Federal Court of Appeal  Cour d'appel fédérale

Date: 20140821

Dockets: A-180-13
A-181-13
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A-185-13
A-186-13

Citation: 2014 FCA 191

CORAM: **SHARLOW J.A.**
DAWSON J.A.
STRATAS J.A.

Docket: A-180-13

BETWEEN:

SUMERA SHAHID, FANG WEI, CHUANYUE IE, MAN YANG, JING YANG, SIU LAI WOO, HONGBING BI, XIANG YANG LIN, YING HUANG, XIANGNING DENG, SHANGSI LING, CHENGXIANG LIU, FAN ZHANG, YINGHONG ZHANG, ZIJUN LIU, BAOQING ZHOU, ZHENDONG WANG, HUIQIANG PENG, YANG TIAN, CHANGYING CHEN, XIAOMIN ZENG, FEI ZHU, QIONG ZHANG, TINGTING ZHAO, YAN TU, JIAN HEI, YAN XU, FUCHUAN NI, XUEJUN WANG, YUN ZHOU, NING LI, XIN LI, PING GUO, HAIJUN LU, TONG QI, SHUNHUA YE, HONGQI LIN, KAMFAI NG, LIANG CHEN, BO LIU, ZHENGHUI XU, SONG LIN, XUANJIN ZHU, ZHIQIANG GUO, PEIFENG HAO, YING BAI, SHUXUN CHEN, YUN LI, LING XIAO, LI AN, ZHU CHAI, YING ZHANG, SHAOPING CAO, GUIMEI JING, LIN ZHANG, WEI CHEN, PAN QIN, LINGJING WENREN, YIDAN LU, GUI MA, XIAOXIAO LIU, YU SHEN, WEIJUAN WU, MING YU WU, WENJUN XUE, BING ZHANG, KUN ZHU, CHUXIAO LI, XINYAN JIA, JUAN LUO, CHUAN HUO, MINGMING LUI, TIAN FU, HUIXIAN LONG, XIAOJIAN YAN, HONG WEI YANG, YU HE, GEQI WENG, ERLI SUN, QIZHI FENG, SHAOCHI WANG, JIANZHONG TAN, CHUN CHU, LI LIANG, JIANCUN HUANG, XIAOYU LIU, DEJIAN LI, XUELIAN BIAN, RUOCHUN LI, RUI HANG, YANLING LIU, AIPING ZHANG, FEI WANG, WEN LU, LIPING QIU, JIANG LUO, YILI WANG, JIONG ZHANG, SHI SUN, JIONG WANG, XILEI SONG, MIN QIAN, JIANGPING LU, JIONG GU, GUO YIN WANG, LIJING XIAN, YUAN XU, YINZI GUAN, JIN LIU, LEI WU, ZHAOHUI SUN, XIAODONG HUANG, PING YU, YANGCHUN YANG,

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Appellants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: A-181-13

AND BETWEEN:

ALI RAZA JAFRI

Appellants

and

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Respondent

Docket: A-186-13

AND BETWEEN:

MARIA SARI TERESA BORJA AUSTRIA

Appellants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard at Toronto, Ontario, on June 23 and 24, 2014.

Judgment delivered at Ottawa, Ontario, on August 21, 2014.

REASONS FOR JUDGMENT BY: SHARLOW J.A.

CONCURRED IN BY: DAWSON J.A.
STRATAS J.A.

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REASONS FOR JUDGMENT

SHARLOW J.A.

[1] The Minister of Citizenship and Immigration has refused to process the applications of approximately 1,400 foreign nationals who applied before February 27, 2008 for permanent resident visas as members of the federal skilled worker class. They each applied to the Federal Court for judicial review of the Minister's refusal. They sought a number of remedies, including an order of mandamus requiring the Minister to process their permanent resident visa applications. The applications for judicial review were heard together based on eight cases that were agreed to be representative of all of the others. Justice Rennie dismissed the applications for judicial review for reasons reported as *Tabingo v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 377.

[2] The Minister's refusal to process the appellants' permanent resident visa applications was based on subsection 87.4(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "IRPA"). Section 87.4 was added to the IRPA by section 707 of the *Jobs, Growth and Long-term Prosperity Act*, S.C. 2012, c. 19. It was proclaimed in force June 29, 2012. Subsection 87.4(1) reads as follows:

87.4 (1) An application by a foreign national for a permanent resident visa as a member of the prescribed class of federal skilled workers that was made before February 27, 2008 is terminated if, before March 29, 2012, it has not been established by an officer, in accordance with the regulations, whether the applicant meets the selection criteria and other requirements applicable to that class.	**87.4** (1) Il est mis fin à toute demande de visa de résident permanent faite avant le 27 février 2008 au titre de la catégorie réglementaire des travailleurs qualifiés (fédéral) si, au 29 mars 2012, un agent n'a pas statué, conformément aux règlements, quant à la conformité de la demande aux critères de sélection et autres exigences applicables à cette catégorie.

[3] I summarize as follows the principal conclusions reached by Justice Rennie in dismissing the appellants' applications for judicial review:

(a) Subsection 87.4(1) of the IRPA terminates an application for a permanent resident visa as a member of the federal skilled worker class on June 29, 2012 if the application was made before February 27, 2008, and it was not determined before March 29, 2012 whether the applicant met the selection criteria and other requirements applicable to the federal skilled worker class.

(b) After June 29, 2012, the Minister had no legal obligation to consider an application described in subsection 87.4(1).

(c) The language of subsection 87.4(1) is sufficiently clear to rebut the presumption against the retrospective application of a statute.

(d) The statutory conditions stated in subsection 87.4(1) are objective facts. The process of identifying which applications are within the scope of subsection 87.4(1) is an administrative review involving no discretion or adjudication.

(e) The termination of an application by subsection 87.4(1) does not contravene section 1(a) or 2(e) of the *Canadian Bill of Rights*, S.C. 1960, c. 44, or the rule of law.

(f) Section 7 of the *Canadian Charter of Rights and Freedoms* is not engaged by the termination of an application pursuant to subsection 87.4(1).

(g) The appellants have not established that the implementation of subsection 87.4(1) discriminates against them on any of the grounds referred to in subsection 15(1) of the Charter or an analogous ground.

[4] To permit an appeal to this Court, Justice Rennie certified the following questions pursuant to paragraph 74(*d*) of the IRPA:

(a) Does subsection 87.4(1) of the IRPA terminate by operation of law the applications described in that subsection upon its coming into force, and if not, are the applicants entitled to mandamus?

(b) Does the *Canadian Bill of Rights* mandate notice and an opportunity to make submissions prior to termination of an application under subsection 87.4(1) of the IRPA?

(c) Is section 87.4 of the IRPA unconstitutional, being contrary to the rule of law or sections 7 and 15 the Charter?

[5] The appellants in these five appeals represent all of the original applicants who appealed.

[6] These reasons are organized into four parts. Part I summarizes the relevant facts relating to each appellant. Part II describes the statutory scheme, which consists of certain provisions of the IRPA (including section 87.4) and the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the "Regulations"). Part III discusses the grounds of appeal. Part IV summarizes my conclusions.

I. Facts

[7] Each of the appellants applied before February 27, 2008 for a permanent resident visa as a member of the federal skilled worker class. Some of the applications were submitted in 2005, others in 2007. None of the applications were processed to completion. Most of the appellants made frequent enquiries about the progress of the applications, and received assurances that the applications would be processed eventually. In each case, all processing stopped after June 29, 2012 because of the enactment of section 87.4 of the IRPA.

[8] The appellants incurred expenses for representation costs, application fees, and the cost of obtaining and submitting the extensive documentation required in support of their applications. They also suffered significant stress while waiting years for their applications to be processed. Although they are entitled to a return of the fees they have paid under the IRPA, they were hoping to be given the chance to establish themselves in Canada and they consider the loss of that opportunity to be substantial. Understandably, they consider it unfair that their applications have been terminated without regard to their merits.

