Federal Court  Cour fédérale

Date: 20191002

Docket: IMM-5201-18

Citation: 2019 FC 1248

Ottawa, Ontario, October 2, 2019

PRESENT: Mr. Justice Ahmed

BETWEEN:

JOSEPH THAVAPALAN LAWRENCE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Facts and Overview

[1] The parties do not dispute the underlying facts in this matter. That said, I will briefly set out the unusual procedural history of this case.

[2] Joseph Thavapalan Lawrence (the "Applicant") is a Canadian citizen. He married Ms. Kayalvili Pooranakumar, a citizen of Sri Lanka, on October 9, 2011.

[3] Ms. Pooranakumar arrived in Canada in July 2009 and claimed refugee protection in February 2010. The Refugee Protection Division dismissed her claim in March 2010. Subsequently, her application for a Pre-Removal Risk Assessment was also dismissed. Ultimately, Ms. Pooranakumar was removed from Canada on May 29, 2012. On August 1, 2012, the Applicant applied to sponsor Ms. Pooranakumar for permanent residence as a member of the family class.

[4] On July 30, 2013, an immigration officer (the "Officer") dismissed the spousal sponsorship application for several reasons as follows:

(1) The marriage is not genuine and was entered into primarily for immigration purposes under subsection 4(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 ("*IRPR*");

(2) Ms. Pooranakumar is inadmissible to Canada for serious criminality under paragraph 36(1)(c) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*");

(3) Ms. Pooranakumar failed to produce all relevant information requested under subsection 16(1) of the *IRPA* (this ground was eventually abandoned by the Minister after Ms. Pooranakumar provided the documents);

(4) Ms. Pooranakumar had misrepresented material facts under subsection 40(1) of the *IRPA*; and

(5) Having been deported from Canada, Ms. Pooranakumar had not received the necessary authorization to return to Canada under subsection 52(1) of the *IRPA*.

[5] Of particular importance in this matter is the inadmissibility finding under paragraph 36(1)(c) of the IRPA. That provision reads as follows:

36 (1). A permanent resident or a foreign national is inadmissible on grounds of serious criminality	**36 (1).** Emportent interdiction de territoire pour grande

for	criminalité les faits suivants :
[…]	[…]
(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.	**c)** commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.

[6] In the refusal letter dated July 30, 2013, the Officer stated that Ms. Pooranakumar is inadmissible to Canada because she committed the offence of using a fraudulent passport for travel in Canada, Sri Lanka, and Hong Kong in 2009, under subsection 57(1) of the *Criminal Code*, RSC 1985, c C-46 *("Criminal Code")*, punishable by a term of imprisonment not exceeding fourteen years. At the end of this letter, the Officer stated that neither Ms. Pooranakumar nor her sponsor could appeal the Officer's decision to the Immigration Appeal Division ("IAD"), by operation of subsection 64(2) of the IRPA.

[7] Shortly before the Officer rendered this decision, on June 19, 2013, the *Faster Removal of Foreign Criminals Act*, SC 2013, c 16 ("*FRFCA*"), entered into force thereby amending a number of provisions in the IRPA, including subsection 64(2) of the IRPA (section 24 of the FRFCA). As will be discussed below, this amendment essentially expanded the scope of criminally inadmissible individuals who do not enjoy a right of appeal to the IAD.

[8] Under the former wording of subsection 64(2) of the IRPA, the Applicant would have enjoyed a right of appeal in respect of Ms. Pooranakumar's sponsorship application. However,

no right of appeal would lie with respect to that application under the new provision. Thereafter, the Applicant nevertheless filed an appeal with the IAD.

[9] The IAD subsequently held two hearings on May 2, 2016 and on July 27, 2016. Ultimately, the IAD rendered a decision, dated August 9, 2016, in which it dismissed the appeal on the ground that the marriage was entered into primarily for the purpose of obtaining permanent residence, without addressing the Officer's criminal inadmissibility finding or any other grounds of the sponsorship application refusal *(Lawrence v Canada (Citizenship and Immigration)*, 2016 CanLII 95880 (CA IRB)).

[10] On April 19, 2017, this Court granted the Applicant's application for judicial review of the IAD's decision. Mr. Justice Southcott concluded that the IAD's assessment of the primary purpose of the marriage was unreasonable and he remitted the matter to a differently constituted panel of the IAD for reconsideration *(Lawrence v Canada (Citizenship and Immigration)*, 2017 FC 369).

