Date: 20060718

Docket: IMM-121-05

Citation: 2006 FC 893

Ottawa, Ontario, July 18, 2006

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

KIT MEI ANN CHU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

I. Introduction

[1] Ms. Kit Mei Ann Chu (the "Applicant") seeks judicial review of the decision of the Immigration and Refugee Board, Immigration Appeal Division (the "IAD"), dated December 13, 2004. In its decision, the IAD dismissed the Applicant's appeal from the refusal of a visa officer to issue her a travel document to allow her return to Canada.

II. Facts

[2] The Applicant is a British national. She was born in Hong Kong on August 5, 1959. She was landed in Canada on November 14, 1994 as a member of the entrepreneur class, under the *Immigration Act*, R.S.C. 1985, c. I-2, as amended (the "former Act"). She had the status of a permanent resident.

[3] The Applicant gave birth to a child, in Canada, on August 31, 2000. The child is a Canadian citizen.

[4] On January 8, 2004, the Applicant applied to the Canadian Consulate General in Hong Kong for a travel document, pursuant to the provisions of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, as amended ("IRPA" or "the Act"). In her application for the travel document, the Applicant indicated that she had been physically present in Canada for 990 days from the period December 2000 to December 2003, as follows:

12/2000 – 11/2001:	360 days
01/2002 – 07/2002:	210 days
09/2002 – 11/2002:	90 days
01/2003 – 06/2003	180 days
08/2003 – 12/2003	150 days

[5] The Applicant was interviewed by a visa officer. According to the Computer Assisted Immigration Processing System ("CAIPS") notes, the visa officer reviewed the Applicant's old

and new passports. The visa officer noted that the passports showed two Canadian entry stamps, the first for February 23, 1997 and the second for February 11, 2002, as a returning resident.

[6] The visa officer recorded that the Applicant had travelled to Singapore in July 1995, Indonesia in February 1997, and in Japan in June 2003. The visa officer recorded that the Applicant had been hospitalized in Hong Kong from December 18, 2003 to December 24, 2003. The visa officer was not satisfied that the Applicant had met the residency requirements under IRPA, that is physical presence in Canada for two out of the preceding five years, for a total of 730 days.

[7] The following entry appears in the CAIPS notes:

> In order to meet the residency requirement 2/5 yrs, proof the [illegible] length of stays in CDA required.

The CAIPS notes indicate that the visa officer wanted to see all passports and travel documents, proof of the Applicant's residency in Canada for the past five years and a school transcript or school progress report for the Applicant's daughter. These entries were recorded in the CAIPS notes on January 8, 2004.

[8] A further entry was made on February 4, 2004 as follows:

> Applicant has not provided any requested documentation which could be used to support her claims. Therefore, I am forced to assume that she is no longer interested in pursuing this application or she is unable to substantiate her claims. File to Program Manager.

[9] On February 4, 2004, the Program Manager made the following entry in the CAIPS notes:

> I refuse this applicant as she fails to meet the requirements of the Act. In addition she has failed to provide me with any compelling information to warrant special consideration on H and C grounds.

[10] The Applicant filed an appeal to the IAD on April 22, 2004. In preparation for the hearing that was scheduled for November 30, 2004, she submitted documents to the IAD under cover of a letter dated November 9, 2004. Among the documents provided, the Applicant forwarded a copy of the permanent resident card that she received on January 9, 2004.

[11] On November 30, 2004, the Applicant appeared without counsel, although the Notice of Appeal had been filed by a lawyer, Mr. Alvin Hui, of Vancouver. The Hearing Information Sheet, contained in the certified Tribunal Record, records the following:

> Counsel no longer retained by the appellant. Appellant explains she no longer needs assistance now that documents have been tendered.

[12] As well, at the beginning of the hearing before the IAD, the matter of representation was addressed. The transcript of the hearing, as contained in the Tribunal Record, shows the following statement by the IAD:

> PRESIDING MEMBER: So the appellant has indicated that she no longer retains the services of Alvin Hui, barrister and solicitor. She indicates that once he sent in the materials, the documents, that she is going to represent herself at the hearing. So that end, Mr. Brummer, I do have a package of documents from her former counsel dated November 9, 2004, with four tabs attached. Do you have any objection to those materials being marked as an exhibit?