[9] The specific facts for each appellant are as follows:

(a) Ms. Fang Wei (A-180-13) applied in 2007 to the visa post in Hong Kong. She had been married in China on May 1, 2006. Her husband subsequently became a permanent resident and a citizen of Canada. For technical reasons that are not relevant to her appeal, her husband has been unable to sponsor her.

(b) Ms. Sumera Shadid (A-180-13) applied in 2007 to the visa post in Islamabad. Her application was transferred to the London visa post on December 29, 2010.

(c) Mr. Ali Raza Jafri (A-181-13) is a citizen of Pakistan. He applied in 2007 to the visa post in Islamabad.

(d) Ms. Mae Joy Tabingo (A-183-13) applied in 2005 to the visa post in Manila for herself, her husband and their children.

(e) Mr. Yanjun Yin (A-185-13) is a citizen of China. He applied in 2007 for himself and his wife.

(f) Ms. Maria Sari Teresa Borja Austria (A-186-13) applied in 2005 to the Manila visa post.

[10] It is not possible to determine with certainty whether the appellants would have been granted permanent resident visas if subsection 87.4(1) of the IRPA had not been enacted. However, the Minister has referred to nothing in the record that raises any doubt as to the eligibility of the appellants to be selected as members of the federal skilled worker class.

II. The statutory scheme

[11] By virtue of subsection 6(1) of the Charter, and historically at common law, every Canadian citizen has the unconditional right to enter and remain in Canada. The right of anyone else to enter and remain in Canada is governed by the IRPA and its predecessor statute, the *Immigration Act*, R.S.C. 1985, c. I-2 (see *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711).

[12] A "permanent resident" as defined in the IRPA has the qualified right to enter and remain in Canada pursuant to subsection 27(1) of the IRPA. "Permanent resident" is defined in subsection 2(1) of the IRPA as a person who has acquired permanent resident status under the IRPA and has not subsequently lost that status under section 46 of the IRPA. Subsection 11(1) of the IRPA provides that a foreign national who wishes to become a permanent resident must apply for the appropriate visa from outside Canada (subject to exceptions that do not apply to the appellants).

[13] Pursuant to subsection 21(1) of the IRPA, a foreign national becomes a permanent resident if an immigration officer is satisfied that the foreign national has applied for that status, holds the visa required to establish his or her entitlement to that status, and is not inadmissible. Pursuant to sections 34 to 41 of the IRPA, a person may be inadmissible on numerous grounds including, for example, grounds relating to security, criminality, health, financial circumstances, misrepresentation, failure to comply with a condition imposed under the Regulations or a Ministerial instruction relating to economic immigration, and failure to comply with the residence requirements for permanent residents.

[14] Pursuant to sections 25 and 25.1 of the IRPA, the Minister has the discretion to grant relief on humanitarian and compassionate grounds from any statutory requirement for permanent resident status, except to a person who is inadmissible under section 34 (security), section 35 (violation of human or international rights) or section 37 (organized criminality). The relief may be granted either on the application of the person affected (subject to the payment of a fee unless the fee is waived), or on the Minister's own initiative. No submissions were made in these

appeals as to whether the appellants are entitled to seek this relief. Section 25.2 of the IRPA permits the Minister to grant similar discretionary relief on public policy grounds.

[15] There is a dispute in these appeals as to the correct interpretation of section 87.4 of the IRPA. The resolution of that dispute is informed by subsection 3(1) of the IRPA, which states the objectives of the IRPA with respect to immigration, and subsection 3(3) which states the principles to be applied in construing and applying the IRPA. Those provisions read in relevant part as follows:

3. (1) The objectives of this Act with respect to immigration are	**3**. (1) En matière d'immigration, la présente loi a pour objet :
(a) to permit Canada to pursue the maximum social, cultural and economic benefits of immigration;	a) de permettre au Canada de retirer de l'immigration le maximum d'avantages sociaux, culturels et économiques;
…	[…]
(*c*) to support the development of a strong and prosperous Canadian economy, in which the benefits of immigration are shared across all regions of Canada;	*c*) de favoriser le développement économique et la prospérité du Canada et de faire en sorte que toutes les régions puissent bénéficier des avantages économiques découlant de l'immigration;
…	[…]
(*e*) to promote the successful integration of permanent residents into Canada, while recognizing that integration involves mutual obligations for new immigrants and Canadian society;	*e*) de promouvoir l'intégration des résidents permanents au Canada, compte tenu du fait que cette intégration suppose des obligations pour les nouveaux arrivants et pour la société canadienne;
(*f*) to support, by means of consistent standards and prompt processing, the attainment of immigration goals established by	*f*) d'atteindre, par la prise de normes uniformes et l'application d'un traitement efficace, les objectifs fixés pour l'immigration

the Government of Canada in consultation with the provinces; ...	par le gouvernement fédéral après consultation des provinces; [...].
(3) This Act is to be construed and applied in a manner that	(3) L'interprétation et la mise en oeuvre de la présente loi doivent avoir pour effet :
…	[…]
(*d*) ensures that decisions taken under this Act are consistent with the *Canadian Charter of Rights and Freedoms*, including its principles of equality and freedom from discrimination and of the equality of English and French as the official languages of Canada; ...	*d*) d'assurer que les décisions prises en vertu de la présente loi sont conformes à la *Charte canadienne des droits et libertés*, notamment en ce qui touche les principes, d'une part, d'égalité et de protection contre la discrimination et, d'autre part, d'égalité du français et de l'anglais à titre de langues officielles du Canada; […].

[16] Paragraph 3(3)(*d*) of the IRPA is a statement of the principle that a discretionary administrative decision must be consistent with the Charter values underlying the grant of discretion. Authority for that principle is found in a line of cases, the most recent of which is *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395 (at paragraph 24).

[17] The IRPA is framework legislation. It states basic principles and policies, leaving secondary policies, implementation, and operational matters to be dealt with in Regulations. This is explained by Justice Evans, writing for the Court in *de Guzman v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436 at paragraph 23:

> [The IRPA] contains the core principles and policies of the statutory scheme and, in view of the complexity and breadth of the subject-matter, is relatively concise. The creation of secondary policies and principles, the implementation of core policy and principles, including exemptions, and the elaboration of crucial operational detail, are left to regulations, which can be amended comparatively quickly in response to new problems and other developments.

[18] Section 5 of the IRPA grants the Governor in Council the authority to make regulations. It reads as follows:

5. (1) Except as otherwise provided, the Governor in Council may make any regulation that is referred to in this Act or that prescribes any matter whose prescription is referred to in this Act.	**5**. (1) Le gouverneur en conseil peut, sous réserve des autres dispositions de la présente loi, prendre les règlements d'application de la présente loi et toute autre mesure d'ordre réglementaire qu'elle prévoit.

