Federal Court Cour fédérale

Date: 20250130

Docket: IMM-539-23

Citation: 2025 FC 193

Ottawa, Ontario, January 30, 2025

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

IZHABEL ZHANG

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Izhabel Zhang [Applicant], is a six-year-old citizen of the Philippines seeking judicial review of the December 12, 2022 decision [Decision] of an immigration officer [Officer] refusing her permanent residence application [PRA]. The Applicant's mother, a permanent resident of Canada, is the Applicant's sponsor. The Officer refused the PRA on the basis that the exception under section 117(9)(d) of the *Immigration and Refugee Protection Regulations*,

SOR/2002-227 [*IRPR*] applied, as the Applicant was neither declared nor examined when her sponsor applied for and subsequently obtained permanent residence.

[2] This application for judicial review is dismissed as it is premature.

II. Background

[3] The Applicant is the child of Sharon Llewellyn and Jun Zhang. Ms. Llewellyn became involved with Mr. Zhang while temporarily separated from her husband, Mr. Lewellyn. Ms. Llewellyn and her husband have two additional children together. The Applicant currently resides with her maternal aunt in the Philippines.

[4] While still living in the Philippines, Ms. and Mr. Llewellyn temporarily separated. It was during this separation that Ms. Llewellyn became pregnant as a result of her involvement with Mr. Zhang. Ms. Llewellyn did not inform Mr. Llewellyn about the existence of the Applicant during this time.

[5] Mr. Llewellyn was recruited to work in Canada and reconciled with Ms. Llewellyn after settling in Canada. Mr. Llewellyn included Ms. Llewellyn and their two children in his PRA. The Applicant was not included.

[6] After informing Mr. Llewellyn about the Applicant, they agreed Ms. Llewellyn should sponsor the Applicant.

III. Decision

[7] On December 12, 2022, the Officer reviewed the Applicant's eligibility as a family class member for permanent residence under section 12(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. However, the Officer determined that the Applicant fell under the exclusion established by *IRPR* section 117(9)(d), which provides:

> (9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if
>
> …
>
> (d) subject to subsection (10), the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined.

[8] This exclusion applied because the Applicant was neither declared nor examined when her sponsor submitted application for and subsequently obtained permanent residence in Canada.

[9] The Officer found the temporary public policy to exempt certain PRAs in the family class from exclusion under *IRPR* section 117(9)(d) did not apply. The permanent residence of the Applicant's sponsor was not granted in any of the categories for which the policy applies.

[10] The Officer also found insufficient humanitarian and compassionate [H&C] grounds to warrant a positive outcome.

IV. Issues and Standard of Review

[11] Neither party provides submissions on the standard of review. However, the Respondent's submissions assume the standard is reasonableness.

[12] The standard of review is reasonableness. This case does not engage one of the exceptions set out by the Supreme Court of Canada in (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65). Therefore, the presumption of reasonableness is not rebutted (at paras 16-17).

[13] The Applicant frames the issues as follows:

1. Was *IRPR* paragraph 117(9)(d) misinterpreted and misapplied?
2. Was the Officer reasoning perversely, denying family unity through use of a provision meant to preserve family unity?
3. Does the Decision violate the Convention on the Rights of the Child?

[14] The Respondent argues the application ought to be dismissed as premature. However, in the alternative, the Respondent frames the issues as follows:

1. The officer reasonably concluded that the applicant is excluded from the family class under paragraph 117(9)(d) of the *IRPR.*
2. The H&C aspect of the officer's decision was reasonable.

[15] The determinative issue is the prematurity of the application. It is unnecessary to address these other issues.

A. *The Application is Premature*

(1) Respondent's Position

[16] The rule against prematurity applies to this matter. It is a fundamental tenet of administrative law that judicial review should not be sought until all available and adequate remedies in the administrative process have been exhausted (*CB Powell Limited v Canada (Border Services Agency)*, 2010 FCA 61 at paras 30-31 [*CB Powell*]; *Lin v Canada (Public Safety and Emergency Preparedness)*, 2021 FCA 81 at para 5; *Viaguard Accu-Metrics Laboratory v Standards Council of Canada*, 2023 FCA 63 at para 5). Very few circumstances qualify as "exceptional" for an exemption from this rule (*CB Powell* at para 33).