[13] The Applicant was the sole witness before the IAD. She was examined by the Presiding Member and by counsel for the Minister of Citizenship and Immigration (the "Respondent"). The Applicant was questioned abut the circumstances concerning her arrival in Canada, her employment history, her income, her investments, her residential accommodation and her daughter, all with respect to her residency in Canada. She was asked about her family in Hong Kong, her intentions to live in Canada, her current marital status and visits to Canada by the father of the child. Near the end of questioning by both the Presiding Member and counsel for the Respondent, the Applicant stated the following on the record:

> APPLICANT: I think I must have wrongly calculated the time, because all along I had the concept that if I had been staying with a citizen, then that period of time would be counted. Am I right?
>
> PRESIDING MEMBER: I have no idea what you're speaking of. Are you trying to say that while you've been living in Hong Kong you've been living with someone who is a Canadian citizen and you thought that counted as part of your time in Canada?
>
> APPLICANT: Yes, yes, whether there is such a condition.
>
> PRESIDING MEMBER: But we've already established that your husband is not a Canadian citizen.
>
> A But my daughter is.
>
> Q Oh. So you thought that if your daughter was outside Canada with you that that would count as being time outside Canada with a Canadian citizen.
>
> A. Yes.
>
> Q Okay. Well, you, now that – things are starting to make some sense to me at this late hour. And how old is your daughter today?

A Four years old.

Q Okay. So you came to Canada, you had your child in Canada, then when you went back to Hong Kong, the child would assist in the calculation of days. Okay. And I'll wait to hear from Mr. Brummer on that. So let's start with that premise, and we're not going to go on much longer, but now that I'm – starting to see how maybe you're thinking about the situation. How much time in the last four years since your daughter has been born have you been in Canada?

A Let me try to remember. Since her birth I have been coming back here intermittently until July of 2002 I came back here.

Q Okay. Anything else to add?

A No, but I did want to know what would it mean that since the birth of my daughter the time I have spent with her outside of Canada and inside Canada would both be counted.

Q Okay. And I understand that that's how you feel that the law applies and it will be interesting to hear whether or not Mr. Brummer agrees with that interpretation, but at this time I would like just to know whether or not you have anything else to say to me or anything else to show me or if there's anyone else you'd like to speak on your behalf.

A No, I don't really have anything to add, but I would want to reiterate that I did want to stay and live here and I have just registered to the Vancouver School Board and I have also found her a school closer to the new address and it is my intention to put her in a public school and to study here all the way to university.

III. The Decision

[14] The IAD dismissed the Applicant's appeal on the grounds that, having considered all the evidence submitted, including a British Columbia driver's licence, statements of account for two department stores, and a cellular telephone bill, the Applicant had failed to meet her onus of proving a physical presence in Canada during the required period, that is for two years within the period

February 5, 1999 to February 5, 2004. This was the relevant period identified by the IAD having regard to section 28 of IRPA.

[15] The IAD considered whether the Applicant had shown that she merited positive consideration on humanitarian and compassionate ("H and C") grounds. It noted that consideration of H and C factors were relevant to the best interests of a child who may be affected by the decision and concluded that, in the circumstances of this case and having regard to the evidence, there were insufficient grounds to warrant the exercise of positive discretion on H and C grounds. The IAD specifically considered the issue of hardship to the Applicant and her Canadian born child if a negative decision were made. It ultimately decided that neither the Applicant nor her Canadian citizen child would suffer hardship resulting from the Applicant's loss of status.

IV. Submissions

A. *The Applicant*

[16] The Applicant argues that the IAD erred by interpreting the residency requirements set out in section 28 of IRPA in a way that imports either a retroactive or retrospective application of the law, contrary to the common law presumption that legislation should not be applied either retroactively or retrospectively in the absence of the clear intention of Parliament that the statutory provision in issue be interpreted in such a manner.

[17] The Applicant submits that section 28 of IRPA should be interpreted in a prospective, forward-looking manner in order not to interfere with vested rights.

[18] The Applicant argues that the IAD's application of the IRPA results in making prior lawful conduct the basis for proceedings to remove persons from Canada. She submits that applying the residency requirements of section 28 to periods of absence that precede the implementation of IRPA is an impermissible retroactive application of legislation.

[19] Alternatively, the Applicant submits that if the application of the new residency requirements in IRPA is not retroactive, then it is retrospective. The *Interpretation Act*, R.S.C. 1985, c. I-21, as amended, subsection 43(c) provides that new legislation will not affect vested rights when existing legislation is repealed.

[20] The Applicant argues that she has the vested right to conduct herself in accordance with the requirements of the former Act in the years prior to the implementation of IRPA. Specifically, she submits that she had the right to rely on the "abandonment" test developed in relation to the former Act to maintain her residence status, without reference to a mathematical formula or otherwise justifying her absence from Canada on humanitarian and compassionate grounds.

[21] Alternatively, the Applicant argues that if the IAD did not err in its retroactive application of the residency requirements of IRPA, then this interpretation breaches her rights to life, liberty and security of the person as guaranteed by section 7 of the *Canadian Charter of Rights and Freedoms*,

Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 (the ACharter@).