[11] Before the new panel, on May 28, 2018, the Minister submitted that the Applicant did not have a right of appeal to the IAD in accordance with subsection 64(2) of the *IRPA* because Ms. Pooranakumar was inadmissible for serious criminality under paragraph 36(1)(c) of the *IRPA*. After receiving further written submissions from both parties, the IAD found that the Applicant had no right of appeal and dismissed the appeal in a decision dated September 28, 2018 *(Lawrence v Canada (Citizenship and Immigration)*, 2018 CanLII 131134 (CA IRB).

[12] Before this Court, the Applicant applies for the judicial review of the IAD's decision finding that he had no right of appeal under subsection 64(2) of the *IRPA*.

II. **Relevant Legislative Provisions and Amendments**

[13] Before summarizing the decision under review and addressing the merits of this matter, it is helpful to first set forth the relevant legislative provisions, namely the relevant amendments and transitional provisions set forth in the *FRFCA*.

[14] Section 64 of the IRPA reads as follows, with my emphasis, **before** the *FRFCA* entered into force on June 19, 2013:

64. (1) No appeal may be made to the Immigration Appeal Division by a foreign national or their sponsor or by a permanent resident if the foreign national or permanent resident has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality.	**64. (1)** L'appel ne peut être interjeté par le résident permanent ou l'étranger qui est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux, grande criminalité ou criminalité organisée, ni par dans le cas de l'étranger, son répondant.
(2) For the purpose of subsection (1), serious criminality must be with respect to a crime that was punished in Canada by a term of imprisonment of at least two years.	**(2)** L'interdiction de territoire pour grande criminalité vise l'infraction punie au Canada par un emprisonnement d'au moins deux ans.

[15] Subsection 64(2) of the *IRPA* reads as follows, with my emphasis, **after** the *FRFCA* entered into force (subsection 64(1) of the *IRPA* was not amended and still reads as it did before the FRFCA entered into force):

(2) For the purpose of subsection (1), serious criminality must be with respect to a crime that was punished in Canada by a term of imprisonment of at least six months or that is described in paragraph 36(1)(b) or (c).	**(2)** L'interdiction de territoire pour grande criminalité vise, d'une part, l'infraction punie au Canada par un emprisonnement d'au moins six mois et, d'autre part, les faits visés aux alinéas 36(1)b) et c).

[16] Sections 32 and 33 of the *FRFCA* set forth the transitional provisions with respect to the amendment to subsection 64(2) of the *IRPA* (which is itself provided by section 24 of the *FRFCA*), and read as follows with my emphasis:

32. Subsection 64(2) of the Act, as it read immediately before the day on which section 24 comes into force, continues to apply in respect of a person who had a right of appeal under subsection 63(1) of the Act before the day on which section 24 comes into force.	**32.** Le paragraphe 64(2) de la Loi, dans sa version antérieure à l'entrée en vigueur de l'article 24, continue de s'appliquer à l'égard de quiconque avait un droit d'appel au titre du paragraphe 63(1) de cette loi avant l'entrée en vigueur de l'article 24.
33. Subsection 64(2) of the Act, as it read immediately before the day on which section 24 comes into force, continues to apply in respect of a person who is the subject of a report that is referred to the Immigration Division under subsection 44(2) of the Act before the day on which section 24 comes into force.	**33.** Le paragraphe 64(2) de la Loi, dans sa version antérieure à l'entrée en vigueur de l'article 24, continue de s'appliquer à l'égard de toute personne visée par une affaire déférée à la Section de l'immigration au titre du paragraphe 44(2) de cette loi avant l'entrée en vigueur de l'article 24.

[17] Both before and after the *FRFCA* entered into force, section 63 of the *IRPA*, which sets forth various rights of appeal to the IAD, reads as follows with my emphasis:

63. (1) A person who has filed in the prescribed manner an application to sponsor a foreign national as a member of the family class may appeal to the Immigration Appeal Division **against a decision** not to issue the foreign national a permanent resident visa.	**63. (1)** Quiconque a déposé, conformément au règlement, une demande de parrainage au titre du regroupement familial **peut interjeter appel du refus** de délivrer le visa de résident permanent.
(2) A foreign national who holds a permanent resident visa may appeal to the Immigration Appeal Division against a decision to make a removal order against them made under subsection 44(2) or made at an admissibility hearing.	**(2)** Le titulaire d'un visa de résident permanent peut interjeter appel de la mesure de renvoi prise en vertu du paragraphe 44(2) ou prise à l'enquête.
(3) A permanent resident or a protected person may appeal to the Immigration Appeal Division against a decision to make a removal order against them made under subsection 44(2) or made at an admissibility hearing.	**(3)** Le résident permanent ou la personne protégée peut interjeter appel de la mesure de renvoi prise en vertu du paragraphe 44(2) ou prise à l'enquête.
(4) A permanent resident may appeal to the Immigration Appeal Division against a decision made outside of Canada on the residency obligation under section 28.	**(4)** Le résident permanent peut interjeter appel de la décision rendue hors du Canada sur l'obligation de résidence.
(5) The Minister may appeal to the Immigration Appeal Division against a decision of the Immigration Division in an admissibility hearing.	**(5)** Le ministre peut interjeter appel de la décision de la Section de l'immigration rendue dans le cadre de l'enquête.

