill*, above, at paras 43-47, that the version of the regulations that should be applied in a sponsorship appeal by the IAD is the

version in force at the time the parties make their submissions. The holding in *Gill* has been consistently applied by this Court, including the recent decision of *Patel*, above, at paras 6-8, which confirmed *Gill* with specific reference to family sponsorship appeals. Thus, the IAD was correct in applying the amended *Regulations* to the Applicant's appeal.

[96] While both parties argued that the constitutional challenge should have been considered against the pre-2014 *Regulations*, the IAD determined that the evidence and submissions also applied to the amended *Regulations.* The Respondent submits that this decision was correct because the difference between both versions is quantitative, not qualitative; both apply an income requirement to sponsorship. Notably, the Applicant's arguments often attacked the presence of *any* financial barrier to immigration rather than make a meaningful legal distinction between the different versions of the *Regulations*. The Applicant has therefore not demonstrated any prejudice or reviewable error in the IAD's approach.

(2) Procedural Fairness

[97] With regards to the Applicant's claim that a breach of natural justice occurred, the Respondent disagrees on the basis that the Applicant was expressly given the opportunity to address which version of the *Regulations* was applicable in the appeal. After the IAD raised and invited submissions on the issue, the Applicant submitted that the pre-2014 *Regulations* were applicable but acknowledged that there would not be a significant dissimilarity between the two on the facts of the case. Furthermore, the Respondent questions whether notice was required, since the amendment of s 133(1)(j) of the *Regulations* was published in the *Canada Gazette* and

extensive evidence was called about its legislative history and purpose. Both should suffice as notice that the regulation existed.

[98] Nevertheless, the Respondent submits that the application of either version of the *Regulations* would have yielded the same outcome in the appeal. The Applicant sought to support a family of fourteen and, based on her highest reported income, would have been at least $80,000 short of meeting the MNI requirement even under the pre-2014 *Regulations*.

(3) Section 7 of the *Charter*

(a) *No Engagement of s 7*

[99] The Respondent takes the position that s 7 of the *Charter* is not engaged in this case. The application of s 7 of the *Charter* requires the Applicant to establish a sufficient causal connection between the government action and the alleged deprivation of liberty or security that is not in accordance with the principles of fundamental justice; no such causal connection is present in this case.

[100] The Respondent disagrees that the separation of the Applicant from her parents and siblings is the result of government action; rather, it is the result of her own choice, as she applied for status and traveled to Canada voluntarily: *De Guzman v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436 at paras 45-46 [*De Guzman*]. Despite the Applicant's claim that she chose to immigrate to Canada on the assumption that she would eventually be able to bring her family members here, the statutory and regulatory requirements

for doing so existed many decades before and at the time she acquired status in Canada. Accordingly, any deprivation of liberty or security that the Applicant feels is a result of her own choices and lacks the sufficient causal connection to government action required to engage s 7 of the *Charter*.

[101] *Bedford*, above, is also unhelpful to the Applicant because, in that case, many of those engaged in prostitution had no meaningful choice but to do so in order to survive and, more importantly, the activity was one that could otherwise be engaged in legally and without government enablement. Unlike *Bedford*, in which the applicants did not seek the positive right to vocational safety, the Applicant seeks a positive right to government enablement of her desire to bring her family members to Canada on her own terms.

[102] Similarly, the Applicant's reliance on the jurisprudence related to child custody is misplaced. In reference to child custody cases, the state initiates proceedings that result in the separation of parents and children; in this case, the Applicant chose to enter Canada voluntarily, knowing that her relatives would remain in Bangladesh. Thus, there is no sufficient causal connection between the MNI requirement and the deprivation of liberty or security of the person. Additionally, the Respondent argues that the Applicant is free to pursue other avenues of reunification, such as through visas or exemptions under H&C considerations.

[103] The Respondent also argues that, even if there were a sufficient causal connection, which the Respondent does not concede, the types of interests that the Applicant asserts do not engage s 7 of the *Charter*. The SCC has stated that the most fundamental principle of immigration law is

that non-citizens do not have an unqualified right to enter or remain in Canada: *Medovarski*, above, at para 46. Since Parliament sets the conditions under which foreign nationals may enter and remain in Canada through legislation, the opportunity for the Applicant's family to enter Canada through a family-class sponsorship is contingent on satisfying the legislative requirements.

[104] The Applicant essentially argues that the imposition of the MNI requirement infringes her rights under s 7 of the *Charter* by preventing her from creating the kind of home and family relationship that she wishes to have. This argument has been consistently rejected in the jurisprudence; there is no right to family unity or family reunification: *Medovarski*, above, at para 45. Additionally, the SCC found in *Medovarski* that the deportation of a non-citizen from Canada cannot implicate the interests protected by s 7 unless there is an allegation of risk of death, persecution, or torture upon return; accordingly, a sponsor's inability to bring a non-citizen parent or grandparent to Canada must be even further outside s 7.

[105] The Applicant also contends that the impediment of the MNI requirement has caused her psychological stress. Psychological harm must be severe and greater than ordinary stress or anxiety to engage s 7: *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62 at paras 125-126. The Respondent submits that the Applicant has not demonstrated that she has experienced psychological harm that rises to that level.

[106] With regards to the right to liberty, the Applicant asserts that she has the right to make the inherently personal and private choice of with whom to live and how to raise her family.

However, the SCC jurisprudence cited in support of this position is misplaced; rather, the cited jurisprudence addresses the types of fundamental personal choices which, but for the restrictive or prohibitive government action, an individual would otherwise be able to freely make, and does not include all choices which might to some extent be described as private or personal: *Bedford*, above, at paras 86-88; *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at paras 49-54 [*Blencoe*]. In the present case, there is no personal or private choice that can be realized without specific government enablement because the Applicant wishes to live with foreign nationals who do not have the right to enter or remain in Canada. In addition to arguing for the positive right to government enablement of her choice, the Applicant asserts the government enablement must be on her own terms. This argument is untenable as the consequence of such a right would be that all grounds of inadmissibility would engage s 7 if they conflicted with a prospective sponsor's expressed personal choice, which runs contrary to all established legal principles.

(b) *Provision is Consistent with s 7*

[107] Alternatively, if s 7 is engaged, the Respondent submits that the Applicant has failed to demonstrate any breach of the principles of fundamental justice as the impugned provision is not arbitrary, overbroad, or grossly disproportionate. Moreover, the procedural safeguards in the *IRPA* and *Regulations* for the consideration of H&C factors are sufficient to comply with the principles of fundamental justice and are consistent with s 7 of the *Charter*.

[108] In order to establish an infringement of s 7, the Applicant must demonstrate a deprivation of life, liberty or security of the person and that the deprivation was not in accordance with the

principles of fundamental justice. A principle of fundamental justice has three requirements: it must be a legal principle; there must be significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate; and it must be sufficiently precise to yield a manageable standard against which to measure deprivations of life, liberty, or security of the person: *Canada (Attorney General) v Federation of Law Societies of Canada*, 2015 SCC 7 at para 87. Section 7 has been regarded as a fair process with regard to the nature of the proceedings and the interests of stake, and nor does the procedural fairness it engages guarantee the most favourable procedures or a perfect process: *Charkaoui v Canada (Minister of Citizenship and Immigration)*, 2007 SCC 9 at para 20; *Canada (Minister of Citizenship and Immigration) v Harkat*, 2014 SCC 37 at para 43.

[109] A s 7 *Charter* analysis begins with identifying the purpose of the regulation, which should be determined according to a review of the legislative record and any other supporting documents at face value. Accordingly, the purpose of s 133(1)(j) of the *Regulations* is to prevent a potential detrimental effect on the immediate parties to the application, as well as to maximize the benefits of immigration to Canada as a whole. Specifically, the objectives are:

1. Ensuring that sponsors, their dependents, and those they sponsor have the ability to support their households with the additional family members;

2. Ensuring the sponsored family members have the basic necessities to enable them to integrate into Canada successfully;

3. Safeguarding against Canadians bearing the cost of the PGP by making it less likely that, should a default occur, collection would be impossible;

4. Balancing the other objectives of the IRPA, including maximizing the benefits of immigration to Canada, supporting

a strong and prosperous economy, and promoting successful integration with family reunification;

5. Guarding against the likelihood that the sponsored family members will need to avail themselves of social assistance during the undertaking period because the family income is more likely to be sufficient;

6. Keeping the costs of the PGP in check in the interests of retaining the program at all, in light of public opinion that its costs outweigh its benefits.

[110] The next step of the analysis considers whether the legislative scheme complies with the substantive principles of fundamental justice. Essentially, the law must not be arbitrary, overly broad, or have effects that are grossly disproportionate to the legislative purpose. The Respondent argues that the impugned provision is not arbitrary because there is a rational connection between the MNI requirement and the objective of preventing detrimental effects on the immediate parties and maximizing the benefits of immigration to Canada as a whole. Nor is the impugned provision overbroad, as there is no disconnect between the purpose and effect in individual cases; on the contrary, the effect of the MNI requirement is minimized by its very low amount and the availability of H&C considerations, which may exempt sponsors from the requirement altogether. The impugned provision has also not been demonstrated to be grossly disproportionate by the Applicant because any negative impact is not grossly disproportionate to the legislative objective of sustainable sponsorship.

[111] The Applicant's argument that the effect of the regulation is arbitrary or overbroad because family separation delays the economic establishment of the sponsor is not supported by meaningful evidence. It also ignores the fact that neither the right to economic establishment by one's chosen means nor family unity in the immigration context is a protected interest under s 7

of the *Charter*. The jurisprudence does not support the Applicant's argument. Additionally, the ability of the IAD to grant equitable relief in appropriate circumstances operates as a constitutional safety valve.