[22] The Applicant submits that the interests protected under section 7 of the Charter have been recognized, in the context of immigration law, in *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177 and *Romans v. Canada (Minister of Citizenship and Immigration)* (2001), 281 N.R. 357 (F.C.A.). She argues that no permanent resident prior to June 28, 2002 could be considered to have been granted status on the essential condition of compliance with a residency requirement that did not exist at that time.

[23] The Applicant submits that section 7 protects personal choices, such as the right to chose to establish a home and relies, in this regard, on the decision in *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844. State actions which may affect an individual's psychological integrity are to be assessed on an objective basis; see *New Brunswick (Minister of Health and Community Services) v. G.J.*, [1999] 3 S.C.R. 46.

[24] The Applicant argues that the section 7 Charter right is fully engaged in her case. The finding that she does not meet the residency requirements leads directly to the loss of her permanent resident status. Upon the loss of that status, she loses the right to enter and remain in Canada with her Canadian daughter. She also loses mobility rights and the right of sponsorship.

[25] Third, the Applicant argues that she suffered a denial of natural justice, directly as the result of incompetence of her former counsel and his untimely withdrawal. She says that Mr. Hui did not

advise her of the importance of providing cogent evidence to support the H and C grounds of her appeal. She says that had she been so advised, she could have provided further documentation to support her involvement in her community in Canada. She argues that had her former counsel exercised a reasonable standard of care, those documents would have been produced for the hearing before the IAD.

[26] As well the Applicant submits that the withdrawal of Mr. Hui as her counsel adversely affected her testimony before the IAD, since she was not adequately prepared. She argues that as a result, her testimony was confused and inconsistent.

[27] The Applicant relies on the decision in *Shirwa v. Canada (Minister of Employment and Immigration)*, [1994] 2 F.C. 51 where the Court found that in extraordinary circumstances, incompetence of counsel can give rise to a reviewable breach of fundamental justice. She submits that such extraordinary circumstances exist in her case.

B. *The Respondent*

[28] The Respondent argues that the Applicant cannot succeed in her argument that the Board erred by failing to consider the abandonment test under the former Act because she did not raise any argument on that issue in her application for a travel document or in her evidence before the IAD. The Respondent notes that evidence of intention may be weighed by the IAD in its assessment of H and C considerations.

[29] The Respondent submits that IRPA replaces the former Act and is intended to apply to those persons who were permanent residents under the former Act. The residency conditions set out in section 28 require a permanent resident to be in Canada, subject to specified exceptions, for 730 days in the five year period preceding an examination. H and C considerations may justify a breach of the residency requirements, those considerations may include intention. Status is not lost under IRPA until a final determination is made with respect to the residency obligations and until the disposition of any appeal.

[30] IRPA states that, upon its coming into force, the former Act is repealed; see section 274. IRPA contains specific transitional provisions. Section 190 provides that every matter that was in progress under the former Act is to be governed by IRPA, upon its implementation. Whether the matter of the Applicant's permanent resident status was pending when IRPA came into force or whether it was a matter arising in January 2004, IRPA governs.

[31] The Respondent submits that Parliament's intention in this regard is confirmed by section 328 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, as amended (the "Regulations"). Section 328 describes the status of persons who were permanent residents immediately prior to IRPA coming into effect. It also sets out a framework for calculating time spent outside Canada, prior to the coming into effect of IRPA, for the purpose of meeting the residency requirements pursuant to section 28.

[32] The Respondent argues that if time prior to June 28, 2002 was not intended to count in computing the residency requirement of two years out of five, there then would be no purpose of

subsection 328(2) of the Regulations in specifying that time outside the country would count as time in Canada, for a person holding a Returning Resident's Permit. The presumption against retroactive or retrospective legislation has been overridden by the express language of section 328.

[33] Further, the Respondent submits that section 28 is not retroactive because it does not reach into the past and change a person's status. Section 28 operates prospectively but looks backwards insofar as it attaches new consequences to an event that occurred prior to the coming into force of IRPA. It is a retrospective provision and the presumption against interference with vested rights does not apply. In this regard, the Respondent relies on *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358.

[34] The Respondent argues that IRPA is clear but even if it were not, section 28 does not interfere with vested rights. In *Gustavson Drilling (1964) Ltd. v. Canada (Minister of National Revenue)*, [1977] 1 S.C.R. 271, the Supreme Court of Canada confirmed that no one has a vested right to the continuance of the law as it stood in the past. In *McAllister v. Canada (Minister of Citizenship and Immigration)* (1996), 108 F.T.R. 1 (T.D.), this Court held that a person does not have the right to have his immigration proceeding determined in accordance with the law that was in effect when the proceeding was commenced.