[19] Most of the conditions for immigration to Canada are set out in Regulations enacted pursuant to subsection 14(1) of the IRPA, which reads in relevant part as follows:

14. (1) The regulations may provide for any matter relating to the application of this Division, and may define, for the purposes of this Act, the terms used in this Division.	**14**. (1) Les règlements régissent l'application de la présente section et définissent, pour l'application de la présente loi, les termes qui y sont employés.
(2) The regulations may prescribe, and govern any matter relating to, classes of permanent residents or foreign nationals, including the classes referred to in section 12, and may include provisions respecting	(2) Ils établissent et régissent les catégories de résidents permanents ou d'étrangers, dont celles visées à l'article 12, et portent notamment sur :
(*a*) selection criteria, the weight, if any, to be given to all or some of those criteria, the procedures to be followed in evaluating all or some of those criteria and the circumstances in which an officer may substitute for those criteria their evaluation of the likelihood of a foreign national's ability to become economically established in Canada;	*a*) les critères applicables aux diverses catégories, et les méthodes ou, le cas échéant, les grilles d'appréciation et de pondération de tout ou partie de ces critères, ainsi que les cas où l'agent peut substituer aux critères son appréciation de la capacité de l'étranger à réussir son établissement économique au Canada;

(*b*) applications for visas and other documents and their issuance or refusal, with respect to foreign nationals and their family members;	*b*) la demande, la délivrance et le refus de délivrance de visas et autres documents pour les étrangers et les membres de leur famille;
(*c*) the number of applications that may be processed or approved in a year, the number of visas and other documents that may be issued in a year, and the measures to be taken when that number is exceeded;	*c*) le nombre de demandes à traiter et dont il peut être disposé et celui de visas ou autres documents à accorder par an, ainsi que les mesures à prendre en cas de dépassement;
(*d*) conditions that may or must be imposed, varied or cancelled, individually or by class, on permanent residents and foreign nationals;	*d*) les conditions qui peuvent ou doivent être, quant aux résidents permanents et aux étrangers, imposées, modifiées ou levées, individuellement ou par catégorie; […].

A. *The federal skilled worker class*

[20] Section 12 of the IRPA specifies two classes of permanent resident, apart from refugees and persons in similar circumstances. A member of the "family class" is selected on the basis of a specified family relationship with a Canadian citizen or permanent resident (subsection 12(1) of the IRPA). A member of the "economic class" is selected on the basis of the ability to become economically established in Canada (subsection 12(2) of the IRPA). The appellants were all seeking to be selected as members of the economic class.

[21] It is the position of the Minister that the creation of the economic class is intended to further the objectives stated in paragraphs 3(*a*), (*c*), (*e*) and (*f*) of the IRPA, quoted above. That suggests that the interpretation and application of the provisions of the IRPA relating to the federal skilled worker class is informed by Parliament's stated intention to permit Canada to pursue the maximum social, cultural and economic benefits of immigration, to support the

development of a strong and prosperous Canadian economy, to promote the successful integration of permanent residents into Canada, and to support the attainment of immigration goals established by the federal government.

B. *Regulations – federal skilled worker class*

[22] The Governor in Council has exercised the authority under section 14 of the IRPA to enact detailed regulations relating to immigration applications, including the applications in issue in these appeals. Although the Regulations are amended frequently and some amendments were made after the appellants' visa applications were made, it has not been suggested that any of those amendments have a bearing on any of the issues in this appeal. For that reason, the following summary of the relevant Regulations is based on the Regulations as they now read.

[23] According to subsection 11(1) of the Regulations, an application for a permanent resident visa (except an application by a refugee or a person in similar circumstances) must be made to a particular visa office (sometimes called a "visa post"). Subsection 11(1) reads as follows:

11. (1) An application for a permanent resident visa — other than an application for a permanent resident visa made under Part 8 — must be made to the immigration office that serves	**11**. (1) L'étranger fait sa demande de visa de résident permanent — autre que celle faite au titre de la partie 8 — au bureau d'immigration qui dessert :
(*a*) the country where the applicant is residing, if the applicant has been lawfully admitted to that country for a period of at least one year; or	*a*) soit le pays dans lequel il réside, s'il y a été légalement admis pour une période d'au moins un an;

(*b*) the applicant's country of nationality or, if the applicant is stateless, their country of habitual residence other than a country in which they are residing without having been lawfully admitted.	*b*) soit le pays dont il a la nationalité ou, s'il est apatride, le pays dans lequel il a sa résidence habituelle — autre que celui où il n'a pas été légalement admis.

[24] Part 6 of the Regulations (sections 73 to 115) states the selection criteria for members of the economic class. It divides the members of the economic class into three categories: skilled workers (Division 1 of Part 6), business immigrants (Division 2 of Part 6), and live-in caregivers (Division 3 of Part 6).

[25] The skilled worker class is further divided into six subcategories: the federal skilled worker class, the transitional federal skilled worker class, the Quebec skilled worker class, the provincial nominee class, the Canadian experience class, and the federal skilled trades class. All of the appellants are seeking to be selected in the first subcategory, the federal skilled worker class. The selection criteria for immigration applicants of that class are set out in sections 75 to 85 of the Regulations.

[26] An applicant may be selected as a member of the federal skilled worker class if: (a) the applicant is determined pursuant to section 75 of the Regulations to be a skilled worker, (b) the applicant is determined pursuant to section 76 of the Regulations to have the ability to become economically established in Canada, and (c) the applicant intends to reside in a province other than Quebec. The applicant must meet these conditions on the date on which the application is made and on the date on which the visa is issued (section 77 of the Regulations).

(1) Skilled Worker – section 75

[27] Subsection 75(2) of the Regulations sets out detailed requirements for the assessment of the occupational skills of an applicant. If those requirements are met, the applicant is a "skilled worker" as defined in subsection 75(2).

[28] Pursuant to subsection 75(2) of the Regulations, the applicant's primary occupation must fall into a prescribed category in the National Occupational Classification matrix published by Human Resources and Skills Development Canada, and the applicant's work experience must meet prescribed conditions. If the primary occupation does not qualify, or if the work experience conditions are not met, the application is refused pursuant to subsection 75(3) of the Regulations and is given no further consideration. Otherwise, the applicant qualifies as a skilled worker and is assessed for the ability to become economically established in Canada.

(2) Ability to become economically established in Canada – section 76

[29] A skilled worker cannot be selected as a member of the federal skilled worker class unless it is determined pursuant to section 76 of the Regulations that he or she will be able to become economically established in Canada. Section 76 states two sets of requirements for that assessment. One set of requirements is intended to assess the applicant's personal characteristics (paragraph 76(1)(*a*) of the Regulations). The other set of requirements is intended to assess the applicant's financial resources and employment prospects in Canada (paragraphs 76(1)(*b*) of the Regulations).

(a) *Personal characteristics – Regulations, paragraph 76(1)(a)*

[30] To assess a skilled worker's personal characteristics, an immigration officer assigns points to six factors pursuant to paragraph 76(1)(*a*) of the Regulations. The skilled worker must obtain a specified minimum number of points to be accepted as a person who will be able to become economically established in Canada.

[31] The required minimum number of points is fixed by the Minister pursuant to subsection 76(2) of the Regulations based on the number of federal skilled worker class applications currently being processed, the number of skilled workers projected to become permanent residents according to a report to Parliament under section 94 of the IRPA and the potential, taking into account economic and other relevant factors, for the establishment of skilled workers in Canada.

[32] The six factors specified in paragraph 76(1)(*a*) of the Regulations for the assessment of the applicant's personal characteristics are:

(a) education (section 78 of the Regulations – from 5 points for a secondary school credential to 25 points for a university level credential at the doctoral level),

(b) proficiency in an official language of Canada (section 79 of the Regulations – a maximum of 24 points for proficiency in English or French and a maximum of 4 additional points for proficiency in the other official language),

(c) work experience (section 80 of the Regulations – a maximum of 15 points for six or more years of work experience within the last 10 years),

(d) age (section 81 of the Regulations – a maximum of 12 points for an applicant between 18 and 35 years of age, with one less point for each additional year over 35),

(e) arranged employment in a specified occupation or skill for full-time work in Canada that is non-seasonal and indeterminate (section 82 of the Regulations – a maximum of 10 points if the applicant holds a work permit that meets the conditions in paragraph 82(2)(a), (b) or (d) of the Regulations, or if the applicant has a job offer from a Canadian employer that meets the conditions in paragraph 82(2)(c) of the Regulations), and

(f) adaptability (section 83 of the Regulations – a maximum of 10 points for certain Canadian work or study experience of the applicant or the applicant's accompanying spouse or common law partner).