[17] The Applicant has a right of appeal to the Immigration Appeal Division [IAD] under *IRPA* section 63(1) and may not seek judicial review until the Applicant has exhausted this right of appeal in accordance with *IRPA* section 72(2)(a).

[18] The combined effect of *IRPA* sections 72(2)(a) and 63(1) statutorily bars family class applicants whose PRA was refused from seeking judicial review of that refusal (*Somodi v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 288 [*Somodi*]). Applicants in these circumstances must seek recourse from the IAD through their sponsor. If necessary, the sponsor may apply for leave to seek judicial review of the IAD's decision (*Somodi* at paras 21-24, 27).

[19] There is a narrow exception when an applicant effectively has no right of appeal with respect to the H&C factors due to *IRPA* section 65. This prohibits the IAD from considering H&C factors where a person is not a member of the family class (*Habtenkiel v Canada (Citizenship and Immigration)*, 2014 FCA 180 [*Habtenkiel*]). However, this exception only applies with respect to the Minister's exercise of discretion under *IRPA* section 25, otherwise the rule from *Somodi* applies (*Habtenkiel* at paras 32-36).

[20] This Court has determined that merely raising H&C arguments on application for judicial review under *IRPA* section 117(9)(d) is insufficient to bring a case within the narrow exception of *Habtenkiel*. In these cases, the applicant must concede that they are not a member of the family class (*Chinenye v Canada (Citizenship and Immigration)*, 2015 FC 378 at paras 30, 32).

[21] The Applicant has a meaningful right of appeal to the IAD. The Applicant argues the Officer erred in the application of *IRPA* section 117(9)(d). The Applicant also asserts she is a member of the family class. These issues fall within the IAD's jurisdiction. The IAD may consider the Applicant's *IRPA* section 117(9)(d) arguments at a *de novo* hearing. If it agrees she is a member of the family class, the IAD may grant the Applicant's appeal, including H&C factors if necessary. The IAD is perfectly capable to consider whether it will accept or reject the Applicant's position concerning the proper interpretation of *IRPA* section 117(9)(d). This is the IAD's home statute. Its interpretation falls squarely within the IAD's specialized expertise.

[22] The Applicant's belief that she will be unsuccessful in an IAD appeal does not warrant an exception to the rule against prematurity. Proper procedure requires the Applicant to raise these

issues before the IAD. If she is unsuccessful, she may then seek judicial review of the IAD's decision.

[23] Meaningful judicial review of complex legal issues depends upon the tribunal's insights. Parliament assigned the responsibility of determining the merits of factual and legal issues to administrative decision-makers, not the Court (*Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2014 FCA 245). It would be antithetical to the basic principles of administrative law, and the interests of justice, to permit the Applicant's premature judicial review simply because her chances of success before the IAD are low.

(2) Applicant's Position

[24] There is no right of appeal to the IAD. The Respondent submits as long as the Applicant does not concede lack of membership in the family class, the dispute must be decided by the IAD. However, the issue is not whether a sponsored person concedes or contests a determination of membership in a family class; the question is whether there is a right of appeal from that determination.

[25] The IAD does not have jurisdiction to hear an appeal in this case. As in *Adjani v Canada (Citizenship and Immigration)*, 2008 FC 32 [*Adjani*], and *Chen v Canada (Minister of Citizenship and Immigration)*, 2005 FC 678 [*Chen*], the IAD is bound to find the Applicant is not a member of the family class.

[26] However, although the IAD is bound by this precedent, the Federal Court can depart from previous rulings provided any of the exceptions to the principle of judicial comity is met. The IAD does not hold jurisdiction over whether this Court may apply an exception to the principle of judicial comity. It serves no purpose to turn the Applicant to the IAD to present it with an issue it cannot decide.