[112] The Respondent also takes issue with the Applicant's characterization of the principle of equality as sufficiently precise to yield a manageable standard against which to measure deprivations of liberty or security of the person. The Applicant seeks to sidestep the requirement to prove discrimination under s 15 by asserting an interpretation of s 7 that has been consistently rejected by the Courts. Arguments about the infringement of equality rights are appropriately assessed under s 15.

[113] With regards to the constitutional safety valve mentioned above, the legislative scheme contains procedural safeguards that comply with the principles of fundamental justice. In this case, potential sponsors who have been refused on the basis of a failure to meet the MNI requirement are permitted to appeal to the IAD and request H&C relief. The IAD is a quasi-judicial tribunal which holds oral hearings and whose processes satisfy the requirements of procedural fairness. This process allows a challenge in equity, which permits the sponsor to submit H&C grounds to satisfy the IAD that an exemption from the MNI requirement should be made. Thus, sponsors are entitled to know the case to be met, present the merits of the case, and have their individual circumstances considered by an impartial decision-maker. In the event that s 7 rights are engaged, any overbroad or disproportionate effects of the MNI can be remedied by the grant of special relief under the appeal process.

[114] The Respondent disagrees with the Applicant's argument that the IAD's equitable jurisdiction is discretionary and therefore arbitrary on the basis that the SCC refuses to find that a broad grant of a discretionary power is unconstitutional and instead affirms that Parliament is entitled to proceed on the basis that its enactments will be applied constitutionally: *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69 at para 71. The IAD's Decision cannot be interfered with unless it is arbitrary or unreasonable; in such a case, the remedy of judicial review to the Federal Court is available.

[115] Furthermore, the Respondent takes issue with the claim that there is an inherent bias that replicates underlying inequalities in the IAD appeal process; rather, it is an established principle of the jurisprudence: *Canada (Minister of Citizenship and Immigration) v Dang (TD)*, [2001] 1 FC 321. The rationale for applying a lower threshold to appellants who meet the MNI requirement is because the inadmissibility has been overcome; if the Applicant were to reapply today and with an income that met the MNI, the application would not be refused on the same ground.

[116] The Applicant contradicts herself by claiming that the application of an objective requirement is arbitrary because it fails to take into account individual choices and circumstances, yet the IAD's appeal process that does take those circumstances into account is still considered arbitrary unless the appeal is allowed.

(4) Section 15 of the *Charter*

[117] The test for an infringement under s 15 is two-fold: the law must create a distinction based on an enumerated or analogous ground and the distinction must be discriminatory in the substantive sense: *R v Kapp*, 2008 SCC 41 at para 17. The burden of establishing the infringement rests on the Applicant: *Law Society of British Columbia v Andrews*, [1989] 1 SCR 143 at para 39.

(a) *Distinction based on Enumerated or Analogous Grounds*

[118] The Respondent contends that the MNI requirement does not create a distinction; nor does it affect the Applicant disproportionately based on an enumerated or analogous ground. The evidence led by the Applicant was too general and did not establish an adverse impact on the basis of sex, race, or disability.

[119] Claimants must demonstrate they have been denied a benefit that others receive, or carry a burden not imposed on others, by reason of a personal characteristic. The evidence before the IAD did not demonstrate this; instead, as noted by the IAD, the Applicant relied on generic evidence that was "broad, tenuous, non-definitive, often contradictory, and sometimes not directly applicable to the [Applicant]." The evidence was also noted to be "nebulous and did not demonstrate a causal connection that produced a disproportionate impact or adverse effect."

[120] The evidence put forward must amount to more than a web of instinct; and general statistical evidence, unrelated to the particular context of the claim, is much less helpful in

establishing an adverse effect: *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at paras 31-34. Notably, none of the Applicant's witnesses had examined sponsorship applications, or the impact of such sponsorships, on the grounds of race, sex, or disability; their opinions relating to the legal issues were based on speculation rather than fact or expertise. As a result, the IAD accorded the evidence limited weight.

[121] The Applicant's evidence alluded to generalized societal disadvantages experienced on the grounds of sex, race, or disability and assumed that the impugned provision has an adverse effect without proof or connection with evidence; as such, it was insufficient to meet the first test of the s 15 analysis. Additionally, there are many sponsors who belong to the groups identified by the Applicant who meet or exceed the MNI requirement and who successfully sponsor parents and grandparents. Even on the assumption that all PGP applications were based on the MNI requirement, there is no statistical connection between the enumerated grounds and decisions on PGP applications or connectivity between country of origin and PGP application outcome. The Applicant had the burden of demonstrating the disproportionate impact towards sponsors with disabilities yet the evidence does not meet this burden; in fact, the evidence regarding female sponsors and visible minority sponsors contradicts the Applicant's general assertions.

[122] The jurisprudence has dismissed arguments similar to the Applicant's: *Boulter v Nova Scotia Power Inc*, 2009 NSCA 17 at paras 68, 72-73, 83 [*Boulter*]; *Grenon v Canada*, 2016 FCA 4 at paras 41-45. In addition, and contrary to the Applicant's claim, the jurisprudence maintains that contextual evidence should be considered when examining the historical disadvantage of existing prejudice against the claimant group, but this does not provide a substitute for the need

to establish that the law in question creates a distinction by imposing limitations or disadvantages on the asserted ground: *Quebec (Attorney General) v A*, 2013 SCC 5 at paras 187-189, 327 [*Quebec v A*]. The Applicant failed to establish that the impugned law drew an adverse distinction based on race, sex, or disability.

[123] The IAD's acknowledgment of the comparative group is in line with SCC jurisprudence that, although the s 15 analysis is moving away from the requirement of comparative groups, the concept of comparison is still included in establishing a distinction under s 15: *Withler*, above, at para 62.

[124] With regards to the Applicant's claim that the IAD rejected the evidence provided by Dr. Galabuzi and Professor Mykitiuk because it was not relevant to the s 15 analysis, the Respondent argues that the IAD was commenting on their opinions of factors that ought to be considered in PGP sponsorships. Their evidence claimed that factors in addition to the MNI requirement should be considered, which the IAD noted was already done in the IAD's appeal process.

[125] Essentially, the Applicant argues that those with incomes below the MNI requirement are not being treated equally due to their financial circumstances. But, as the Courts have repeatedly found, income, poverty, and economic status are not immutable personal characteristics that attach to the individual and therefore do not constitute an analogous ground under s 15 of the *Charter*: *Withler*, above, at para 33; *De Guzman*, above, at para 19, *Bailey v Canada*, 2005 FCA 25 at para 12; *Boulter*, above, at paras 33, 37-42.

(b) *Resultant Discrimination*

[126] Alternatively, the Respondent submits that even if there was a distinction based upon an enumerated or analogous ground, the Applicant does not meet the second stage of the s 15 test, because any distinction is not discriminatory. This part of the analysis considers four contextual factors: whether the law or program has an ameliorative effect; the pre-existing disadvantage, if any, of the claimant group; the degree of correspondence between the differential treatment and the claimant group's reality; and the nature of the interest affected.

[127] Women, persons with disabilities, and visible minorities may suffer from pre-existing disadvantage and stereotyping, but this is not determinative.

[128] There is a degree of correspondence between the MNI requirement and the circumstances of those wishing to sponsor through the PGP. The MNI requirement measures the sustainability of adding members to a family unit and is not a high threshold; rather, it falls below the average family income in Canada. The MNI requirement is consistent with the government's objectives of successful integration, especially in the context of PGP sponsorships. Thus, it does not operate by way of stereotype or impose an arbitrary disadvantage on a particular group. Moreover, those who do not meet the MNI requirement are still able to bring their parents and grandparents to Canada through an exemption under H&C considerations, temporary visitor visas, or a subsequent re-application with the required income level. Notably, an IAD appeal has no eligibility criteria; instead, it is an entirely individualized assessment that allows appellants to

submit whatever evidence they wish in order to persuade the decision-maker to allow sponsorship.

[129] The interest affected by the impugned provision is family reunification. The impugned provision recognizes the importance of this interest, but does not abrogate from the core principle that non-citizens do not enjoy the right to enter or remain in Canada. It does not constitute non-recognition of an enumerated group, nor does it render them incapable of participating in a fundamental aspect of Canadian society. Many individuals belonging to the identified enumerated groups are able to achieve family reunification through the successful sponsorship of their parents and grandparents, the appeal process, or a subsequent application with the required income. The legislation also allows for temporary reunification through other mechanisms.

(5) Section 1 of the *Charter*

[130] In the alternative, if the Court accepts that the Applicant has established an infringement of ss 7 or 15 of the *Charter*, the Respondent contends that such an infringement is justified under s 1. Subsection 133 (1)(j) of the *Regulations* is a regulatory provision adopted pursuant to ss 12 and 14(2)(e) of the *IRPA*; it is therefore a limit prescribed by law. The limit is also reasonable and demonstrably justified in a free and democratic society, according to the *Oakes*, above, test.

(a) *Pressing and substantial objective*

[131] The limit has a pressing and substantial objective because it ensures that sponsors are able to adequately care for their sponsored parents and grandparents at a minimum level. It also ensures that the benefit of immigration to Canada as a whole is maximized. A minimal financial threshold, examined in the context of family reunification, maintains fairness in Canada's immigration system. Only those who can demonstrate the minimal capacity to assume the financial obligation of caring for their existing family unit and additional members are entitled to a positive decision. Exceptions are also provided for those who do not meet the minimum standards in certain situations; such applications are brought in half of all refusals and have a very high approval rating.