[33] If the immigration officer conducting the assessment concludes that the criteria in paragraph 76(1)(a) of the Regulations are not a sufficient indicator of the applicant's ability to become economically established in Canada, the officer may substitute a different evaluation if a second officer concurs (subsections 76(3) and (4) of the Regulations).

(b) *Financial resources and employment prospects – paragraph 76(1)(b)*

[34] Paragraph 76(1)(*b*) of the Regulations provides that the skilled worker must have transferable and available funds in a specified amount, or must be awarded points under paragraph 76(1)(*a*) of the Regulations for arranged employment that meets the conditions in paragraphs 82(2)(*a*), (*b*) or (*d*) of the Regulations.

C. *The normal processing of a permanent resident visa application*

[35] When an application for a permanent resident visa is received at the appropriate visa post with the required fee, an acknowledgement letter is sent to the applicant. The first examination of the application may not occur for years, so that much of the information becomes out of date before the application is considered. When the examination of an application is commenced after a long delay, the applicant generally is requested to submit updated information. The request for updated information is assumed by applicants to mean that the processing of their application is almost complete. However, it is not uncommon for the next step to take several months.

[36] Once an officer determines from the documentation whether the applicant meets the requirements for selection as a member of the federal skilled worker class, a selection decision is made. Normally, that decision is documented by the notation "SELDEC" in the applicant's file on the Computer Assisted Immigration Processing System ("CAIPS") or the notation "Eligibility – Passed" or "Eligibility – Failed" in the Global Case Management System ("GCMS"). There may be other notes in the CAIPS or GCMS that document the determination before any SELDEC, Eligibility – Passed or Eligibility – Failed notation is made.

[37] The next stage requires a review of documents relating to admissibility, such as medical and police documentation. If that review has a positive outcome, the applicant is requested to pay the required fee and submit a passport. It normally takes two to three months for the passport to be returned to the applicant with the permanent resident visa affixed.

[38] At any time during the processing, a question may arise as to whether the applicant is eligible for selection as a member of the federal skilled worker class or is inadmissible. In that event, the applicant is sent a letter (referred to as a fairness letter) disclosing the new issue and requiring a response within a specified time. There is no statutory time limit for determining the new issue.

D. *Section 87.4 of the IRPA*

[39] Section 87.4 came into force on June 29, 2012. It reads in full as follows:

87.4 (1) An application by a foreign national for a permanent resident visa as a member of the prescribed class of federal skilled workers that was made before February 27, 2008 is terminated if, before March 29, 2012, it has not been established by an officer, in accordance with the regulations, whether the applicant meets the selection criteria and other requirements applicable to that class.	**87.4** (1) Il est mis fin à toute demande de visa de résident permanent faite avant le 27 février 2008 au titre de la catégorie réglementaire des travailleurs qualifiés (fédéral) si, au 29 mars 2012, un agent n'a pas statué, conformément aux règlements, quant à la conformité de la demande aux critères de sélection et autres exigences applicables à cette catégorie.
(2) Subsection (1) does not apply to an application in respect of which a superior court has made a final determination unless the determination is made on or after March 29, 2012.	(2) Le paragraphe (1) ne s'applique pas aux demandes à l'égard desquelles une cour supérieure a rendu une décision finale, sauf dans les cas où celle-ci a été rendue le 29 mars 2012 ou après cette date.
(3) The fact that an application is terminated under subsection (1) does not constitute a decision not to issue a permanent resident visa.	(3) Le fait qu'il a été mis fin à une demande de visa de résident permanent en application du paragraphe (1) ne constitue pas un refus de délivrer le visa
(4) Any fees paid to the Minister in respect of the application referred to in subsection (1) — including for the acquisition of permanent resident status — must be returned, without interest, to the person who paid them.	(4) Les frais versés au ministre à l'égard de la demande visée au paragraphe (1), notamment pour l'acquisition du statut de résident permanent, sont remboursés, sans intérêts, à la personne qui les a

The amounts payable may be paid out of the Consolidated Revenue Fund.	acquittés; ils peuvent être payés sur le Trésor.
(5) No person has a right of recourse or indemnity against Her Majesty in connection with an application that is terminated under subsection (1).	(5) Nul n'a de recours contre sa Majesté ni droit à une indemnité de sa part relativement à une demande à laquelle il est mis fin en vertu du paragraphe (1).

[40] The Minister takes the position that on June 29, 2012, subsection 87.4(1) terminated the permanent resident visa applications in issue in this appeal because on that date the applications met the conditions stated in that provision. No steps were taken by the Minister after that date to complete the processing of the applications.

[41] According to evidence presented for the Minister, the enactment of subsection 87.4(1) was intended to deal with an unacceptable backlog of applications for permanent resident visas for the federal skilled worker class.

[42] Between 2002 and 2012, the Minister received and processed applications for permanent resident visas from over 2.4 million persons seeking to be selected as members of the economic class. That included more than one million applications from persons seeking to be selected as members of the federal skilled worker class.

[43] During those years hundreds of thousands of federal skilled worker applications were processed in the New Delhi, Islamabad, Manila, Hong Kong and Beijing visa posts. Thousands more applications from nationals of India, Pakistan, the Philippines and China were processed at visa posts in Buffalo, London, Paris, Sydney and Singapore. Despite the number of completed federal skilled worker applications, a significant backlog developed because the number of

applications far exceeded the number of federal skilled worker applicants that could be accepted under the government's annual immigration plans.

[44] The Minister considered the existence of a large backlog to be a significant detriment to the immigration program for federal skilled workers. It reduced the program's flexibility and the government's ability to respond to changing labour market conditions affecting the prospects of new immigrants to find work and become economically established in Canada. It also reduced public confidence in the effectiveness of the immigration system.

[45] Over the years, attempts were made to reduce the backlog by increasing the number of applications processed each year. However, those attempts could not succeed in the face of the limited number of planned annual admissions to Canada, even when they were at historically high levels.

[46] In February of 2008, the IRPA was amended to authorize the Minister to make binding instructions reducing or suspending the intake of new applications. However, that step alone was insufficient to remove the backlog. It was projected that the backlog would subsist for some years, and that applicants would suffer wait times of seven to eight years. At the same time, there was evidence of declining income and higher levels of unemployment among new immigrants. The government considered that situation to be unacceptable as a matter of policy.

[47] Section 87.4 was enacted in order to eliminate the backlog in a single step, enabling the government to focus on newer permanent resident visa applications from persons with pre-

arranged employment. After its introduction, efforts were made to "mine" the backlog for potentially successful federal skilled worker applications, and many successful applications resulted from that effort. However, not all meritorious applications were or could have been identified. The applications in issue in this case might have succeeded if they had not been terminated by subsection 87.4(1).

[48] The appellants have suggested that the backlog might have been exacerbated by subsection 11(1) of the Regulations (enacted in 2002) that stipulated which visa post an applicant was required to use. Prior to that change, an applicant could choose to submit the application to a post with a shorter queue. When that was no longer possible, applicants who were obliged to submit their applications to a high volume visa post suffered substantial processing delays if the visa post was not provided with sufficient resources.

[49] On April 4, 2012, Citizenship and Immigration Canada (CIC) issued Operational Bulletin 400. It was intended to explain the effect of section 87.4, which at that time had been introduced but not enacted. It stated that the processing of applications for permanent resident visas for members of the federal skilled worker class should not commence or continue if the application was made before February 27, 2008 and no selection decision was made before March 29, 2012. Operational Bulletin 400 was intended to have the same effect as subsection 87.4(1) before it was enacted. After a legal challenge, Operational Bulletin 400 was rescinded.