[35] The Respondent argues that the Applicant has no vested right, as a permanent resident under the former Act, to an exemption from the residency requirements of IRPA. Relying on *Gustavson*, it submits that a right can only be described as vested if its eventual accrual is certain and not

conditional on future events. A person must satisfy the statutory conditions precedent to the existence of a right before claiming it.

[36] The Respondent takes the position that there is no breach of section 7 of the Charter. In the first place, none of the section 7 interests of life, liberty or security of the person arise from the facts. Second, the relevant statutory scheme complies with the principles of fundamental justice.

[37] The Respondent notes that there is no independent right to fundamental justice itself. If there is no deprivation of life, liberty or security of the person, then there is no breach of section 7; see *Blencoe v. B.C. (Human Rights Commission)*, [2000] 2 S.C.R. 307 at paragraphs 47-48.

[38] As for the decision in *Godbout* relied on by the Applicant, the Respondent submits that the decision does not suggest that a person has an absolute right to determine place of residence. The Respondent argues that in *Godbout*, the Court was referring to persons lawfully in Canada. That approach is consistent with the mobility rights entrenched in section 6.

[39] The Respondent further argues that the Applicant's submissions are contrary to the view stated by the Supreme Court in *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711, that non-citizens do not have an unqualified right to enter or remain in Canada.

[40] The Respondent takes the position that the absence of legal representation before the IAD did not give rise to a breach of procedural fairness or the extraordinary circumstances that are necessary to justify quashing a decision, as contemplated by the decision in *Shirwa*.

C. *Post-Hearing Submissions*

[41] Shortly before the hearing, the Applicant submitted evidence of a complaint to the Law Society of British Columbia, concerning the conduct of her former counsel. On May 31, 2006, she provided a copy of a letter from the Law Society of British Columbia, dismissing her complaint.

[42] By letter dated December 9, 2005, the Respondent sought leave to file further submissions concerning a recent decision of the Supreme Court of Canada in *Dikranian v. Quebec (Attorney General)*, [2005] 3 S.C.R. 530. By a Direction issued on December 22, 2005, the parties were given leave to address the application of that decision to the present case.

[43] In *Dikranian*, the Supreme Court dealt with the effect of amendments to the Quebec *Act respecting financial assistance for students*, R.S.Q. c. A-13.3, s. 23. The amendments, which came into effect in 1997 and 1998, resulted in the financial institution charging Mr. Dikranian interest accrued for an exemption period that, according to the loan certificate signed with the financial institution, was to have been paid by the provincial government. Mr. Dikranian had received student loans, beginning in 1990, in relation to studies that he completed in January 1998.

[44] Mr. Dikranian commenced a class action against the Government of Quebec and was unsuccessful at both trial and upon appeal. The Courts decided that the legislation covered all student loans both before and after the amendments came into effect. Upon appeal to the Supreme Court of Canada, the majority of the Court found that the appellant had a vested right with respect to the duration of the exemption period. Because the loan contract was signed prior to the introduction of the legislative amendments, his legal situation was both tangible and concrete, and fully constituted when the amendments came into effect. The majority concluded that the legislation lacked a transitional provision that would support the conclusion that the legislation intended to apply the amended provisions to limit the rights of borrowers or to change the terms of existing contracts.

[45] The Respondent argues that, in the present case, Parliament intended to apply the residency requirements in section 28 of IRPA to all permanent residents. The former Act was expressly repealed by section 274 of IRPA and section 190 says that all matters or proceedings pending under the former Act were to be governed by IRPA.

[46] Again, the Respondent refers to section 328 of the Regulations. Subsection 328(2) provides that time spent outside Canada within the five years preceding the implementation of the Regulations will count as periods of time spent in Canada for the purpose of calculating the residency requirements under section 28 of IRPA. This is an express provision that the residency obligations of IRPA apply to periods of time preceding June 28, 2002, the date on which IRPA

came into force. The Respondent submits that this interpretation is supported by the reasoning of the Supreme Court in *Dikranian*.

[47] The Respondent argues that *Dikranian* stands for the principle that a mere right contained in repealed legislation is not a vested right. Accordingly, the Applicant cannot rely on the provisions of the former Act to overcome the residence requirements of IRPA. In order to succeed, the Applicant must show that she had a specific, tangible and concrete right that had materialized and vested under the former Act. In *Dikranian*, such right was established by a perfected contract between Mr. Dikranian and the lending institution.

[48] The Respondent argues that the only analogous right under the former Act would be a Returning Resident Permit (a "RRP"), as proof of an intention not to abandon Canada as the place of permanent residence. The Applicant does not have a RRP. It is submitted that she has no vested right to rely on the intention to abandon that appeared in the former Act.

[49] For her part, the Applicant submits that her situation can be distinguished from that in *Dikranian*, due to the different nature of the relationships between the parties. The relationship in *Dikranian* was between two private parties, while her relationship is with the state, subject to IRPA. The Applicant argues that the Supreme Court's analysis of vested rights favours her position.