[132] As delegated legislation, the *Regulations* were not the subject of extensive Parliamentary debate. The RIAS, while a useful interpretive tool, began in 1986 and did not exist for the amendment in question. The Respondent has provided consistent legislative evidence that the purpose of s 133(1)(j) of the *Regulations* is to protect the program's integrity by ensuring that sponsors can take care of their sponsored family members, which has been confirmed by this Court: *Motala v Canada (Minister of Citizenship and Immigration)*, 2012 FC 123 at para 22.

(b) *Proportionality*

[133] In establishing a rational connection, the government need only demonstrate that it is reasonable to suppose that the limit *may* further the legislative objectives, not that it *will* do so:

Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37 at para 48. In this case, there is a clear connection between the MNI requirement and the legislative objectives.

[134] The SCC has held that a law is a minimal impairment if it falls within a range of reasonable alternatives: *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 at para 160. In this case, a comparison to other free and democratic societies demonstrates a recognized need for financial requirements on the sponsorship of relatives. This need is recognised in the UK, Australia, New Zealand, and the United States, with additional requirements. LICO, despite being viewed as far too low to make the PGP fiscally sustainable, is the standard measure used by Statistics Canada to gauge poverty, and is a minimal measure of the financial stability of a family unit on an annual basis. The reduction or elimination of the MNI requirement would seriously compromise the government's objectives, particularly since the MNI was increased by 30% on the basis that it was previously inadequate for assessing a PGP sponsor's ability to provide for their sponsored family members. Additionally, the statistics on approval rates demonstrate that the financial requirements placed on those sponsoring through the PGP have little effect on the outcomes based on the grounds of gender and ethnic minority.

[135] The legislation, which allows for the right to appeal on the basis of all factors that may result in the grant of special relief, strikes the appropriate balance between responsible fiscal constraints and accounting for personal circumstances where those constraints should not be applied. Furthermore, a person who has been denied sponsorship through the PGP due to income and a lack of H&C grounds may still apply to sponsor their parents or grandparents for a

temporary visa or different immigration stream; alternatively, they may re-apply to the PGP after improving their economic situation.

(c) *Salutary and Deleterious Effects*

[136] The Respondent argues that the evidence establishes the salutary effects of any limitation outweigh any deleterious effects of the right of the individual in this case. The societal interest in protecting the integrity and sustainability of the immigration system is achieved by confirming the sponsor has the ability to support their parents and grandparents and should be afforded considerable weight. In contrast, an individual who is denied a sponsorship through the PGP can still sponsor immediate family members without financial constraints or may seek an exemption from the financial requirements through the IAD appeal process. Such an individual is also free to seek alternate mechanisms such as visitor visas or super visas that allow for extended contact. The Respondent also notes that many individuals who belong to the groups identified by the Applicant fall below the MNI requirement or have obtained exemptions based on H&C considerations; these individuals are similar to the Applicant and have been successful in their sponsorship applications through the PGP.

(6) Reasonableness

[137] The Respondent rejects the Applicant's arguments with regards to the IAD's assessment of the evidence. The Applicant argues that the IAD ignored a psychological report, which is inaccurate as the IAD specifically reviewed the psychological evidence in the Decision. The IAD also did not ignore the Applicant's statement that she chose to discontinue her prescribed

medication and that visits and communication with her family were insufficient in improving her depression; rather, the IAD was not persuaded that this justified the remedy of special relief. It was reasonably open for the IAD to maintain the status quo since the Applicant had chosen to settle in Canada with the knowledge that her relatives lived in Bangladesh. Additionally, the IAD's Decision does not disrupt any existing relationships, as she and her children remain free to visit and communicate with their extended family.

[138] With respect to the IAD's analysis of the best interests of the child, the Respondent argues that the IAD reviewed the testimony of the Applicant's daughters and expressly gave substantial weight to the circumstances and interests of the Applicant's children. However, this factor was not necessarily determinative because the status quo remains intact and the children are able to continue with visits and communications with their family. As such, this finding does not constitute a reviewable error.

[139] The challenge to the adequacy of the reasons also cannot establish reviewable error; reasons are read in their entirety with a view to understanding, not parsed closely for possible errors or omissions, inconsistency, ambiguity, or infelicity of expression: *Ragupathy v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 151 at para 15. The IAD reviewed a 27-volume Tribunal Record and rendered a Decision spanning 119 paragraphs of analysis. Even if there were infelicities of expression, this does not justify overturning the Decision. The IAD's finding was clear in that the Applicant led insufficient evidence to meet her burden.

D. *Applicant's Reply*

(1) Sponsorship Approval Rates and IAD Appeal Success Rates

[140] The Applicant challenges the Respondent's claim that the vast majority of people who submit PGP sponsorship applications are approved. These statistics are only a partial picture, as the Applicant's evidence demonstrates that many prospective sponsors, including those who are members of racialized communities, do not submit an application because they do not meet the MNI requirements. The Applicant's evidence also demonstrates that women are more likely than men to fail the MNI requirements.

[141] With regards to the success rates of sponsorship appeals, the Applicant also submitted evidence that sponsors who are able to meet the LICO at the time of the appeal have a greater chance of succeeding because they are subject to a lower standard. As stated previously, this only reinforces the inherent inequality set in place by the MNI requirement and privileges those who are economically well-off.

[142] The IAD failed to consider such evidence in the finding that the MNI requirement did not violate ss 7 and 15 of the *Charter*.

(2) Reviewable Error

[143] The Applicant disagrees that the jurisprudence is settled on the issue of which version of the *Regulations* is applicable. *Gill*, above, was decided without the benefit of substantive legal

arguments with respect to the SCC's jurisprudence on the *Interpretation Act* and should be revisited. *Gill* is also distinguishable because it considers the amendments in the context of spousal sponsorship, in which there was overlap between the two versions of the *Regulations*. In contrast, the changes regarding family sponsorship are substantial and new.

(3) Failure to Assess Relevant Evidence

[144] The Applicant disagrees that the IAD assessed the legislative history with respect to the MNI requirement; instead, the IAD dismissed the evidence as "too indirect for this appeal." The Decision does not reference any of the legislative history in support of its findings on the constitutional questions. While the Court does not re-weigh evidence, the Applicant contends that the IAD did not weigh the evidence at all. The Court may, however, find an error when a decision-maker does not explicitly engage with or consider the evidence.

(4) Failure to Assess Best Interests of the Child

[145] Despite 119 paragraphs, the Decision's reference to the best interests of the child was limited to one sentence, which was cursory and does not meet the standard set forth by the jurisprudence. The fact that the two eldest children are in university does not lessen the obligation to assess their interests, considering that the obligation continues after they turn 18. Moreover, the other children remain under the age of 18, yet their interests were not discussed.

(5) Erroneous *Charter* Analysis

[146] The Applicant disagrees that the evidence she tendered failed to establish a breach of s 15 of *Charter*. The IAD refused to review the evidence because it was too indirect and, instead, focused on irrelevant considerations such as whether the Applicant had ever been denied employment due to discrimination. The analysis was not based on evidence, as it made no mention of the statistical evidence cited by both parties. The IAD also failed to consider the expert evidence in finding there was no s 15 violation.

[147] The Applicant also refutes the application of *De Guzman*, above, to the present case. The impediment in the Applicant's reunification is the MNI requirement, not a misrepresentation about her family circumstances, which was the case in *D*e *Guzman*. Additionally, the Applicant did not voluntarily choose to give up her right to family reunification when she entered an arranged marriage with her husband. There was no analysis of s 7; rather, the IAD engaged in a s 1 analysis by balancing family reunification with successful settlement and benefits to Canada. This is an application of the wrong legal test and warrants judicial intervention.

VIII. ANALYSIS

A. *Application of s 133(1)(j) and s 134 of the Regulations*

(1) Error of Law

[148] The IAD found that the amended version of s 133(1)(j) of the *Regulations* (effective January 1, 2014) was applicable in this case.

[149] The Applicant concedes that a number of IAD decisions since January 1, 2014 have applied the amended s 133(1)(j) retroactively but asks the Court to rule that such decisions were wrongly decided.

[150] The Applicant also seeks to distinguish *Gill*, above, and the cases of this Court that have followed *Gill*, on the grounds that counsel in *Gill* did not "identify any principle of law upon which the Court can rely to keep alive her hope of sponsoring her husband for permanent residence in Canada." In the present case, counsel argues that the Applicant had "an accrued right, i.e. the right to appeal, which entitled her to have her appeal be (sic) assessed on the basis of the pre-2014 sections of IRPA."

[151] A right of appeal existed in *Gill* and in the cases that have followed and applied *Gill*, so that I cannot say the Applicant has identified a meaningful distinction that the Court can apply to distinguish this case from *Gill* and its progeny. In essence, the Applicant's argument is that an accrued right of appeal exists, meaning that the law in effect in September 2011 should apply because the appeal right accrued either when the Applicant received the negative decision or when she filed her appeal to the IAD. However, I do not think that the existence of a right of appeal changes the rationale in *Gill*, which provides, in effect, that applicants have no accrued or accruing rights to have their applications decided under certain provisions until a final decision is made on their application. They can appeal, but under *Gill*, the appeal does not fix the governing provision and the IAD will decide *de novo* whether to grant the application in accordance with the provisions in force at the time of its decision. In *Gill*, an application was decided unreasonably and sent back for reconsideration; however, by that time, the applicants no longer

met those requirements for the new legislation even though they would have met the requirements had the quashed decision been reasonably made. Yet the Court still found that the applicants did not have accrued rights to have their application determined under the old legislation – the application was decided *de novo* under the new legislation. In this process, the right of appeal does not fix the governing provision at the time when the appeal is made. That is what *Gill* says. And *Gill* has been followed and applied by this Court in, for example, *Patel*, above, and *Burton v Canada (Citizenship and Immigration)*, 2016 FC 345. The Applicant's arguments before me based upon an accrued right of appeal do not allow me to distinguish this jurisprudence which, as a matter of *judicial comity*, I am bound to follow.