[50] On June 29, 2012, the date on which subsection 87.4(1) came into effect, CIC issued Operational Bulletin 442 to provide immigration officers with processing instructions that were

intended to give effect to subsection 87.4(1) as then construed by the Minister. The parts of Operational Bulletin 442 that reflect the Minister's interpretation of subsection 87.4(1) are reproduced as an appendix to these reasons.

III. Discussion

[51] Each appellant has raised slightly different arguments, but many of their arguments overlap. In my view the arguments may be reduced to these questions:

(a) What is the standard of review?

(b) In determining whether subsection 87.4(1) of the IRPA terminated an application for a permanent resident visa, does subsection 87.4(1) require only that objective facts be discerned from the application file, or must an immigration officer conduct an individualized assessment involving the exercise of discretion?

(c) Does the *Canadian Bill of Rights* guarantee the appellants procedural rights (including notice and a right to be heard) before their applications are determined to be terminated by subsection 87.4(1) of the IRPA?

(d) Does the retrospective effect of subsection 87.4(1) of the IRPA render it invalid as contrary to the rule of law?

(e) Do the appellants have a vested right to have their applications considered under the provisions of the IRPA in effect when they made their applications?

(f) Does the manner in which subsection 87.4(1) of the IRPA was implemented breach the rights of the applicants under subsection 15(1) of the Charter?

(g) Does subsection 87.4(1) of the IRPA breach the appellants' rights under section 7 of the Charter?

[52] In the Federal Court, the Minister did not argue that the applicants have no rights under section 7 or subsection 15(1) of the Charter. Justice Rennie expressed reservations on that point but since it was uncontested before him, he declined to make a determination. Rather, he assumed without deciding that the applicants have those rights.

[53] In this Court, the Minister argues that the applicants do not have rights under section 7 or subsection 15(1) of the Charter. However, for reasons that will become apparent from the discussion below, I do not consider it necessary to express an opinion on that point.

A. *Standard of review*

[54] The proceeding in the Federal Court was in form an application for judicial review. However, there was no administrative decision maker except the Minister who refused to consider the appellants' permanent resident visa applications after June 29, 2012 when subsection 87.4(1) of the IRPA came into effect. That refusal was based on the Minister's interpretation of subsection 87.4(1). The parties who addressed this point agreed that the Minister's interpretation of subsection 87.4(1) is reviewable on the standard of correctness.

[55] In certain circumstances, the Minister's interpretation of the IRPA may be reviewed on the standard of reasonableness. Under that standard, the Minister may be afforded some deference if the statutory provision contains words of debatable scope or requires the Minister to make a discretionary decision suffused with factual determinations, policy considerations or both (see, for example, *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, at paragraphs 49 and 50). In this case, however, the words of subsection 87.4(1) are fairly plain and do not admit of more than one acceptable and defensible interpretation. In the end, nothing turns on the standard of review of the Minister's interpretation of subsection 87.4(1), since I have concluded that his interpretation of subsection 87.4(1) is correct.

[56] The facts are undisputed except those made by Justice Rennie relating to the statistical evidence of the backlog in various visa posts. The judge considered that evidence in first instance, not upon a review of a prior administrative decision. Therefore, his findings of fact and mixed fact and law relating to that evidence are reviewable on the standard of palpable and overriding error as required by *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (see *Li v. Canada (Minister of Citizenship and Immigration)*, 2011 FCA 110 at paragraph 12, and *Saputo Inc. v. Canada (Attorney General*), 2011 FCA 69 at paragraph 9).

B. *Determining whether subsection 87.4(1) applies to an application*

[57] Subsection 87.4(1) of the IRPA is quoted above and reproduced here for ease of reference:

87.4 (1) An application by a foreign national for a permanent resident visa as a member of the prescribed class of federal skilled workers that was made	**87.4** (1) Il est mis fin à toute demande de visa de résident permanent faite avant le 27 février 2008 au titre de la catégorie réglementaire des

before February 27, 2008 is terminated if, before March 29, 2012, it has not been established by an officer, in accordance with the regulations, whether the applicant meets the selection criteria and other requirements applicable to that class.	travailleurs qualifiés (fédéral) si, au 29 mars 2012, un agent n'a pas statué, conformément aux règlements, quant à la conformité de la demande aux critères de sélection et autres exigences applicables à cette catégorie.

[58] The Minister argues that to identify a permanent resident visa application that falls within the scope of subsection 87.4(1) it is necessary simply to determine certain facts that are readily ascertainable upon a review of the application file. According to the Minister's interpretation, if an application was made before February 27, 2008 for a permanent resident visa as a member of the federal skilled worker class (as all of the appellants' applications were), then it was terminated by subsection 87.4(1) on June 29, 2012 if (a) no immigration officer determined, before March 29, 2012, whether the applicant met the selection criteria and other requirements applicable to that class, or (b) if an immigration officer made such a determination on or after March 29, 2012 but the application was not finalized before June 29, 2012.

[59] Justice Rennie agreed with the Minister's interpretation. He concluded that the "selection criteria" referred to in subsection 87.4(1) means the requirements of section 76 of the Regulations (entitled "selection criteria") which states the requirements for assessing the ability of a skilled worker to become economically established in Canada. He also concluded that the "other requirements applicable to [the federal skilled worker class]" means all other requirements for selection as a member of that class, including those stated in section 75 of the Regulations (the definition of "skilled worker").

[60] No appellant has argued that an immigration officer erred in determining in his or her case whether or when the selection criteria and other requirements applicable to the federal skilled worker class were met. Such a factual dispute may be the subject of a judicial review application in the Federal Court, as the Minister recognized and as Justice Rennie found. However, there is no such factual dispute here. The appellants are arguing that as a matter of statutory interpretation, subsection 87.4(1) is so unclear that its effect on a particular permanent resident visa application cannot be determined without an individualized assessment in which an immigration officer exercises some discretion.

[61] I do not accept this argument. A decision is discretionary if the law permits more than one possible outcome on the facts. If the law permits only one possible outcome on the facts, there is no element of discretion.

[62] I acknowledge that the status of any given application may be difficult to discern from the file because the CAIPS notes or the GCMS notes are unclear or incomplete. No doubt that is why, for example, Operational Bulletin 442 (appended to these reasons), instructs immigration officers not to rely only on the customary decision notations ("SELDEC" in the CAIPS or "Eligibility – Passed" or "Eligibility – Failed" in the GCMS) when determining whether or when there has been a selection decision. Officers are instructed to examine all of the notes to see if and when a selection decision was in fact made even if the customary notation is absent. However, the possibility of such evidentiary difficulties cannot by itself transform a factual determination into a discretionary decision.

[63] The appellants rely on the fact that a number of permanent resident visas were issued in error to applicants who had applied before February 27, 2008 and whose applications should have been terminated by subsection 87.4(1), based on the Minister's interpretation. Those visas were not rescinded. Rather, the Minister exercised the authority under section 25.2 of the IRPA, citing public policy, to declare those applicants to be eligible for permanent resident visas. That indicates some initial confusion about the implementation of subsection 87.4(1). But it does not follow that the application of subsection 87.4(1) depends upon the discretionary decision of an immigration officer.

[64] The appellants also point out that within an application there may be more than one selection decision. That could occur if, for example, an officer makes a selection decision at a certain point in time, but events occur or new facts are discovered that cause the opposite decision to be made. However, it is always possible to determine whether a decision described in subsection 87.4(1) was made before March 29, 2012, or whether the application was finalized by June 29, 2012. That is all subsection 87.4(1) requires.

[65] Finally, the appellants rely on *Zhu v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 155. I do not consider that decision to be inconsistent with the Minister's interpretation of subsection 87.4(1). Mr. Zhu received a final negative decision dated May 12, 2012. His application file indicated that a negative selection decision had been made on the same day. The judge concluded that because the selection decision was made after March 29, 2012 and a final decision was made before June 29, 2012, subsection 87.4(1) did not apply to his application.