[27] The Applicant seeks the Court's determination on whether the exception to the rule - refusal of a sponsored PRA must be appealed to the IAD - only applies where the sponsored person concedes they are not a member of the family class. The Applicant seeks clarification on whether the exception also applies where the IAD must find the sponsored person not to be a member of the family class because of binding Federal Court precedent, but the sponsored person argues the precedent should not be followed on the basis of one or more exceptions to the principle of judicial comity.

(3) Conclusion

[28] I agree with the Respondent, this application is premature. The Applicant must first exhaust her appeal to the IAD. *IRPA* section 72(2) requires an applicant to exhaust any right of appeal before seeking judicial review. Combined with the availability of appeal to the IAD under *IRPA* section 63(1), there is a statutory bar to judicial review in this Court until the appeal is exhausted (*Somodi*).

[29] This case also does not fall under the exception from *Habtenkiel*. This exception concerns only the Minister's exercise of discretion concerning H&C factors under *IRPA* section 25 when

the IAD is barred from considering H&C factors due to the applicant not being a member of the family class (*Habtenkiel* at paras 36-38). As the Applicant maintains she is a family class member, it is the IAD's responsibility to determine whether this is so. If the Applicant is found not to be a family class member, the H&C factors are not reviewable on appeal to the IAD (*Habtenkiel*).

[30] The Applicant does not raise any ground showing the alternative remedy is inadequate. For instance, the Applicant does not suggest there is similar reasoning to *Habtenkiel* as to why the right of appeal to the IAD is inadequate due to a portion of a decision being "insulated" from review (at para 38). Instead, the Applicant only suggests the IAD is bound to find the Applicant is not a family class member. The Applicant wishes for this Court to determine whether an exception to judicial comity applies in order to find the Applicant is a member of the family class. That is not the proper role of the reviewing Court.

[31] The Applicant made several arguments regarding the unreasonableness of the Decision. In light of finding the application premature, it is unnecessary to assess the merits of this matter.

B. *Questions for Certification*

[32] The Applicant proposes the following three questions for certification:

1. In the assessment by the respondent of a sponsorship application, does section 117(9)(d) of the *Immigration and Refugee Protection Regulations* apply to exclude the foreign national being sponsored from the family class where the foreign national was a non-accompanying family member of the sponsor at the

time of the immigration of the sponsor and was not examined by reason of an innocent misrepresentation of the sponsor?

2. In the assessment of humanitarian and compassionate factors in determination by the respondent of a sponsorship application by a parent of a child that does not meet legal requirements, is there a legal duty to apply a rebuttable presumption that the child shall not be separated from his or her parents against the will of the parents and the child?

3. Does this Court have jurisdiction to consider an application for leave and judicial review where the respondent has refused a sponsorship application by a parent of a child, where there has been no appeal to the Immigration Appeal Division of the Immigration and Refugee Board and where this Court has held, because of the nature of the case, such an appeal legally could not succeed?

(1) Applicant's Position

[33] The Applicant submits these questions as written, noting that while question one challenges the leading case law (*Adjani*; and *Chen*), it is their intent to "change the law" on this point. The Applicant relies on their Further Memorandum written submissions in support of their certification questions without further comment.

(2) Respondent's Position

[34] The Respondent submits none of these questions meet the test for certification and are therefore unsuitable for certification.

(a) *Question One*

[35] On question one, the Respondent argues an answer to this question would not be dispositive of an appeal. Since the application itself is premature, and therefore statute barred for failure to exhaust all rights of appeal to the IAD, the Court cannot certify questions on issues that must be properly addressed by the IAD.

[36] The Respondent argues this is not a serious question of general importance. Jurisprudence holds *IRPA* section 117(9)(d) is not limited to fraud. There is no need for this Court to clarify the law where the jurisprudence is entirely consistent.

[37] This question does not arise on the facts of the case. Question one as stated presumes the misrepresentation was innocent. This is not what the Officer found, nor what the evidence suggests. This question was not before the Officer but was raised for the first time on application for judicial review. Therefore, this question is not properly before the Court.