III. **Decision Under Review**

[18] After setting forth the relevant legislative provisions above, the IAD made note of the Applicant's argument that his right of appeal to the IAD "crystallized" when he filed his sponsorship application on August 1, 2012, before the *FRFCA* entered into force on June 19, 2013. However, the IAD held that the more reasonable construction of subsection 63(1) of the *IRPA* suggests that appeal rights are crystallized not by the filing of a sponsorship application, but by the decision on a sponsorship application.

[19] The IAD further stated that "[t]he fact of filing the application is relevant in identifying who may appeal, but it does not trigger the right of appeal." The IAD then examined subsections 63(1) through 63(5) of the *IRPA* relating to appeal rights to the IAD which, in its view, provide who may appeal and when the right of appeal crystallizes. The IAD concluded that under each of these provisions, a right of appeal to the IAD crystallizes when a decision is made by the relevant immigration authorities on a variety of matters.

[20] Finally, the IAD dismissed the Applicant's argument that the "lock-in date" ought to determine when a right of appeal crystalizes in order to protect against the "vagaries of processing timelines". The IAD acknowledged that it is reasonable to expect that applications may take different amounts of time to be processed for a variety of reasons, including differences between applicants and their personal circumstances. However, the IAD reasoned that the lock-in date is about locking in assessment criteria relevant to processing and making a determination on an application, rather than crystallizing appeal rights. The IAD thus concluded that although a right of appeal flows from refusal of the sponsorship application in the letters dated July 30,

2013, the Applicant was barred from appealing to the IAD since amendments to subsection 64(2) of the *IRPA* took effect before the Applicant's sponsorship was refused, on June 19, 2013.

[21] The IAD made some final remarks in *obiter*, noting that although the visa officer's determination on the Applicant's criminal inadmissibility arose from the use of a forged passport under subsection 57(1) of the *Criminal Code*, section 133 of the *IRPA* provides some protection for refugee claimants from prosecution under section 57 of the *Criminal Code*. The IAD stated it was not clear what effect section 133 of the *IRPA* would have on the Applicant, and observed there were several substantive issues at play. The IAD concluded by stating that it is not able to provide a closer look and that the Applicant would have been better served in bringing this matter before the Federal Court.

IV. **Issue**

[22] This matter raises the following issues:

A. What is the applicable standard of review?

B. Did the IAD commit a reviewable error in determining that the Applicant did not have a right to appeal?

V. **Standard of Review**

[23] The Applicant submits that the IAD's determination as to whether he has a right of appeal amounts to a "true question of jurisdiction" reviewable on a correctness standard (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at para 59 [*Dunsmuir*]; *Fang v Canada (Citizenship and Immigration)*, 2014 FC 733 at para 16).

[24] The Respondent submits that this matter concerns the IAD's interpretation of its enabling statute and is therefore reviewable on a reasonableness standard, notwithstanding the fact that it concerns whether or not the IAD was able to entertain the matter *(Democracy Watch v Canada (Attorney General)*, 2018 FCA 194 at para 38).

[25] I note that the standard of review applicable to the IAD's interpretation of subsection 64(2) of the IRPA has been subject to conflicting approaches *(Bouali v Canada (Citizenship and Immigration)*, 2019 FC 152 at para 12).

[26] Some decisions have considered this to be a true question of jurisdiction reviewable on a correctness standard *(Sivagnanasundram v Canada (Citizenship and Immigration)*, 2015 FC 1233 at para 25; *Nagalingam v Canada (Citizenship and Immigration)*, 2012 FC 1410 at para 12; *Nguyen v Canada (Citizenship and Immigration)*, 2010 FC 30 at para 8; *Brown v Canada (Public Safety and Emergency Preparedness)*, 2009 FC 660 at para 16).