[50] The Applicant submits that IRPA is retroactive, as opposed to retrospective, legislation. Both IRPA and the legislation at issue in *Dikranian* seek to "reach back" and alter the legal consequences of particular facts. This "reaching back' distinguishes both *Dikranian* and the present

case from the decision of the Supreme Court of Canada in *Gustavson*. In that case, the legislation did not have retroactive effect but was forward-looking.

[51] The Applicant argues that there is a contractual element to her circumstances that favours the recognition of vested rights and the presumption against interference, as in *Dikranian*. She refers to the decision in *Chiarelli* which dealt with the removal of a permanent resident on grounds of criminality.

[52] The Applicant submits that IRPA contains provisions, regulating loss of status for non-compliance with the residency requirements, that are comparable to the inadmissibility provisions of the former Act. She argues that the Supreme Court's characterization of a permanent resident's conditional right to remain in Canada, subject to violation of conditions imposed under the legislation, is consistent with the *Dikranian* decision. She says that the starting point of the analysis in that case was the recognition of contractual rights.

[53] The Applicant argues that the contractual context goes to the recognition of vested rights and the requirement that subsequent amending legislation not be retroactive except where expressly provided by the amending legislation or where unavoidably implied.

[54] The Applicant submits that if she is correct in characterizing IRPA as retroactive legislation, she need not prove that she holds vested rights. Nonetheless, she argues that her rights relating to a

residency obligation under the former Act are vested and accordingly are protected from any retrospective application of IRPA.

[55] The Applicant submits that her obligations concerning her permanent resident status are unchanged from 1994, until the repeal of the former Act in 2002. As long as the former Act was in force, her obligations and the test for loss of status were crystallized, finalized, definitively concluded and directly applied to her as a permanent resident of Canada. She argues that this situation is analogous to the concluded contract between Mr. Dikranian and his financial institution.

V. Discussion and Disposition

[56] This application for judicial review concerns the interpretation and application of section 28 of IRPA and section 328 of the Regulations. These provisions read as follows:

IRPA	IPR
28. (1) A permanent resident must comply with a residency obligation with respect to every five-year period.	28. (1) L'obligation de résidence est applicable à chaque période quinquennale.
(2) The following provisions govern the residency obligation under subsection (1):	Application (2) Les dispositions suivantes régissent l'obligation de résidence :
(a) a permanent resident complies with the residency obligation with respect to a five-year period if, on each of a total of at least 730 days in that five-year period, they are	a) le résident permanent se conforme à l'obligation dès lors que, pour au moins 730 jours pendant une période quinquennale, selon le cas :
(i) physically present in Canada,	(i) il est effectivement présent au Canada,
(ii) outside Canada accompanying a Canadian	(ii) il accompagne, hors du

citizen who is their spouse or common-law partner or, in the case of a child, their parent,
(iii) outside Canada employed on a full-time basis by a Canadian business or in the federal public administration or the public service of a province,
(iv) outside Canada accompanying a permanent resident who is their spouse or common-law partner or, in the case of a child, their parent and who is employed on a full-time basis by a Canadian business or in the federal public administration or the public service of a province, or
(v) referred to in regulations providing for other means of compliance;
(b) it is sufficient for a permanent resident to demonstrate at examination
(i) if they have been a permanent resident for less than five years, that they will be able to meet the residency obligation in respect of the five-year period immediately after they became a permanent resident;
(ii) if they have been a permanent resident for five years or more, that they have met the residency obligation in respect of the five-year period immediately before the examination; and
(c) a determination by an officer that humanitarian and compassionate considerations relating to a permanent resident, taking into account the best interests of a child directly affected by the determination, justify the retention of

Canada, un citoyen canadien qui est son époux ou conjoint de fait ou, dans le cas d'un enfant, l'un de ses parents,
(iii) il travaille, hors du Canada, à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale,
(iv) il accompagne, hors du Canada, un résident permanent qui est son époux ou conjoint de fait ou, dans le cas d'un enfant, l'un de ses parents, et qui travaille à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale,
(v) il se conforme au mode d'exécution prévu par règlement;
b) il suffit au résident permanent de prouver, lors du contrôle, qu'il se conformera à l'obligation pour la période quinquennale suivant l'acquisition de son statut, s'il est résident permanent depuis moins de cinq ans, et, dans le cas contraire, qu'il s'y est conformé pour la période quinquennale précédant le contrôle;
c) le constat par l'agent que des circonstances d'ordre humanitaire relatives au résident permanent — compte tenu de l'intérêt supérieur de l'enfant directement touché — justifient le maintien du statut rend inopposable l'inobservation de l'obligation précédant le contrôle.