Therefore, that provision could not apply to preclude the judge from invalidating the final decision on the basis of procedural unfairness and ordering the application to be reconsidered.

[66] As mentioned above, the enactment of subsection 87.4(1) was intended to eliminate a backlog of federal skilled worker applications that the Minister considered so large as to be unmanageable within a reasonable time, and that was impeding the government's ability to respond to changing labour market conditions as they affected the prospects of new immigrants. Those were valid considerations pursuant to section 3 of the IRPA, in particular paragraphs 3(1)(*a*), (*c*), and (*e*), which are quoted above and repeated here for ease of reference:

3. (1) The objectives of this Act with respect to immigration are	**3**. (1) En matière d'immigration, la présente loi a pour objet :
(*a*) to permit Canada to pursue the maximum social, cultural and economic benefits of immigration;	*a*) de permettre au Canada de retirer de l'immigration le maximum d'avantages sociaux, culturels et économiques;
…	[…]
(*c*) to support the development of a strong and prosperous Canadian economy, in which the benefits of immigration are shared across all regions of Canada;	*c*) de favoriser le développement économique et la prospérité du Canada et de faire en sorte que toutes les régions puissent bénéficier des avantages économiques découlant de l'immigration;
...	[…]

(*e*) to promote the successful integration of permanent residents into Canada, while recognizing that integration involves mutual obligations for new immigrants and Canadian society ….	*e*) de promouvoir l'intégration des résidents permanents au Canada, compte tenu du fait que cette intégration suppose des obligations pour les nouveaux arrivants et pour la société canadienne […]

[67] Considering the language, purpose and context of subsection 87.4(1), it cannot reasonably bear an interpretation that requires an immigration officer to exercise discretion in determining whether it terminates a particular application. I do not accept that Parliament intended to put in place a new discretionary administrative process to replace the one that led to an unacceptable backlog of many years. I conclude that the interpretation of subsection 87.4(1) proposed by the Minister and accepted by Justice Rennie is correct.

C. *Canadian Bill of Rights*

[68] The appellants rely on section 2(*e*) of the *Canadian Bill of Rights*, which guarantees certain procedural rights in the interpretation and operation of federal laws. Paragraph 2(*e*) reads as follows:

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to …	**2**. Toute loi du Canada, à moins qu'une loi du Parlement du Canada ne déclare expressément qu'elle s'appliquera nonobstant la *Déclaration canadienne des droits*, doit s'interpréter et s'appliquer de manière à ne pas supprimer, restreindre ou enfreindre l'un quelconque des droits ou des libertés reconnus et déclarés aux présentes, ni à en autoriser la suppression, la diminution ou la transgression, et en particulier, nulle loi du Canada ne doit s'interpréter ni s'appliquer comme […]

(*e*) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;	*e*) privant une personne du droit à une audition impartiale de sa cause, selon les principes de justice fondamentale, pour la définition de ses droits et obligations;

[69] Section 2(*e*) of the *Canadian Bill of Rights* guarantees procedural rights before a tribunal or administrative body that determines individual rights and obligations, but it does not protect anyone from the right of Parliament to terminate a legal right by amending a statute: *Authorson v. Canada (Attorney General)*, 2003 SCC 39, [2003] 2 S.C.R. 40, at paragraphs 58 to 61.

[70] As explained above, subsection 87.4(1) terminated the appellants' right to have their permanent resident visa applications processed, and it did so without expressly or implicitly requiring an adjudicative process or a discretionary administrative decision. In my view, section 2(*e*) of the *Canadian Bill of Rights* is of no assistance to the appellants.

D. *Rule of law*

[71] The appellants argue that subsection 87.4(1) is invalid because it is so arbitrary that it offends the principle of the rule of law. The appellants characterize the provision as arbitrary because of its retrospective application to permanent resident visa applications that were pending before subsection 87.4(1) came into force, which were terminated without regard to their prospects of success.

[72] *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473 is instructive on this point. In that case, tobacco companies challenged the validity of a provincial

law that permitted the province to sue a manufacturer of tobacco products to recover the costs of providing health care to individuals exposed to the products. It contained a provision giving the law the retroactive effect necessary to give all of its provisions full effect, including the abrogation of any limitation periods for an action for damages alleged to have been caused or contributed to by a tobacco related wrong. One of the arguments of the tobacco companies was that the legislation offended the rule of law because of its retroactive effect.

[73] Justice Major, writing for the Court, discussed the principles of the rule of law at paragraphs 57 to 60:

> 57 The rule of law is "a fundamental postulate of our constitutional structure" (*Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 142) that lies "at the root of our system of government" (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 70). It is expressly acknowledged by the preamble to the *Constitution Act, 1982*, and implicitly recognized in the preamble to the *Constitution Act, 1867*: see *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, at p. 750.
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> 58 This Court has described the rule of law as embracing three principles. The first recognizes that "the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power": *Reference re Manitoba Language Rights*, at p. 748. The second "requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order": *Reference re Manitoba Language Rights*, at p. 749. The third requires that "the relationship between the state and the individual ... be regulated by law": *Reference re Secession of Quebec*, at para. 71.
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> 59 So understood, it is difficult to conceive of how the rule of law could be used as a basis for invalidating legislation such as the Act based on its content. That is because none of the principles that the rule of law embraces speak directly to the terms of legislation. The first principle requires that legislation be applied to all those, including government officials, to whom it, by its terms, applies. The second principle means that legislation must exist. And the third principle, which overlaps somewhat with the first and second, requires that state officials' actions be legally founded. See R. Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001), 80 *Can. Bar Rev. 67*, at pp. 114-15.

> 60 This does not mean that the rule of law as described by this Court has no normative force. As McLachlin C.J. stated in [*Babcock v. Canada (Attorney General)*, [2002] 3 S.C.R. 3, 2002 SCC 57], at para. 54, "unwritten constitutional principles", including the rule of law, "are capable of limiting government actions". See also *Reference re Secession of Quebec*, at para. 54. But the government action constrained by the rule of law as understood in *Reference re Manitoba Language Rights and Reference re Secession of Quebec* is, by definition, usually that of the executive and judicial branches. Actions of the legislative branch are constrained too, but only in the sense that they must comply with legislated requirements as to manner and form (i.e., the procedures by which legislation is to be enacted, amended and repealed).

[74] Justice Major went on to acknowledge the existence of a debate about whether the rule of law might embrace additional principles, and the extent to which those additional principles might apply to invalidate legislation based on its content. However, he did not accept any extension of the established principles. He also rejected the argument of the tobacco companies that the rule of law requires that legislation be prospective. In my view, this Court cannot, in the face of *Imperial Tobacco*, accept the argument of the appellants that subsection 87.4(1) offends the rule of law because it is retrospective.

E. *Retrospective effect and vested rights*

[75] The appellants argue, based primarily on *Dikranian v. Quebec (Attorney General*), 2005 SCC 73, [2005] 3 S.C.R. 530, that when they submitted their permanent resident visa applications, they had a vested right to have their applications processed to completion and to have them considered under the statutory provisions and regulations in effect when the applications were submitted. There is no merit to this argument.

[76] The appellants had the right to apply for permanent resident visas and, when they submitted their applications, they had the right to have their applications considered in

accordance with the IRPA. However, they did not have the right to the continuance of any provisions of the IRPA that affected their applications. Nor did they have the right to have their applications considered under the provisions of the IRPA as in effect when they submitted their applications. I reach that conclusion for the following reasons.