(b) *Question Two*

[38] On question two, the Respondent again argues an answer to this question would not be dispositive of an appeal. This application is statute barred. Where the Court cannot consider the merits of an application, the Court cannot certify questions in relation to that application.

[39] This question also does not arise on the facts of the case. Question two presumes the child in this case is separated from parents against their will. This is not accurate. The sponsor

(mother) intentionally left this child behind when she entered Canada. The State of Canada did not cause the separation of the family. Likewise, Canada is not preventing the family from reuniting. Where no legal impediment exists, no duty exists to apply a rebuttable presumption.

(c) *Question Three*

[40] The Respondent submits this is the only question that arises on facts of the case. However, this is not a serious question of general importance. *Somodi* and *Habtenkiel* have laid out this Court's jurisdiction. There is no lack of clarity. *CB Powell* also confirms the bar against prematurely seeking judicial review is nearly absolute. Important legal issues do not qualify as an exception to the bar against premature review. The Applicant already has all the case law on this question. Since it is not a serious question of general importance it fails to meet the test for certification.

(3) Analysis and Conclusion

[41] I agree with the Respondent. The questions proposed by the Applicant are not properly certifiable questions.

[42] This Court in *Tesfaye v Canada (Public Safety and Emergency Preparedness)*, 2024 FC 2040 [*Tesfaye*] briefly summarizes the principles of certification at paragraph 76:

> According to paragraph 74(d) of the *IRPA*, a question can be certified by the Court if "a serious question of general importance is involved." To be certified, a question must be a serious one that: (i) is dispositive of the appeal; (ii) transcends the interests of the immediate parties to the litigation; and (iii) contemplate an issue of broad significance or general importance [citations omitted]. The

> question must also have been dealt with by the Court, and it must arise from the case rather than from the Court's reasons [citations omitted]. Finally, and as a corollary of the requirement that it be of general importance, it must not have been previously settled in an earlier appeal [citations omitted].

[43] *Mudrak v. Canada (Minister of Citizenship and Immigration)* 2016 FCA 178 [*Mudrak*], lays out the legislative history of *IRPA* section 74. The Court specifies the purpose of section 74 at paragraph 14:

> This legislative context is relevant to understand the purpose of this requirement and its importance within the immigration system as a whole. In *Huynh v. R.*, [1996] 2 F.C.R. 976, [1996] F.C.J. No. 494 (Fed. C.A.) [*Huynh*], this Court explained that appeal rights are solely created by the legislature. More recently, this Court has emphasized again one of the purposes of section 74 of the *IRPA* as being a gatekeeping provision to ensure that applications that have no merit are dealt with in a timely manner [citation omitted].

[44] The Court in *Mudrack* then continues to lay out the key principles determining whether a question should be certified, summarized in *Tesfaye* above.

[45] Furthermore, this Court in *Cano Granda v. Canada (Citizenship and Immigration)* 2021 FC 1471, reiterates:

> [40] the question must arise from the case itself rather than merely from the way in which the Federal Court disposed of the application. An issue that need not be decided cannot ground a properly certified question (*Lai v Canada (Public Safety and Emergency Preparedness)*,2015 FCA 21 at para 10). Nor will a question that is in the nature of a reference or whose answer turns on the unique facts of the case be properly certified (*Mudrak v Canada (Citizenship and Immigration)*,2016 FCA 178 at paras 15, 35).

[46] I agree with the Respondent, neither question one nor question two are dispositive of an appeal, nor do they turn on the facts of the case. Therefore, these questions do not meet requirements for certification.

[47] Question three likewise does not meet the requirements for certification. It is not a serious question of general importance and has been answered effectively in jurisprudence such as *Somodi* and *Habtenkiel*.

[48] The questions proposed for certification are refused.

V. Conclusion

[49] I find this application for judicial review is premature. A determination on the merits is not required. The appropriate forum for reviewing the Decision is by appeal to the IAD.

[50] The questions proposed for certification by the Applicant are dismissed.

JUDGMENT in IMM-539-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed because of prematurity.

2. The proposed certified questions are dismissed.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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