[152] Nor do the common law principles cited by the Applicant support a meaningful distinction between *Gill*, *Patel* or *Burton*, all above.

(2) Breach of Procedural Fairness

[153] The Applicant says that procedural fairness was breached in this case because the IAD failed to advise the Applicant that it would be applying the amended version of ss 133(1)(j) and 134 to her sponsorship appeal. She says this meant that no submissions could be made as to why the amended version should not apply. She asserts that this was particularly problematic in an appeal that was presented as a test case and in which both parties directed their arguments at the pre-2014 *Regulations*.

[154] The transcript of the hearing reveals that the IAD raised this issue with Applicant's counsel and the following exchange took place:

> PRESIDING MEMBER: Does it make a difference if it was post? Really?
>
> COUNSEL #1: No. I mean—
>
> PRESIDING MEMBER: I didn't think so.
>
> COUNSEL #1: --there would still not –well I guess it makes a difference in terms of the analysis, because there's a lot of evidence about the purpose of the post 2014. But those—
>
> PRESIDING MEMBER: True.
>
> COUNSEL #1: Yeah. Those analyses do not, in our submission do not apply. So but I think it's the pre-2014 that we're looking at.
>
> COUNSEL #2: Something like minimal impairment is a factor for analysis, but – because it would be a higher amount then.
>
> COUNSEL #1: Right. Yeah.
>
> PRESIDING MEMBER: Yeah. Correct.
>
> COUNSEL #1: That's true too.

[155] In the NCQ, the Applicant made it clear that she intended "to question the constitutional validity of s 133 (1)(j)" of the *Regulations* on the basis that any MNI infringed ss 7 and 15 of the *Charter*. In other words, the constitutional challenge applied to both the pre-2014 and post-2014 version of s 133 (1)(j). Presumably then, the Applicant marshalled evidence and made arguments that went to any MNI. The exchange quoted above occurred at the end of the hearing so that, presumably, the Applicant had entered her case for the unconstitutionality of any MNI, whether the pre-2014 or the post-2014 version of s 133 (1)(j). The IAD did have to decide which version applied to the facts of this case, but I don't see how that prevented the Applicant from presenting her constitutional challenge aimed at any MNI.

[156] Also, as the Respondent points out, the post-2014 *Regulations* were published in the *Canada Gazette* and evidence was called about their history and purpose. Given that the IAD raised the issue itself and asked for submissions on point, I cannot say that procedural unfairness occurred here. The Applicant argues before me that the issue was raised at the end of the hearing and, although it made no difference which regulation applied when it came to the H&C aspects of the Decision, the Applicant could have taken a different approach to the constitutional issues if prior notice had been given. However, given the constitutional challenge was aimed at the imposition of any MNI, I don't see how the Applicant was unfairly prevented from making that case by the exchange at the end of the hearing.

B. *Constitutional Issues*

(1) Preliminary Errors

(a) *The Fowler Evidence*

[157] The Applicant says that one of her key arguments in the constitutional context was that the Respondent had not provided any evidence to support the government's rationale for introducing the LICO requirement in the first place in the 1978 *Immigration Regulations* made under the 1976 *Immigration Act*. In particular, the Applicant had argued before the IAD that the evidence adduced by the Respondent through Mr. Fowler with regard to the 2014 amendments could not be used to support the purpose behind pre-2014 LICO requirements.

[158] The Applicant now says before me that the IAD misunderstood her point because, at paragraph 88 of the Decision, the IAD found as follows:

> [88] The appellant's main criticism of Mr Fowler's evidence was that the data, in her view, do not support the rationale provided by the government for the 2014 income requirements.

[159] The Applicant says that the IAD made the same mistake when it decided that the constitutional evidence adduced applied as much to the 2014 amendments as it did to the pre-2014 amendments.

[160] The Applicant says that Mr. Fowler did not say that his evidence drew on previous policies to bring insight to the 2014 amendments; Mr. Fowler was referring to the pre-2014 LICO requirement.

[161] My review of the record suggests that Mr. Fowler considered his evidence to indirectly provide a rationale for both the pre- and post-2014 *Regulations*; specifically, he opines that his evidence provides some of the rationale for the 1978 introduction of LICO. This is confirmed in the second exchange below, when Mr. Fowler opines that his evidence provides insight on the pre-2014 *Regulations* because some of the considerations carry over.

[162] On page 5215 of the transcript at line 35 in Volume 27 of the Certified Tribunal Record, Mr. Fowler is asked about the documents (specifically, the RIAS) in his affidavit:

> COUNSEL #1: Okay. Now so the document, is it fair to say that the document provides the rationale for the amendments that came into effect on January 2014?
>
> WITNESS: Yes, that's fair to say.
>
> COUNSEL #1: And the document itself does not specifically speak to why the LICO requirement was introduced back in 1978.

> WITNESS: Direct reference to 1978, no.
>
> COUNSEL #1: Okay.
>
> WITNESS: I would add that it provides some of the rationale for that.

And then later on page 5216 at line 15:

> COUNSEL #1: So it's fair to say that the government is relying on this document to provide a rationale for the Low Income Cut off requirement.
>
> WITNESS: The new –
>
> COUNSEL #1: Not the new one, the –
>
> WITNESS: For the changes that are redesigned in the program.
>
> COUNSEL #1: Well we know it helps explain the redesign program but you also said that it provides some insight into why the old requirement was put in place.
>
> WITNESS: Yes, I mean some of those considerations carry across time.
>
> (emphasis added)

[163] Accordingly, Mr. Fowler's evidence was, at least to some extent, applicable to both pre- and post-2014 *Regulations*.

(b) *Constitutional Evidence not Applicable to 2014 Amendments*

[164] The Applicant says that the IAD also made a fundamental mistake when it decided, in paragraph 95 of the Decision, that the constitutional evidence and submissions made by the parties applied to both the 2014 amendments and the pre-2014 legislation:

> [95] *IRPR* s. 133(1)(j) was amended effective January 2, 2014. However, the appellant and respondent directed their constitutional submissions to the pre-2014 legislation, suggesting that the appellant is not subject to the amendment because the appellant made her sponsorship application before January 2014. The appellant Begum applied to sponsor her parents in March 2006 and filed an IAD appeal in September 2011. The panel finds that he amended 2014 version is applicable to this appeal (it increases the MNI by 30 percent from that considered by the visa officer). However, the constitutional evidence and submissions provided in this appeal apply as much to the 2014 amendments as to the pre-2014 legislation.
>
> [footnotes omitted]

[165] The Applicant's point is that the constitutional arguments would be different for the 2014 amendments. This, however, is difficult to reconcile with the Applicant's NCQ and the position she takes that any MNI is unconstitutional. She had to know that the IAD would have to decide which version of s 133 (1)(j) would apply to the facts of this case, so that any constitutional arguments or evidence adduced would have to address both version of the *Regulations*. The parties may have argued that the pre-2014 version should apply, but the IAD did not have to accept this and could reasonably assume that any argument or evidence adduced by the Applicant addressed *any* MNI requirement, regardless of whether it was pre-2014 or post-2014.

(2) Section 15 Issues

[166] The Applicant's s 15 *Charter* arguments are based upon the alleged adverse effects of the MNI requirement under the *Regulations* on the basis of the intersection of race, sex and disability. The Applicant urged the IAD to adopt an intersectional approach to s 15 in order to fully capture her experience of discrimination based upon the confluence of race, sex and disability. She argued that, while the MNI requirement is neutral on its face, it has a

disproportionate impact upon her as a racialized woman with a disability because members of racialized communities, women, and people with disabilities experience higher levels of unemployment, are more likely to live in poverty, and are thus less likely to be able to meet the MNI requirement.

[167] In her arguments before me, the Applicant provides the following summary of the trap she finds herself in because of the MNI requirement:

> 73. By requiring the Applicant to meet the LICO requirement which reinforces barriers to labour market participation, s.133(1)G) creates a distinction based on enumerated grounds, and the distinction perpetuates the pre-existing disadvantage experienced by the Applicant due to her race, sex and disability. Having family members in Canada will alleviate the childcare responsibility of the Applicant, provide her with the necessary emotional and physical support, improve her mental and physical well being and ultimately, provide her with the opportunity to participate in the labour market and thus earn a higher income. Yet by denying that very family support the Applicant needs to become economically independent, the impugned section serves to trap the Applicant in isolation while perpetuating her detachment from the labour market and her reliance on her spouse for income support. Indeed, having the MNI requirement further reinforces the Applicant's barriers to labour market participation and thus serves to ensure that she will not be able earn enough income to meet the MNI requirement.

[168] The Applicant now alleges several fundamental errors in the IAD's analysis of this issue.