[77] Parliament has the authority to enact laws governing immigration and to amend those laws from time to time. Parliament also has the authority to enact laws that have retrospective effect, although it is presumed that retrospective effect is not intended unless the law is so clear that it cannot reasonably be interpreted otherwise: *Gustavson Drilling (1964) Ltd. v. Canada (Minister of National Revenue)*, [1977] 1 S.C.R. 271 at pages 279 to 283, *Imperial Tobacco Canada Ltd.*, cited above, at paragraphs 69 to 72.

[78] I have already concluded, for reasons stated earlier in these reasons, that subsection 87.4(1) of the IRPA is sufficiently clear to terminate the appellants' applications retrospectively. That distinguishes this case from *Dikranian*, in which the Supreme Court of Canada held that certain amendments to provincial legislation were not clear enough to abrogate contractual rights of students who borrowed money from financial institutions prior to the amendments.

[79] The appellants rely on *Choi v. Canada (Minister of Employment and Immigration*), [1992] 1 F.C. 763 (FCA). In my view, this case does not assist the applicants because it does not deal with a legislative change that was expressed to have retrospective effect. Rather, it deals with a remedy for an administrative error that caused prejudice to an applicant because of a change to the Regulations. Canadian authorities had informed Mr. Choi that he would qualify to

apply for immigration to Canada (meaning that he would have enough "points" for his occupation under the regime then in effect). He was given a pre-application questionnaire but he was not told that he could submit his formal application immediately. Nor was he told that changes to the eligibility provisions for applicants in his occupation were imminent. He returned the completed questionnaire a few days later. The eligibility changes were made after he returned the questionnaire but before he submitted his formal application. The Court held the Canadian authorities, having undertaken to provide information to Mr. Choi, were obliged to provide correct information and they had failed to do so. The Court ordered the situation to be remedied by treating Mr. Choi as though he had submitted his application on the date on which he submitted his completed pre-application questionnaire, which preceded the eligibility changes.

[80] The appellants also rely on *McDoom v. Canada (Minister of Manpower and Immigration)*, [1978] 1 F.C. 323 (T.D.). That case deals with changes to the Regulations that were made after an applicant submitted an application. The Court held that the applicant was entitled to be assessed under the Regulations as they read at the date of application. However, this case is of no assistance to the appellants because there is no suggestion that the changes to the Regulations in issue were intended or stated to have retrospective effect. Indeed, it appears that the Governor in Council has only recently been authorized to enact Regulations that may affect pending applications for permanent resident visas (see subsection 5(1.1) of the IRPA, added by section 702 of the *Jobs, Growth and Long-term Prosperity Act*, effective June 29, 2012).

[81] Finally, the appellants cite *Dragan v. Canada (Minister of Citizenship and Immigration)*, [2003] 4 F.C. 189 (F.C.). That case is of no assistance to the appellants either. In that case, legislative amendments affecting the applicants were found to have retrospective effect unless the applications were processed by March 31, 2003. On February 21, 2003, the Court ordered the Minister to process the applications by March 31, 2003.

F. *Subsection 15(1) of the Charter*

[82] The appellants rely on subsection 15(1) of the Charter, which reads as follows:

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.	**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.

[83] The appellants argue that the manner in which subsection 87.4(1) of the IRPA was implemented breaches their equality rights under subsection 15(1) of the Charter because of the differential allocation of resources to different visa posts, combined with changes to the processing rules that required post-2008 applications to be given priority. They argue that the visa posts to which applicants from China, the Philippines and Pakistan were required to submit their permanent resident visa applications were provided with proportionally less resources than visa posts that would process applications from other countries. They say that the result is discrimination on the basis of "national origin in consideration of country of residence", which they argue is a single analogous ground.

[84] The burden of establishing discrimination contrary to subsection 15(1) of the Charter lies on the appellants. Among other things, the appellants were required to adduce evidence proving on the balance of probabilities that the allocation of resources was discriminatory. To discharge that burden, the appellants relied primarily on statistics they obtained from the Minister about the different rates of completed applications at various visa posts, and then invited Justice Rennie to draw inferences and conclusions from the statistics. The Minister submitted affidavit evidence explaining the variation by reference to the workload at various visa posts and other factors.

[85] Although the thrust of the appellants' claim is that there has been a discriminatory allocation of resources, the Minister did not adduce detailed evidence on the point. The appellants could have converted all or part of their applications to actions in order to get discovery and try this point, or they could have subpoenaed witnesses: see *Federal Courts Act*, R.S.C. 1985, c. F-7, subsection 18.4(2); *Federal Courts Rules*, SOR/98-106, Rules 41 and 316. But they did not do so.

[86] Neither party submitted expert evidence that analyzed the statistics in any way. There was no attempt on the part of the appellants to adduce expert evidence to refute the Minister's position that the factors cited by the Minister are a sufficient explanation of the different rates of processing at various visa posts.

[87] Justice Rennie held that country of residence is not an analogous ground, but he considered the claim of discrimination on the basis of national origin and concluded, essentially for two reasons, that the evidence does not support the appellants' claim. First, Justice Rennie

found that the appellants, and the thousands of people they represent, share no commonality of race, national origin or ethnicity. Second, he found in the Minister's evidence cogent explanations for the different processing rates that had nothing to do with the personal characteristics of the appellants or those they represent. Based on his appreciation of the evidence, Justice Rennie was unwilling to draw inferences favourable to the appellants' case. I have been able to discern from the record no palpable and overriding error in this conclusion.

[88] It is true that the statistics indicate that there were different rates of processing in different visa posts. For example, approximately 90% of pre-2008 federal skilled worker applications were processed in the visa posts serving Europe and the Americas, while approximately 40% were processed in the visa posts serving Africa, the Middle East, Asia and the Pacific. In the end, over 90% of the terminated files originated in Africa, the Middle East, Asia and the Pacific.

[89] However, those different rates of processing had numerous causes. Each visa post had a varied workload that included not only federal skilled worker applications but also visas for visitors, international students and foreign workers that were given priority because they were time sensitive. Some visa posts were required to give priority to refugee claimants or, in the case of Manila, applicants under the Live-In Caregiver Program or the Provincial Nominee Program. The Buffalo visa post gave priority to applicants already lawfully in Canada.

[90] The government's ability to resource certain visa offices was also influenced by external factors such as natural disasters, political instability and regional conflicts. There were

significant variations in staff turnover and limitations based on physical premises and security concerns. Some visa posts were affected by poor local infrastructure that slowed down mail service and other means of communication, or rendered them unreliable. Local conditions also affected the time required to verify documentation relating to birth, education and training credentials.

[91] Justice Rennie found particularly compelling the evidence that, because of the internal transfer of applications, the visa posts in Buffalo, London and Paris processed a significant number of applicants from India, China and Pakistan. For example, 69% of the applications processed in Buffalo, which had one of the highest clearance rates, were applications from Asia, the Middle East and Africa.

[92] Given the evidentiary limitations of the record, I do not consider it necessary to express any opinion on the legal issues considered by Justice Rennie in the context of the appellants' claim under subsection 15(1) of the Charter, including the issue as to whether the appellants, as foreign nationals outside Canada who have applied for permanent resident visas, have any rights under subsection 15(1) of the Charter.

[93] I have not ignored the argument of the appellants that Justice Rennie was wrong when he said that the appellants raised no precise or particular deficiency that called into question the accuracy or reliability of the Minister's evidence. They say they raised the concern that the Minister had a "monopoly" on the evidence, that the statistical data was incomplete and ambiguous, and that the Minister failed to produce any witnesses that were able to address

questions about visa office operations, from which Justice Rennie should have drawn an inference adverse to the Minister.