Les Réglements
328. (1) La personne qui était

permanent resident status overcomes any breach of the residency obligation prior to the determination.

The Regulations
328. (1) A person who was a permanent resident immediately before the coming into force of this section is a permanent resident under the Immigration and Refugee Protection Act.
(2) Any period spent outside Canada within the five years preceding the coming into force of this section by a permanent resident holding a returning resident permit is considered to be a period spent in Canada for the purpose of satisfying the residency obligation under section 28 of the Immigration and Refugee Protection Act if that period is included in the five-year period referred to in that section.
(3) Any period spent outside Canada within the two years immediately following the coming into force of this section by a permanent resident holding a returning resident permit is considered to be a period spent in Canada for the purpose of satisfying the residency obligation under section 28 of the Immigration and Refugee Protection Act if that period is included in the five-year period referred to in that section.

un résident permanent avant l'entrée en vigueur du présent article conserve ce statut sous le régime de la Loi sur l'immigration et la protection des réfugiés.
(2) Toute période passée hors du Canada au cours des cinq années précédant l'entrée en vigueur du présent article par la personne titulaire d'un permis de retour pour résident permanent est réputée passée au Canada pour l'application de l'exigence relative à l'obligation de résidence prévue à l'article 28 de la Loi sur l'immigration et la protection des réfugiés pourvu qu'elle se trouve comprise dans la période quinquennale visée à cet article.
(3) Toute période passée hors du Canada au cours des deux années suivant l'entrée en vigueur du présent article par la personne titulaire d'un permis de retour pour résident permanent est réputée passée au Canada pour l'application de l'exigence relative à l'obligation de résidence prévue à l'article 28 de la Loi sur l'immigration et la protection des réfugiés pourvu qu'elle se trouve comprise dans la période quinquennale visée à cet article.

[57] Section 190 of IRPA is also relevant and provides as follows:

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

[58] The first question to be addressed is the applicable standard of review, having regard to the pragmatic and functional analysis. The four elements to be considered are the presence or absence of a privative clause; the expertise of the tribunal; the purpose of the legislation; and the nature of the question.

[59] IRPA does not contain a strong privative clause; see *Pushpanathan v. Canada*, [1998] 1 S.C.R. 1222. The IAD is a specialized tribunal in dealing with appeals under IRPA. The statutory purpose is to regulate the admission of persons into Canada. Finally, the nature of the question in this case is one of statutory interpretation. On balancing the four factors, I conclude that the applicable standard of review is that of correctness.

[60] The next question is whether the provisions of the former Act, concerning loss of permanent resident status, are relevant in any way to the Applicant. Sections 24 and 25 of the former Act provides as follows:

24. (1) A person ceases to be a permanent resident when (a) that person leaves or remains outside Canada with the intention of abandoning Canada as that person's place of permanent residence; or (b) a removal order has been made against that person and the order is not quashed or its execution is not stayed pursuant to subsection 73(1). (2) Where a permanent resident is outside Canada for more than one hundred and eighty-three days in any one twelve month period, that person shall be deemed to have abandoned Canada as his place of permanent residence unless that person satisfies an immigration officer or an adjudicator, as the case may be, that he did not intend to abandon Canada as his place of permanent residence.	24. (1) Emportent déchéance du statut de résident permanent : a) le fait de quitter le Canada ou de demeurer à l'étranger avec l' intention de cesser de résider en permanence au Canada; b) toute mesure de renvoi n'ayant pas été annulée ou n'ayant pas fait l'objet d'un sursis d'exécution au titre du paragraphe 73(1). (2) Le résident permanent qui séjourne à l'étranger plus de cent quatre-vingt-trois jours au cours d'une période de douze mois est réputé avoir cessé de résider en permanence au Canada, sauf s'il convainc un agent d'immigration ou un arbitre, selon le cas, qu'il n'avait pas cette intention.
25. (1) Where a permanent resident intends to leave Canada for any period of time or is outside Canada, that person may in prescribed manner make an application to an immigration officer for a returning resident permit. (2) Possession by a person of a valid returning resident permit issued to that person	25. (1) Le résident permanent qui veut quitter le Canada temporairement ou qui séjourne à l'étranger peut demander à un agent d'immigration, dans les formes réglementaires, un permis de retour. (2) Le fait d'être muni d'un permis de retour réglementaire établit, sauf preuve contraire, l'absence d'intentio n de ne plus résider en permanence au Canada de la

pursuant to the regulations is, in the absence of evidence to the contrary, proof that the person did not leave or remain outside Canada with the intention of abandoning Canada as his place of permanent residence.	part de la personne absente du Canada pendant un certain temps.