(a) *Wrong Approach – Disregard and Rejection of the Larger Social, Political and Legal Context*

[169] Relying upon SCC jurisprudence in *Withler*, and *Quebec v A*, both above, and on the jurisprudence of this Court in *Canadian Doctors*, the Applicant alleges that the IAD failed to

appreciate and apply the broad contextual approach that is now required. The Applicant summarizes the governing principles as follows:

> 63. The current test for s.15 is set out in *Withler* in which the SCC moved away from the formalized approach to s.15 analysis that requires a mirror comparator group. The focus now is on a contextual analysis of substantive inequality. The SCC also stated that it is "unnecessary to point to a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground the discrimination." The SCC emphasizes in *Withler* that equality is not about sameness, and section 15(1) does not protect a right to identical treatment. Rather, it protects every person's equal right to be free from discrimination. In order to establish a violation of section 15(1), a claimant must show not only that the law creates a distinction based on an enumerated or analogous ground, but also that the distinction creates a disadvantage by perpetuating prejudice or stereotyping.
>
> 64. Having retreated from a reliance on the mirror comparator, the SCC states that at the stage of determining whether a distinction exists, it is unnecessary to pinpoint a particular group that precisely corresponds to the claimant group except for the characteristic alleged to ground the discrimination. In an effort to preserve its flexibility to consider claims based on multiple grounds of discrimination, the sec states: "Provided that the claimant establishes a distinction based on one or more enumerated or analogous grounds, the claim should proceed to the second step of the analysis." The SCC suggests that even without a mirror comparator it could remain straightforward to establish a direct distinction, where the differential treatment of the complainant group is plain on the face of the impugned instrument. Where the discrimination alleged is indirect, the establishment of the distinction at this first stage might be more difficult. "Historical or sociological disadvantage may assist in demonstrating that the law imposes a burden or denies a benefit to a claimant that is not imposed upon or denied to others. The focus will be on the effect of the law and the situation of the claimant group."
>
> 65. At the second stage of its section 15 analysis, determining whether a distinction amounts to discrimination, the sec calls for an inquiry focused on the actual impact of the impugned law or action. The analysis is contextual, not formalistic, grounded in the actual situation of the group and the potential of the impugned provisions to worsen their situation. There is no "rigid template" for the analysis but all relevant factors should be considered.

Where the discriminatory effect is said to be the perpetuation of disadvantage or prejudice, evidence that goes to establishing a claimant's historical position of disadvantage or demonstrating existing prejudice against the claimant group, as well as the nature of the interest that is affected, will be considered.

66. Justice Abella in *Quebec v. A* also cautioned against adopting a formalized approach by stating "that the Court was not purporting to create a new s. 15 test" and that "prejudice and stereotyping are two of the indicia that may help answer that question; they are not discrete elements of the test which the claimant is obliged to demonstrate."

67. Finally, it has been well established that not all members of a group need to be adversely affected for a law to be found to discriminate on the ground in question. For instance, the fact that not all women are pregnant does not prevent the court from finding that discrimination affecting pregnant women constitutes sex discrimination.

68. A similar approach has been adopted by this Honourable Court in examining s.15 claims, as explained by Mactavish J.:

> 719 Since *Kapp*, the Supreme Court has reminded us of the importance of looking beyond the impugned government action in a section 15 Charter analysis, and of the need to examine the larger social, political and legal context of the legislative distinction in issue....
>
> 720 Indeed, in *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396 (*Withler*), the Supreme Court stated that "[a]t the end of the day there is only one question: Does the challenged law violate the norm of substantive equality in s. 15(1) of the *Charter*?" ...
>
> 721 Most recently, in *Quebec (Attorney General) v. A.*, 2013 SCC 5, [2013] 1 S.C.R. 61 (A.G. v. A.), Justice Abella noted that "the main consideration must be the impact of the law on the individual or the group concerned". She also observed that the purpose of section 15 was "to eliminate the exclusionary barriers faced by individuals in the enumerated or analogous groups in [page454] gaining meaningful access to what is generally available" ....

> 69. This contextual approach 1s particularly important in analyzing race based equality claims dealing with indirect (or adverse impact) discrimination. This is so in part because it is now comparatively rare for there to be direct purposeful discrimination in government law-making or policy on the basis of race. It is more likely that racialized persons will be affected by indirect or "effect" discrimination, where the instrument is neutral on its face but has a more deleterious impact on those identified by the characteristic of race, often with other enumerated or analogous characteristics that apply as well (e.g. sex, disability). This adverse impact can arise when government fails to take into account the actual situation of each group being made subject to the law, and treats all persons in a formally equal manner.
>
> [footnotes omitted]

[170] Although the jurisprudence cited by the Applicant does make it clear that the IAD had to look beyond the impugned government action to the larger social, political and legal context, the same jurisprudence also makes it clear that "the main consideration must be *the impact* of the law on the individual or the group concerned," to quote Justice Abella in *Quebec v A*, above. And it was on this basis that the IAD took issue with the Applicant's evidence:

> [102] Because s. 133 does not distinguish explicitly on the basis of sex, race or disability, the appellant submitted that it adversely impacts her indirectly. This indirect discrimination must have a disproportionate or adverse effect on the appellant, which she attempted to demonstrate by evidence concerning comparator groups.
>
> [103] Although the appellant submitted that she is a "racialized person," the direct evidence about the appellant identified her as coming to Canada from Bangladesh; there was no other specific evidence of "race" other than that territorial country-of-origin description. The semantics and subjective nature of "racialization" were skirted. The evidence concerning the appellant's disability was previously discussed in this Decision but the appellant directed much of her argument to an "intersectional" approach to discrimination.
>
> [104] However, the appellant relied almost entirely on broad, generic evidence and did not produce specific instances relating to

> her. The historical development of immigration legislation and statistical evidence about race and the labour market she presented is mostly too indirect for this appeal. She provided minimal direct evidence about her own situation, relating any absence of her financial resources to those characteristics. There was no evidence that she has been denied employment due to discrimination. In fact, as seen above in this Decision, very little supporting evidence was presented at all about the appellant's income or financial resources.
>
> [105] Moreover, the panel finds that the appellant has not established that *IRPR* s. 133 creates a distinction based on the enumerated or any analogous grounds. After reviewing the testimony and surrounding general statistical documentation previously discussed, the panel finds that it is broad, tenuous, non-definitive, often contradictory, and sometimes not directly applicable to the appellant (or even to a group that may have been arguably comparative). Considering an "intersectional" context, the evidence was not sufficiently substantive to produce a real comparative group, or demonstrate the actual impact of *IRPR* s. 133 on that group. The evidence was often nebulous· and did not demonstrate a causal connection that produced a disproportionate impact or an adverse effect.
>
> [footnotes omitted]

[171] In other words, the Applicant was unable to establish an adverse impact on the basis of intersectional sex, race and disability. She was unable to show that she was denied a benefit that others receive, or that she carried a burden by reason of a personal characteristic not imposed on others.

[172] Whether the IAD's treatment of the evidence on this issue was reasonable, I will discuss below, but I cannot say that the IAD failed to follow the guiding jurisprudence. According to the IAD, the Applicant simply had not demonstrated that s 133(1)(j) created an adverse impact on the basis of sex, race and disability. The Applicant says that the IAD "chose not to analyse the very substantiated socio-economic evidence in the context of s 15" but, as the Decision makes

clear, the IAD did examine this evidence and concluded that it was too "generic" and "indirect" to establish the necessary adverse impact on the Applicant or the group concerned as required by the jurisprudence. Nor did the IAD, as the Applicant now argues, insist that she provide evidence that she had been denied employment due to discrimination. The Applicant is making this remark in relation to a paragraph of the Decision where the IAD is pointing to the dearth of evidence going to the impact of the legislation on her or the group concerned. Nor does the IAD rely on "the outdated notion of a comparator group." The IAD is simply referring to evidence that the Applicant produced of comparator groups to demonstrate discrimination. Evidence on the larger social, political and legal context does not obviate the need for impact evidence on the individual or group involved. The Applicant's evidence went to systemic economic disadvantages and income disparities faced by members of racialized communities, women and people with disabilities and intersectionality but it did not, as far as the IAD was concerned, demonstrate that s 133(1)(j) creates a distinction that perpetuates pre-existing disadvantages experienced by the Applicant due to her race, sex and disability on the intersectionality of these factors. I do not see how this approach to the evidence is not commensurate with the governing jurisprudence cited by the Applicant.

(b) *Evidentiary Findings*

[173] The Applicant argues that she did, in fact, and contrary to the IAD's findings, provide evidence about her own situation:

> 77. It is worth repeating that not all members of a group need to be adversely affected for a law to be found to discriminate on the ground in question. Having said that, the Applicant in this case did provide documentary and testimonial evidence confirming that she is low income, that she relies on her husband's income as a taxi

> driver to support the family, and that while she has a taxi driver's licence and a childcare worker's certificate, she only had limited employment history since coming to Canada. As such, the Member's findings that the Applicant provided very little information about her income was also unfounded. The fact of the matter is the Applicant has very little income, and for that reason is unable to meet the LICO requirement. So while the Applicant's s.15 claim is grounded in part on her financial precarity, the Member dismissed the s.15 claim by mischaracterizing the Applicant's lack of income as lack of evidence about her income.
>
> …
>
> 79. Astonishingly, the Member took issue with the identification of the Applicant as a "racialized' person, and insisted the Applicant provide "specific evidence" of her race, before it would even assess whether the impugned section creates a distinction on an enumerated or analogous ground. This, notwithstanding the evidence given by Professor Galabuzi that the term "racialized" is used to describe a group of people who are designated as different and on that basis subjected to differential and unequal treatment, and that in the present Canadian context the term racialized groups includes visible minorities who are non-Caucasian in race or non-white in colour, including people of South Asian origin like the Applicant. The Applicant's status as a racialized person and a member of racial groups who are subject to discrimination was never contested, not even by the Respondent, during the entire proceeding. By refusing to even acknowledge the Applicant's racial status, the IAD has thus failed to conduct a proper s.15 analysis.