[94] I find this argument unpersuasive. The onus of proving a breach of subsection 15(1) of the Charter was on the appellants, not the Minister. The appellants apparently believed that they could prove their case with the statistical evidence provided by the Minister. In the end, Justice Rennie found that that evidence did not discharge the appellant's burden of proof, a finding he made without palpable and overriding error. As mentioned above, the appellants chose not to adduce rebuttal evidence and did not pursue steps to obtain more and better evidence. Their affirmative case in support of a finding of discrimination fell short of the mark, rendering irrelevant any deficiencies in the Minister's evidence.

G. *Section 7 of the Charter*

[95] The appellants rely on section 7 of the Charter, which reads 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.

[96] This provision is engaged only when a person's life, liberty or personal security is in jeopardy because of a law or its application. Justice Rennie concluded that the appellants' section 7 claim fails at this threshold question. I agree, substantially for the reasons he gave.

[97] The appellants are foreign nationals who reside outside Canada. Their only connection to Canada is that they have applied under a Canadian statute for the right to become permanent residents. They have no legal right to that status, and no right to enter or remain in Canada unless they attain that status. They had the right to seek permanent resident status under the IRPA, and when they did so they had the right to have their applications considered under the IRPA. However, neither of those rights is a right to life, liberty or security of the person. When their applications were terminated by subsection 87.4(1), they were not deprived of any right that is protected by section 7 of the Charter.

[98] The appellants argue that if their applications had been accepted they would have acquired the right to enter and remain in Canada, which means necessarily that they would also have acquired all Charter rights except those given only to citizens of Canada. They argue that, because of the importance of their objective of becoming permanent residents of Canada, the loss of their right to have their permanent resident visa applications considered is such a blow to their psychological and physical integrity that it should be construed as the loss of a right that is within the scope of section 7 of the Charter.

[99] I do not accept this argument. I have no doubt that the termination of the appellants' permanent resident visa applications caused them financial loss, but financial loss alone does not implicate the rights to life, liberty and security of the person. The termination of their applications could have been profoundly disappointing to the appellants and perhaps for some psychologically damaging, but the evidence does not establish the high threshold of

psychological harm necessary to establish a deprivation of the right to security of the person: *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307.

IV. Conclusion

[100] I would answer the certified questions as follows:

(a) Does subsection 87.4(1) of the IRPA terminate by operation of law the applications described in that subsection upon its coming into force, and if not, are the applicants entitled to mandamus?

Answer: Subsection 87.4(1) terminated the applications automatically on June 29, 2012. After that date, the Minister had no legal obligation to continue to process the applications. The appellants are not entitled to mandamus.

(b) Does the *Canadian Bill of Rights* mandate notice and an opportunity to make submissions prior to termination of an application under subsection 87.4(1) of the IRPA?

Answer: No.

(c) Is section 87.4 of the IRPA unconstitutional, being contrary to the rule of law or sections 7 and 15 the Charter?

Answer: No.

[101] I would dismiss all of the appeals.

"K. Sharlow"

J.A.

"I agree.
Eleanor R. Dawson J.A."

"I agree.
David Stratas J.A."

Appendix A

Operational Bulletin 442 - June 29, 2012 (excerpt)

Cessation of Processing and Return of Fees for Certain Federal Skilled Worker Applications

Summary

Processing of certain applications made under the Federal Skilled Worker (FSW) program prior to February 27, 2008, is to cease effective June 29, 2012, and fees paid to Citizenship and Immigration Canada (CIC) in respect of the affected applications are to be returned to the person who paid them as required by law.

Issue

This Operational Bulletin (OB) provides guidance on steps to be taken to terminate certain FSW applications made prior to February 27, 2008, as per amendments to the *Immigration and Refugee Protection Act* (IRPA) that were enacted as part of the *Jobs, Growth and Long-term Prosperity Act* and come into force on June 29, 2012.

Background

The *Jobs, Growth and Long-term Prosperity Act* eliminates the majority of the backlog in the FSW program by terminating applications and returning fees paid to CIC by certain FSW applicants who applied prior to February 27, 2008. The requirement to terminate certain FSW applications takes legal effect upon the coming into force of relevant provisions of the *Jobs, Growth and Long-term Prosperity Act* on June 29, 2012.

An application by a foreign national for a permanent resident visa as a member of the prescribed class of federal skilled workers that was made before February 27, 2008, is terminated if, before March 29, 2012, it has not been established by an officer, in accordance with the regulations, whether the applicant meets the selection criteria and other requirements applicable to that class.

Processing Instructions

Visa offices are to cease processing of FSW applications made prior to February 27, 2008, in accordance with the following instructions:

If the officer …	and	Then …
has not established whether the applicant meets the selection criteria *prior to* March 29, 2012		• the application is terminated; and • fees paid to CIC are to be returned to the person who paid them
has established whether the applicant meets the selection criteria *prior to* March 29, 2012	the application has *not* been finalized before June 29, 2012…	• •processing of the application continues to a final decision; and • *fees paid to CIC will not be returned to the person who paid them*.
established whether the applicant meets the selection criteria *on or after* March 29, 2012	the application has *not* been finalized before June 29, 2012…	• the application is terminated; and • fees paid to CIC are to be returned to the person who paid them.
established whether the applicant meets the selection criteria *on or after* March 29, 2012	the application has been finalized before June 29, 2012…	• the final decision on the application stands; • processing continues to visa issuance or refusal; and • *fees paid to CIC will not be returned to the person who paid them*.

Note: No further action is required at this time on the part of visa offices for those applications that are terminated in accordance with the above instructions.

Establishing that a decision has been made as to whether the applicant meets selection criteria

A decision as to whether the applicant meets selection criteria *was made* if, prior to March 29, 2012, at least one of the following actions was taken:

- a selection decision was entered into the processing system ("SELDEC" in the Computer-Assisted Immigration Processing System (CAIPS) or "Eligibility – Passed" / "Eligibility – Failed" in the Global Case Management System (GCMS));

- the file notes clearly state that the selection criteria have or have not been met, but a selection decision has not yet been entered into the processing system;

- a negative decision had previously been made, but the file had been re-opened for a redetermination further to an order by a Superior Court (which includes the Federal Court) or a settlement agreement entered into by way of a Court order made prior to March 29, 2012.

A decision as to whether the applicant met selection criteria *was not made* prior to March 29, 2012, if any of the following situations applied as of that date:

- a preliminary review of the documentation has taken place, but a selection decision has not been entered into the processing system or documented as described above;

- additional documentation had been requested from the applicant but has not been received, or a selection interview is pending;

- additional documents were received that could have served to make a selection decision, but the selection decision has not been entered in the processing system or documented as described above. For instance, receipt of an Arranged Employment Opinion (AEO) or a response to an officer's request for additional information prior to March 29, 2012.

Establishing that a final decision has been made

In establishing that final decision has been made on an application, at least one of the following actions must have been taken:

- a final decision was entered into the processing system ("FINDEC" in the Computer-Assisted Immigration Processing System (CAIPS) or "Final – Approved" / "Final – Refused" in the Global Case Management System (GCMS));

- the file notes clearly state that a final decision has been rendered, but the decision has not yet been entered into the processing system.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-180-13, A-181-13, A-183-13, A-185-13 and A-186-13
DOCKET:	A-180-13
STYLE OF CAUSE:	SUMERA SHAHID et al v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
AND DOCKET:	A-181-13
STYLE OF CAUSE:	ALI RAZA JAFRI v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
AND DOCKET:	A-183-13
STYLE OF CAUSE:	MAE JOY TABINGO, ET AL v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
AND DOCKET:	A-185-13
STYLE OF CAUSE:	YANJUN YIN v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
AND DOCKET:	A-186-13
STYLE OF CAUSE:	MARIA SARI TERESA BORJA AUSTRIA v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JUNE 23 AND 24, 2014
REASONS FOR JUDGMENT BY:	SHARLOW J.A.

CONCURRED IN BY: (DAWSON, STRATAS JJ.A.)

DATED: AUGUST 21, 2014

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