[61] IRPA clearly states, in section 274, that the former Act is repealed, upon the Act coming into force. Section 190 clearly states that IRPA shall apply to any matter that is in process upon IRPA coming into force.

[62] The combined effect of sections 274 and 190, in my opinion, is that IRPA governs, not the former Act. In *Dragan v. Canada (Minister of Citizenship and Immigration),* [2003] 4 F.C. 189 (T.D.), affirmed (2003), 27 Imm. L.R. (3d) 194 (FCA), the Court commented upon Parliament's intention that IRPA apply to all immigration matters once it entered in force. At paragraphs 33 to 37, the Court said the following:

> 33. In order to assess the merits of this argument, the Court has to look at the specific statutory language used in the transitional provisions of the IRPA and the Regulations made under those provisions. The Court will presume that legislation is not intended to have a retrospective effect when the provision substantially affects the vested rights of a party, see Brosseau v. Alberta Securities Commission, [1989]1 S.C.R. 301. As this is only a presumption, it can be rebutted. As Mr. Justice Duff stated in Upper Canada College v. Smith (1920), 61 S.C.R. 413, at page 419:
>
> > ... that intention may be manifested by express language or may be ascertained from the necessary implications of the provisions of the statute, or the subject matter of the legislation or the circumstances

> in which it was passed may be of such a character as in themselves to rebut the presumption that it is intended only to be prospective in its operation.

34. It is also now well established that the Court can examine the legislative history of a provision when interpreting its meaning, see R. v. Heywood, [1994] 3 S.C.R. 761, at pages 787-789.

35. Upon considering the express words used by Parliament in sections 190 and 201 of the IRPA, the Court is satisfied that Parliament intended the new Act apply to applications for permanent residence filed under the former Act, and that it delegated to Governor in Council the authority to make regulations that would set out the transitional legal regime for such applications. In other words, the statutory language clearly conveys the legislative intent to apply the new Act retrospectively and to authorize regulations with retrospective effect. It is trite law that Parliament can expressly enact retroactive or retrospective legislation, and this clear expression overrides the presumption against retroactivity or retrospectivity, which is identified in section 43 of the Interpretation Act.

…

37. This interpretation of the transitional provisions is supported by jurisprudential precedent. In Chen v. Canada (Secretary of State) (1995), 91 F.T.R. 76, the Federal Court Trial Division was concerned with interpretation of section 109 of An Act to amend the Immigration Act and other Acts in consequence thereof, S.C. 1992, c. 49 (commonly known as Bill C-86)--a provision quite similar in language to section 190 of the IRPA. Rothstein J. held that such language was sufficiently clear to convey the legislative intent that the law should apply retrospectively (at paragraph 12):

> ... Parliament, by section 109, has clearly stated how amendments to the Immigration Act under Bill C-86 are to apply. Such express statutory provision overrides any common law rule or general provision in the Interpretation Act applicable in the absence of such legislation.

I therefore conclude that section 361 of the IRPR is validly authorized retrospective legislation and should operate according to its terms. This means that the applications filed after January 1, 2002 are to be assessed under the new Regulations, and applications filed before January 1, 2002 shall be assessed under the old Regulations up until March 31, 2003.

[63] More recently, in *de la Fuente v. Canada (Minister of Citizenship and Immigration)* 2006 FCA 186, the Federal Court of Appeal said the following:

> 19. The issue raised by the first question can be disposed of rapidly. Section 190 of IRPA is clear and unambiguous. It provides that if an application is pending or in progress on June 28, 2002, IRPA applies without condition. The doctrine of legitimate expectations is a procedural doctrine which has its source in common law. As such it does not create substantive rights and cannot be used to counter Parliament's clearly expressed intent (*Canada (M.E.I.) v. Lidder*, [1992] F.C.J. No. 212 (F.C.A.) at paras. 3 and 27).

[64] In light of the language of sections 274 and 190 and the applicable relevant jurisprudence, I am satisfied that the Applicant's situation is to be assessed in accordance with the current statutory requirements, that is those created by IRPA.

[65] Who is a permanent resident under IRPA? According to section 2 of IRPA, "permanent resident" is defined as follows:

"permanent resident" means a person who has acquired permanent resident status and has not subsequently lost that status under section 46.	« résident permanent » Personne qui a le statut de résident permanent et n'a pas perdu ce statut au titre de l'article 46.