[174] The IAD does not reject the Applicant's racial status. It simply points out that "there was no other specific evidence of 'race' other than territorial country-of-origin description," but the main point is that the "semantics and subjective nature of 'racialization' were skirted" and much of the Applicant's argument was directed to "an 'intersectional' approach to discrimination," which is what the IAD then goes on to deal with. Nor does the IAD's pointing out that "very little supporting evidence was presented at all about the appellant's income or financial resources" mean that the IAD did not accept that the Applicant had very little income. The

Decision as a whole makes it very clear that the Applicant's inability to meet the MNI requirement under either version of s 133(1)(j) was fully accepted.

(c) *Conflating s 15 Arguments with the H&C Considerations*

[175] On this point, the Applicant argues as follows:

> 78. The Member also conflated the s.15 arguments with the H&C considerations. For instance, in rejecting the evidence by Professor Galabuzi about the contributions made by PGPs in the form of family support, and social development, the Member noted that these factors "can be raised before the IAD pursuant to s.67(1)(c)." The Member dismissed the evidence presented by Professor Mykitiuk for the same reason. By so concluding, the Member effectively injected s.1 considerations into its s.15 analysis. As the SCC and this Court has confirmed, once an applicant has discharged his/her burden to show that the government has made a distinction based on an enumerated or analogous ground and that the distinction's impact on the individual or group creates a disadvantage by perpetuating prejudice or stereotyping, then the burden shifts to the government to justify the distinction under section 1 of the *Charter*. The Member erred by requiring the Applicant to rebut the s.1 justification in the context of her s.15 arguments.

[176] In my view, this represents another misreading of the Decision by the Applicant. In assessing the value of Dr. Galabuzi's evidence, the IAD pointed out that "he had not researched sponsorship MNI approval and refusal rates or trends" and then concluded that:

> [54] The panel discerned that Dr Galabuzi's primary observation was that for sponsorship, MNI and economic factors are overemphasized by the legislation and its rationale, although he agreed that he had not examined healthcare costs by isolating parents and grandparents. He did note that immigrants, as a whole, present no difference in health care use.
>
> [55] However, the panel notes that many of the factors that Dr Galabuzi would like to be considered in addition to tax contribution, such as the role of parents in family support, social

> development and other family-related benefits, are factors that can be raised before the Immigration Appeal Division (IAD) pursuant to *IRPA*, s. 67(1)(c), although he did not discuss that option. Most of his observations were relevant to government policy-making and have been, in fact, partly incorporated by the government into legislation and regulations concerning sponsorship criteria.
>
> [footnotes omitted]

[177] Dr. Galabuzi's evidence was simply not sufficient to demonstrate the impact of s 133(1)(j) on the Applicant or the intersectional group that the Applicant claimed was discriminated against by the legislation. And pointing out that Dr. Galabuzi's concerns were addressed under s 67(1)(c) is not, in my view, injecting s 1 considerations into the s 15 analysis. Dr. Galabuzi's evidence was not rejected; it was simply not sufficient to establish an adverse impact on the basis of sex, race or disability resulting from the statutory provision at issue.

[178] The same can be said for the IAD's treatment of Professor Mykitiuk, who "did not relate these opinions and comments to the [Applicant's] circumstances, which include disregarding medical advice to take medication, and possible help from her older children and her husband's family":

> [61] Prof Mykitiuk acknowledged that she has not specifically researched immigration and disability, poverty and immigration issues, or the effect of disability on family class immigration applications. She also stated that all immigrants could not be "lumped together" because of the diversity of discrete groups and she acknowledged that there were limitations on the data used for various studies; often the data and research were about parents with disabled children. She emphasized the assumed positive influence and importance of family support but also said that it could have a negative impact; it varies case-by-case but she stated that the better option is to defer to the individual to make a determination about its usefulness. Prof Mykitiuk pointed out that the use of MNI as a screening device has also raised "concerns" about its impact in other contexts, such as housing; however, she

> had not researched immigration consequences or data about sponsorship applications.
>
> [62] The problem with this evidence and testimony is that the link to the appellant's circumstances is tenuous. Most of the observations and comments by Prof Mykitiuk are concerns often and usually addressed for the availability of special relief (*IRPA* s. 67(1)(c)) in MNI cases, including the importance of family reunification (*IRPA* s. 3(1)(d)).
>
> [footnotes omitted]
>
> (d) *Conclusion on s 15*

[179] In the end, as the Decision makes clear, the Applicant simply failed to establish a causal connection between the denial of her sponsorship for MNI reasons and the intersectional grounds she raised. She argues that the IAD failed to take into account, and dismissed, the larger contextual evidence as "too indirect," thus ignoring the larger social, political and legal context of the legislative distinction at issue that the governing jurisprudence demands. But the governing jurisprudence also makes it clear that "the main consideration must be the impact on the individual or the group concerned," and this is where the Applicant's evidence fell short. No adverse effect was established by the general statistical evidence produced by the Applicant, and her witnesses conceded they had not researched sponsorship MNI approval and refusal rates or trends. In the end, the Applicant failed at the first step of a s 15 analysis in that the evidence adduced did not establish that s 133(1)(j) either on its face or by reason of impact created a distinction on an enumerated or analogous ground. The Applicant in this application has not really addressed the deficiencies in her evidence that were the basis for the IAD's findings on this point. Rather, she has sought to establish that the IAD ignored the larger social, political and

legal context in its analysis contrary to SCC jurisprudence. This approach is not persuasive and ignores the basis of the IAD's analysis on s 15.

(3) Section 7 Issues

[180] The Applicant raises three principal arguments with regards to the IAD's s 7 analysis.

(a) *No First Stage Analysis*

[181] On this issue, the Applicant argues as follows:

> 88. As noted above, the first stage of the s.7 analysis addresses the values at stake with respect to the individual and whether these engage interests protected by the rights to life, liberty and security of the person. The Member did not engage any stage 1 analysis at all with respect to the Applicant's s.7 claim; instead, it summarily dismissed the claim by finding that s.7 rights are not engaged and that the Applicant's evidence about psychological harm is not sufficient to engage s.7. This is in spite of the psychologist's report and hospital record confirming that the Applicant has suffered from and is still suffering from several depression and that the psychological challenges are a result of the separation from her family.

[182] What the Applicant means here is that the IAD failed to address "the values at stake with respect to the individual and whether these engage interests protected by the rights to life, liberty and security of the person."

[183] The values at stake, however, are identified in paragraph 108 of the Decision:

> The appellant submits that the MNI provisions of *IRPR* s. 133(1)(j) violate her rights to liberty and security guaranteed by Charter s. 7 by denying her the right to sponsor her parents to Canada and thus "[prevents the appellant] from creating the kind of home and

> family relationship that they seek to provide for themselves and for their children." She argues that it is her "fundamental right ... to decide with whom they wish to live and the kind of relationship they wish to maintain with their family." The values at stake, according to the appellant, are her entitlement to make life choices involving who (from outside Canada) should be able to live with her as a permanent resident. Another value is reducing psychological stress by having her parents immigrate. The appellant also submits that the equality interests described above are implicated in the rights guaranteed by Charter s. 7
>
> [footnotes omitted]

[184] The IAD then addresses whether the values at stake engage s 7 rights:

> [111] Charter s. 7 does not contain a right to family reunification; non-citizens do not have an unqualified right to enter or remain in Canada. The appellant is required by *IRPR* s. 133 to demonstrate that her parental permanent resident applicant (and dependents) will not need to live in poverty or require social assistance. By the sponsor meeting the MNI requirement, she demonstrates that she is capable of providing basic necessities for all the family members. If she does not meet that MNI, she can still demonstrate that there are humanitarian and compassionate circumstances to overcome that obstacle. In fact, the MNI is only one component and must be placed in context with the other diverse assessment requirements for immigration.
>
> [112] The panel is not persuaded that her inability to sponsor her parent and any resulting stress are infringements of the appellant's constitutional rights. Additionally, the evidence about psychological harm, discussed above under special relief, is not sufficient to engage Charter s. 7.
>
> [footnotes omitted]

[185] It is unclear what analysis the Applicant has in mind here, but the IAD refers to *Medovarski* and *De Guzman*, both above, and decides that the rights asserted by the Applicant do not engage s 7 because the Applicant is asserting an unqualified right that the jurisprudence clearly says she doesn't have. This is not a summary dismissal without analysis.

[186] The IAD also addresses the evidence about psychological harm and explains why it is not sufficient to engage s 7.

[187] The Applicant may disagree with the IAD's treatment of the psychological evidence, but she cannot say it was not addressed. The IAD is not obliged to accept the Applicant's version of what the evidence establishes.

(b) *Perfunctory Stage Two Analysis*

[188] On this point, the Applicant argues as follows:

> 89. The Member's treatment of the stage 2 analysis of s.7 was equally perfunctory. By simply stating, without explaining, that there was inconclusive and conflicting evidence to find the MNI requirement is unfair to the Applicant. The Member failed to discharge his duty to provide adequate and transparent reasons to support its finding. For instance, the Member did not explain why he rejected the affidavit and testimonies of Debbie Douglas confirming that many prospective sponsors would not even submit a sponsorship application because they could not meet the MNI requirement. The Member's decision did not address the findings of the OCASI survey with respect to the need of survivors of torture and war for family reunification but who are unable to do so since they cannot meet the MNI requirements. Nor did he deal with the issues identified in the survey of persons who experience isolation and depressions as a result of the refusal of their sponsorship but who are unable to seek legal help to appeal the negative decision.

[189] By "stage two," the Applicant means the "possible limitations of those values when considered in conformity with fundamental justice" (*Rodriguez*, above, at para 127).

[190] Having concluded that the jurisprudence makes clear that the rights and values asserted by the Applicant do not engage s 7, the IAD was not required to enter into an extensive "stage two" analysis. In *Blencoe*, above, at para 47, the Court states: "Thus, if no interest in the respondent's life, liberty or security of the person is implicated, the s. 7 analysis stops there."

(c) *Procedural Fairness and Equality as a Principal of Fundamental Justice*

[191] The Applicant's third complaint about the IAD's s 7 analysis is that:

> 90. The Member's conclusion that procedural fairness is accorded through s.67(3) of IPRA (*sic*) which mandates an examination of H&C circumstances also failed to take into account the evidence before the IAD showing that there is an inherent bias in the appeal process whereby sponsors who are able to meet the MNI requirement at the time of appeal are more likely to be successful. The Applicant argument's (*sic*) about equality as a principle of fundamental justice, and the evidence presented by the Applicant to support it, was not addressed at all in the Member's decision.

[192] Once again, the IAD's Decision is clear that her s 7 arguments are rejected because the rights and values she asserts do not, according to the governing jurisprudence, engage s 7, and "Additionally, the evidence about psychological harm, discussed above under special relief, is not sufficient to engage s 7."

[193] The IAD addresses the "evidence about psychological harm" as follows:

> [35] The appellant related that in 2006 she sought help from her family doctor, feeling "empty" and "lonely" because she had "no family here" and "no social support;" she feels that if her parents were in Canada they would provide that support. She was referred for other medical assessment and was diagnosed in June 2006 with "adjustment disorder with mixed anxiety and depressed features, mild in severity." The appellant explained that her anxiety started

with her 2004 visit to Bangladesh, and further visits there would not be a viable solution to her depression.

[36] For the purpose of this hearing, the appellant was assessed by a psychologist in January 2015. The psychologist provided an opinion of depression and recommended that the appellant be permitted to sponsor her family to come to Canada. The appellant testified that she can visit a counsellor monthly but does not take any of her prescribed medication because she is "scared" of the side effects, although she agreed that her psychologist recommended taking the medication. She added that she also has high blood pressure and diabetes, although there was no supporting documentation.

[37] The appellant added that future visits to Bangladesh would not reduce her depression and anxiety. She said that if her parents were in Canada it would give her "peace of mind" and put her in a "better mood." They could assist her in raising her children and providing them with a heritage context. However, the appellant's youngest child is now twelve and the two older ones are already at university. The appellant said that if her parents were only to visit for six months it would not "solve my problem;" they must stay in Canada because using Skype and other communication is not sufficient. Her main reason for sponsoring their immigration is that it would solve her depression, but the panel notes that she refuses to take her recommended medication or travel to Bangladesh without her whole family. She rejects any alternative to their immigration to Canada.

[38] The appellant testified that it would be devastating to her if her parents did not immigrate and her depression would continue. However, she left her family over twenty years ago to immigrate to Canada. The panel feels that her concerns could be partly alleviated by communication (especially through Skype) and visitations by her or by them, even though she herself disagrees with that. There was no evidence that the applicants would suffer any specific hardship, other than general separation, from the dismissal of this appeal.

[footnotes omitted]

(d) *Conclusion on s 7 Analysis*

[194] Clearly, then, the IAD makes it very clear that the basis of its Decision with regard to s 7 is that s 7 is not engaged, and full reasons are given for this conclusion. No further discussion was required.

[195] The Applicant failed to establish that there was a "sufficient causal connection" between the government action embodied in s 133(1)(j) and the deprivation of her liberty or security, and the values and rights she asserted to engage s 7 have been rejected in the relevant jurisprudence. The separation of the Applicant from her family is a choice that she made many years ago now when she decided to come to Canada. She may have wanted to eventually sponsor family members but she must be taken to have known that restrictions would apply and that family reunification would not be automatic. As the IAD points out by referring to *Medovarski*, above, the SCC has made it clear that family members do not have an unqualified right to enter or remain in Canada. In addition, the evidence in this case, as the IAD points out, does not establish that the psychological harm alleged by the Applicant was sufficient to engage s 7. I can find no reviewable error with respect to the IAD's conclusion that s 7 of the *Charter* is not engaged on the facts of this case.

(4) Section 1 Issues

[196] The Applicant made s 1 arguments before the IAD, but the IAD's findings and conclusions with regard to s 15 and s 7 of the *Charter* meant that "Because the panel has found

no constitutional infringements, it is unnecessary to determine whether IRPR's s 133(1)(j) is justified by Charter s 1."

[197] Because I have concluded there are no reviewable errors with regards to the IAD's findings on constitutional infringement, it is not necessary for me to assess the s 1 arguments put forward by the Applicant in this judicial review application.

C. *Unreasonableness*

[198] In addition to the constitutional issues addressed above, the Applicant also alleges reviewable errors that render the Decision unreasonable.

(1) Ignoring and Misconstruing Evidence

[199] The Applicant says that, in reaching its conclusions, the IAD simply ignored or misconstrued evidence:

> 100. The Applicant had submitted substantial evidence with regard to a number of issues including her severe depression resulting from the family separation. This evidence included a 2015 report from Dr. Natasha Brown, a registered psychologist, which found that the Applicant demonstrated scores consistent with severe clinical anxiety and severe levels of depression. Dr. Brown's final diagnosis was that the Applicant was suffering from a Major Depressive Episode "due to separation from her family and subsequent social isolation". Yet the IAD completely ignored such evidence by finding that her evidence about psychological harm was not sufficient. The Applicant also explained she stopped taking her medication due to the severe side effects. Yet the IAD ignored this evidence and blamed the Applicant for "disregarding medical advice to take medication" when it stated:
>
> Her main reason for sponsoring their immigration is that it would solve her depression, but the panel notes that she refuses to take

> her recommended medication or travel to Bangladesh without her whole family.
>
> 101. Unreasonably, the Member found no evidence about the hardship caused by family separation in the face of substantial evidence of psychological harm and the fact that the Applicant was "tearful and visibly upset when discussing her parents and her separation from them."
>
> 102. More importantly, the Member's statements completely ignored the evidence that the Applicant's anxiety and depression began after her visit to Bangladesh. As such, the member's findings that the Applicant refused to consider alternatives to family reunification, and that there was no evidence "that the applicants would suffer any specific hardship, other than general separation", was not only insensitive, but could only have been arrived at by ignoring the Applicant's evidence put before him.
>
> 103. Also, as noted above, the Member repeatedly stated that the Applicant has failed to provide information about her income and employment record. But in fact, the Applicant previously had no income and had a limited employment history in Canada until recently, and had provided an explanation for the lack of record for her recently earned income.
>
> 104. The Member's refusal to consider all of the holistic evidence substantiating the Applicant's claim for H&C considerations can be explained by the fact that even though the appeal was based on the Applicant's request for special relief, the Member was nonetheless single-mindedly focused on the Applicant's inability to meet the LICO requirement. This is made evident by comments in the decision referring to the Applicant's income and financial resources as the "primary issues in this appeal", and that "the primary concern is the financial viability of the sponsor to provide accommodation and sustenance" for her family. The Member said the availability of special relief was "hardly explored" by the Applicant, yet it was the Member himself who had disregarded the extensive evidence adduced by the Applicant to support her H&C factors justifying special relief.

[200] The inadequacy of the psychological evidence is only one basis for the IAD's conclusion that s 7 of the *Charter* is not engaged on the facts of this case. In any event, the IAD refers to Dr. Brown's evidence in paragraph 36 of the Decision and gives reasons for its conclusions on

the psychological evidence in paragraphs 37 and 38 of the Decision. The Applicant may disagree with these conclusions but she cannot say that the evidence was ignored. The IAD also refers to the Applicant's evidence that "she explained that her anxiety started with her 2004 visit to Bangladesh, and further visits there would not be a viable solution to her depression."

[201] There is no dispute between the parties concerning the Applicant's income and limited employment history and the IAD shows itself to have been fully aware of the facts. The IAD's point is that "she provided minimal direct evidence about her own situation, *relating any absence of her financial resources to those characteristics*" [emphasis added] and, as regards the MNI requirement, the IAD found it "especially puzzling that the [Applicant] spent so much time and effort presenting evidence and making submissions outlining the general principles of economic discrimination but failed to provide the basic factual documentation needed for the panel to assess the essential issue of her own family income and resources":

> [23] The appellant said that her parents are retired and own a farm, growing rice and vegetables that they sell wholesale at a market; they hire labourers when required. That farm provides their sole income and her parents do not receive any pension. She said that if her father came to Canada he could rent the farm and have the income sent to Canada but there was no supporting documentation about that proposition.
>
> [24] The appellant testified that she would not have to support the applicants in Canada because they would bring enough money to live on for about six months; her parents and siblings could rent a house near Toronto and she has searched possible real estate offerings. She said that her siblings are more educated than she is and are qualified for many jobs; she provided the results of some appropriate job searches. She also thinks that she will establish a catering business, although there was no evidence presented about this. Little substantive evidence was provided about the applicants' financial situation, other than the generalities mentioned earlier. Based on the evidence about the appellant's own economic situation her hopes and expectations appear extremely speculative.