[66] The statutory conditions for establishing and maintaining permanent resident status are set out in section 28 of IRPA and in section 328 of the Regulations. These provisions establish the framework for the entry of persons into Canada, as permanent residents. It lies within the

competence of Parliament to establish such conditions. There is no broad right for the admission of non-citizens into the country. In this regard, I refer to *Chiarelli v. Canada (Minister of Citizenship and Immigration)*, [1992] 1 S.C.R. 711 at 733-734 where the Court said the following:

> … The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country. At common law an alien has no right to enter or remain in the country: *R. v. Governor of Pentonville Prison*, [1973] 2 All E.R. 741; *Prata v. Minister of Manpower and Immigration*, [1976] 1 S.C.R. 376.
>
> …
>
> The distinction between citizens and non-citizens is recognized in the *Charter*. While permanent residents are given the right to move to, take up residence in, and pursue the gaining of a livelihood in any province in s. 6(2), only citizens are accorded the right "to enter, remain in and leave Canada" in s. 6(1).

[67] I reject the Applicant's submissions that she had a vested right to have her permanent residence status assessed according to the test of abandonment that was part of the former Act. In my view, permanent resident status is inherently flexible. It is granted by the government, in the exercise of its authority to regulate the admission of non-citizens into Canada. It may be lost, as the result of actions of the individual concerned. It does not automatically mature into the status of citizenship. It is fundamentally different from the rights that arise from a private contract, as was the case in *Dikranian*.

[68] I agree with the submissions of the Respondent that the current legislative scheme represented by IRPA is retrospective in effect, relative to compliance with residency requirements. The legislation rebuts the presumption against retrospective or retroactive application since its terms

unambiguously say that it applies to immigration matters, as of June 28, 2002. The Supreme Court of Canada, in *Benner*, has recognized that there is no vested right in having a claim determined under a particular set of rules. In *McAllister*, the Court said the following at paragraph 53:

> i. In my opinion, Mr. McAllister, having made a claim to be a Convention refugee had no vested or entrenched rights to have that claim considered under the rules prevailing at the time of his application; rather, he only had a right to have his claim considered under the rules prevailing when it is considered. He was a person with no right to enter or remain in Canada, except as provided by the *Immigration Act*, and in my opinion any claim he made to enter or to remain is subject to the law prevailing when that claim is determined, not when the claim is made.

[69] Section 328 provides for the continuation of permanent resident status, once it has been established in accordance with the statutory requirements.

[70] I am satisfied that the Applicant is subject to the provisions of IRPA and the Regulations, and the IAD did not err in its interpretation of the relevant legislation. In these circumstances, can the Applicant show that she has suffered a breach of section 7 of the Charter?

[71] Section 7 of the Charter provides as follows:

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 of fundamental justice.	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 de justice fondamentale.

[72] In *Blencoe* at paragraph 47, the Supreme Court of Canada said that there is no independent right to fundamental justice itself and there will be no violation of section 7 if there is no deprivation of life, liberty or security of the person.

[73] In this case, the Applicant has not shown that she has suffered a loss of life, liberty or security of her person. She has no "unqualified right to enter or remain in the country"; see *Chiarelli*. Her presence in Canada may be desirable for personal reasons, but it is not grounded upon a right.

[74] Next, there is the issue of breach of natural justice. Did the Applicant suffer a breach of natural justice, arising form the conduct of her former counsel and the fact that she appeared without counsel at the hearing before the IAD?

[75] On the basis of the record, I am satisfied that no reviewable breach of natural justice occurred here. The Applicant, according to the record, made it clear that she was no longer represented by Mr. Hui. She gave no indication, at the beginning of the hearing, that she wanted legal counsel or was unprepared to proceed. Documents had been submitted to the IAD, on her behalf, prior to the hearing. I am not persuaded that the further documents that were provided as part of her application record constitute significant new evidence relative to H and C factors.

[76] The Applicant's principal argument concerning the conduct of her former lawyer relates to her lack of awareness of the need to present cogent evidence of H and C factors. In my opinion, that submission is weak. The original decision of the visa officer referred to H and C considerations and the Applicant was, or should have been, aware that such factors could be considered by the IAD. H and C factors are to be assessed relative to the evidence submitted and the burden lay upon her to adduce that evidence. Counsel may have assisted in the presentation of the evidence but, ultimately, the Applicant was responsible for the submission of evidence to the IAD. She failed to discharge that burden.

[77] In the result, this application for judicial review is dismissed. Counsel have jointly submitted the following questions for certification. I am satisfied that these questions meet the criteria set out in section 74(d) of IRPA for certification, that is a serious question of general importance and the questions will be certified, as follows:

> 1. Does the five year period in s. 28 of IRPA apply to periods prior to June 28, 2002?
>
> 2. If so, does applying s. 28 retroactively breach s. 7 of the Canadian Charter of Rights and Freedoms?

ORDER

This application for judicial review is dismissed.

The following questions will be certified:

1. Does the five year period in s. 28 of IRPA apply to periods prior to June 28, 2002?

2. If so, does applying s. 28 retroactively breach s. 7 of the Canadian Charter of Rights and Freedoms?

"E. Heneghan"

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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