> [25] There is almost a complete absence of documentation showing any income or other financial assets and liabilities for the appellant or her husband for most of the last five or six years. The visa refusal was based on her financial position and she could have easily provided income tax assessments for the various years to illustrate her financial situation. This appeal was obviously meant to consider financial, as well as other matters, and this consideration weighs heavily against the appellant. The evidence was unsatisfactory concerning the financial circumstances of the appellant, her family and the applicant. The applicant has the onus to how close she is to the MNI and the impact that has on special relief; she did not do that. All of that weighs against her appeal.
>
> [26] Based on the evidence presented (and absence of evidence for most years), the panel concludes that the appellant falls well below the MNI, or even a feasibility of sponsorship. In *Jugpall*, upheld in *Dang*, it was held that where the obstacle to admissibility has been overcome at the time of the hearing, a lower threshold for the exercise of special relief than that set out in *Chirwa* is appropriate. That is not the case in this appeal and the panel finds that the higher threshold applies.

[202] The Decision reveals that the IAD fully addressed special relief in accordance with the evidence and arguments put forward by the Applicant which concentrated upon the constitutional issues. The IAD also extensively reviewed the facts and considerations pertinent to special relief under the extensive "Special Relief" section of the Decision. This covers some 40 paragraphs and a conclusion that "physical separation alone is not sufficient to invoke special relief and there was insufficient evidence about hardship or any unusual and serious circumstance that might permit the imposition of special relief."

(2) Failure to Consider Best Interests of the Child

[203] The Applicant's complaints in this regard are captured in the following passage from her written submissions:

> 108. In this case, apart from providing support letters, the Applicant's two eldest daughters also testified as to why they wanted their grandparents, aunts and uncles to come to Canada. The Applicant herself testified that she wants her children to learn from her own parents about their culture and heritage. Counsel for the Applicant also made submissions as to why the appeal should be granted in the best interests of the child, in view of the close relationships between the Applicant's children and their aunts and uncles, from whom they seek and receive guidance. The IAD's entire assessment of the best interests of children amounts to one lonely sentence:
>
> > However, the appellant's youngest child is now twelve and the two older ones are already in university.
>
> …
>
> 112. Even assuming, without conceding, that the Member did not need to consider the best interests of the two oldest daughters of the Applicant, it is still entirely unreasonable for the Member not to take into account the interests of the Applicant's 12- year-old son, when deciding whether his grandparents, uncles and aunts should be allowed to come to Canada or not. While some of the Applicant's children are young adults, some are still in high school and elementary schools. Moreover, the Member had before it expert evidence confirming the critical role family, especially parents and grandparents play, in individual well being, and the importance of having grandparents' transmission of cultural values on the development of self esteem among children from racialized communities. The Member's complete disregard for the best interests of the Applicant's children, especially the younger ones, renders its decision unreasonable.

[204] When the IAD comments that the "[Applicant's] youngest child is now twelve and the two older ones are already at university," it is merely responding to the Applicant's assertion that if her parents were in Canada they could assist her in raising her children and providing them with a heritage context.

[205] The IAD accurately identifies all of the children in paragraph 27 of the Decision: "They have three daughters and two sons, all born in Canada, now ages twelve through twenty. Two of their daughters are at university; the others are in high school or elementary school."

[206] The IAD also refers to and deals with the evidence provided by some of the children and acknowledges that, on the facts of this case, the best interests of the children must be given "substantial weight." By this, I take the IAD to mean that the best interests of the children in having their grandparents, uncles and aunts in Canada is fully acknowledged. This being the case, I don't think the IAD needed to go into a protracted analysis as to how it reaches this conclusion because it is conceding the Applicant's point that the best interests of the children are a very important factor. But the case law says that, having assessed the best interests of the children, the tribunal must then weigh its conclusions against the other factors at play. That is exactly what the IAD does in this case and concludes that the best interests of the children do not outweigh the other negative factors that are referred to throughout the Decision:

> [34] The appellant's two eldest daughters also testified about their visit to their grandparents and uncles and aunts in 2004. They both emphasized the closeness of the family and their continued communications, especially through social media. The panel accorded substantial weight to the circumstances and interests of the appellant's children; but finds that there is insufficient evidence to make it determinative or to overcome the negative factors in this case.
>
> [footnotes omitted]

[207] A reading of the Decision as a whole makes it clear why the IAD came to this conclusion. The children's lives would not be changed by a negative decision and there is nothing to suggest that they will not continue to do well. In addition, there are many other ways that they can

continue to maintain a connection with their family in Bangladesh and to partake in their cultural heritage.

[208] In the circumstances, the IAD's Decision with regard to the children is both transparent and intelligible, and the Decision falls well within the *Dunsmuir* range.

(3) Inadequate Reasons

[209] The Applicant's complaints in this regard are as follows:

> 117. In this case, the decision is filled with disjointed and incoherent statements that simply made the decision unintelligible. For instance, at paragraph 59, the decision started by referencing the Applicant's anxiety with her visit to Bangladesh, but in the next sentence, it questioned why the Applicant's husband did not participate in the sponsorship, without explaining the connection between the two. The Member also made numerous conclusive statements without setting out the analysis upon which those conclusions were drawn. For example, the Member stated repeatedly that there was "conflicting" evidence presented by the Applicant's experts without explaining what these conflicts were, or having ever asked the experts to explain the perceived inconsistencies. Similar conclusory findings can be found in many instances. Just as the RPD in Petrovic has failed to provide sufficient reasons why it found the cumulative mistreatment of the applicant did not amount to persecution, the Member in this case has failed to explain why it found the Applicant's rights under sections 7 and 15 have not been violated.

[210] This is a fairly lengthy Decision (119 paragraphs) that deals with a voluminous mass of evidence and some complex legal issues. Perfection is not required. See *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)* , 2011 SCC 62 at para 16; *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at para 54. When the Decision is read as a whole on the main points at

issue, it is substantially transparent, intelligible and justified and, in my view, cannot be said to fall outside the range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

D. *Certification Issues*

[211] The Applicant has raised the following questions for certification:

> a) Given that s. 133(1)(j) and s. 134 of the *Immigration and Refugee Protection Regulations (IRPR)* were amended and came into force on January 2, 2014, should the Immigration Appeal Division (IAD) have retroactively applied the amended version of these regulations to a case where the applicant's Notice of Appeal to the IAD was filed before the amended version of the regulations came into force?
>
> b) Does paragraph 133(1)(j) of the *Immigration and Refugee Protection Regulations* violate section 15 of the *Canadian Charter Rights and Freedoms* (the "*Charter*")?
>
> c) Does paragraph 133(1)(j) of the *Immigration and Refugee Protection Regulations* violate section 7 of the *Charter*?

[212] In *Mudrak v Canada (Citizenship and Immigration)*, 2016 FCA 178, the Federal Court of Appeal recently confirmed the principles to be applied when certifying questions:

> [15] This Court in *Canada (Minister of Citizenship and Immigration) v. Liyanagamage*, [1994] F.C.J. No. 1637 (QL), 176 N.R. 4 [*Liyanagamage*]) set the principles that should be considered when determining whether a question should be certified:
>
> > [4] In order to be certified pursuant to subsection 83(1), a question must be one which, in the opinion of the motions judge, transcends the interests of the immediate parties to the litigation and contemplates issues of broad significance or general application (see the useful analysis of the concept of "importance" by Catzman J. in *Rankin v.*

> *McLeod, Young, Weir Ltd. et al.* (1986), 57 O.R. (2d) 569 (Ont. H.C.)) but it must also be one that is determinative of the appeal. The certification process contemplated by section 83 of the *Immigration Act* is neither to be equated with the reference process established by section 18.3 of the *Federal Courts Act*, nor is it to be used as a tool to obtain from the Court of Appeal declaratory judgments on fine questions which need not be decided in order to dispose of a particular case.
>
> [16] In *Zhang v. Canada (Citizenship and Immigration)*, 2013 FCA 168, [2014] 4 F.C.R. 290 [*Zhang*], at paragraph 9, this Court reaffirmed these principles. It is trite law that 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. As a corollary, the question must also have been raised and dealt with by the court below and it must arise from the case, not from the Judge's reasons (*Liyanagamage*, at paragraph 4; *Canada (Minister of Citizenship and Immigration) v. Zazai*, 2004 FCA 89, [2004] F.C.J. No. 368 (QL) at paragraphs 11 and 12 [*Zazai*]; *Varela* at paragraphs 28, 29, and 32).

[213] In my view, all three of the proposed questions satisfy these principles and criteria.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. The following questions are certified for appeal:

    a) Given that s. 133(1)(j) and s. 134 of the *Immigration and Refugee Protection Regulations (IRPR)* were amended and came into force on January 2, 2014, should the Immigration Appeal Division (IAD) have retroactively applied the amended version of these regulations to a case where the applicant's Notice of Appeal to the IAD was filed before the amended version of the regulations came into force?

    b) Does paragraph 133(1)(j) of the *Immigration and Refugee Protection Regulations* violate section 15 of the *Canadian Charter Rights and Freedoms* (the "*Charter*")?

    c) Does paragraph 133(1)(j) of the *Immigration and Refugee Protection Regulations* violate section 7 of the *Charter*?

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3178-16
STYLE OF CAUSE:	SAJU BEGUM v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 15, 2017
JUDGMENT AND REASONS:	RUSSELL J.
DATED:	APRIL 26, 2017

APPEARANCES:

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