[27] On other more recent occasions however, this Court has held that this is an exercise of the IAD interpreting its enabling legislation, which is reviewable on a reasonableness standard *(Granados v Canada (Citizenship and Immigration)*, 2018 FC 302 at para 12; *Singh v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 455 at para 23. In *Flore*, this Court held that the IAD already had established jurisdiction, and that the IAD made a determination properly within that jurisdiction in finding the applicant had no right of appeal, based on its interpretation of subsection 64(2) of the IRPA *(Flore v Canada (Citizenship and Immigration)*, 2016 FC 1098 at paras 13-21). Recently, the Federal Court of Appeal has held that the IAD's interpretation of its jurisdiction is reviewable on a reasonableness standard because this amounts

to an administrative body interpreting its home statute *(Momi v Canada (Citizenship and Immigration)*, 2019 FCA 163 at para 21). I believe this is the case here.

[28] In any event, I believe that the IAD's conclusion that the Applicant did not have a right of appeal is both reasonable and correct for the reasons set forth below.

VI. **Right of Appeal to the IAD**

[29] The Applicant submits that the transitional provision set forth in section 32 of the *FRFCA* permits him to maintain a right of appeal that he always had from the moment he filed his application to sponsor Ms. Pooranakumar in August 2012. He submits that Parliament would not have intended to "upend the rights of those already being processed under the current system prior to the amendments." In his view, the purpose of the transitional provisions is to subject new applicants to the new laws once they are in force, while not affecting prior existing applicants already in the system and that this is in line with "common sense" and "fairness".

[30] The Applicant notes that the transitional provision refers to appeal rights under subsection 63(1) of the *IRPA*. In his view, the reference point under that provision is the "person who has filed [a family class sponsorship application] in the prescribed manner". He submits that the preconditions for enjoying a right of appeal to the IAD are twofold: 1) one must file a family class sponsorship application; and 2) the application must be filed in the prescribed manner, not improperly or in a deficient manner. In other words, the Applicant's argument is that as soon as he applied to sponsor his wife in August 2012 in the prescribed manner, he enjoyed a right of appeal to the IAD. He would be able to exercise this right of appeal once an officer rendered an unfavourable decision.

[31] The Applicant attempts to distinguish the language used in the transitional provision of section 32 from that of section 33 of the *FRFCA* regarding the subject of a report referred to the Immigration Division ("ID") under subsection 44(2) of the *IRPA*: under section 33, an individual only retains their appeal right before the *FRFCA* enters into force, if the Minister has already drafted a section 44 report and has referred it to the ID. However, the Applicant argues that section 32 is not predicated on an action having been completed by the Minister or the referral of a pending case to the IAD. The Applicant further argues that "three separate canons of statutory interpretation" weigh in his favour.

[32] First, the Applicant submits that the rule against retrospectivity suggests that the *FRFCA* should not be interpreted so as to have a retrospective effect unless Parliament's intention to do so is explicit. It would be unfair to apply the law retrospectively because he and his wife expected the laws in force at the time they filed their sponsorship application to govern their appeal rights.

[33] Second, the Applicant argues that the IAD's interpretation of the transitional provisions would produce "absurd results". In his view, this interpretation would subject his right of appeal to "the arbitrary date upon which the IRCC office makes a final decision on the matter." He submits this is "capricious and unjust" because different offices have different case-loads and processing times and these factors are not within his control. The Applicant points to the fact that, in his case, if the Officer had rendered its decision approximately 45 days earlier, he would have had a right of appeal to the IAD. The Applicant further refers to the "lock-in" principle set forth to protect applicants from factors outside of their control *(Hamid v Canada (Minister of*

Citizenship and Immigration), 2006 FCA 217 at paras 41-46; *Deng v Canada (Citizenship and Immigration)*, 2019 FC 338).

[34] Third, the Applicant argues that if this Court determines the provisions at issue are ambiguous, it should resolve the ambiguity in his favour *(Morguard Properties Ltd. v City of Winnipeg*, [1983] 2 SCR 493 at p 508-509). In this regard, the Applicant submits the provision is ambiguous: if it were clear, the issue of his appeal right to the IAD would have been raised by the Minister or the IAD at the original hearing.

[35] The Respondent argues that following a plain reading of subsection 63(1) of the *IRPA*, the IAD did not commit a reviewable error in determining when individuals obtain a statutory right of appeal. The Respondent further endorses the IAD's finding that a right of appeal to the IAD arises at the moment a decision is rendered, following subsections 63(1) to 63(5) of the *IRPA*.

[36] The Respondent submits that on June 18, 2013 (the day before the *FRFCA* entered into force), the Applicant was "a person who has filed [a sponsorship application] in the prescribed manner," but no decision refusing to issue a permanent resident visa had been rendered at that time. As such, the Applicant had no right of appeal on the day before the *FRFCA* entered into force under subsection 63(1) of the *IRPA*, and could not have had a right of appeal after the *FRFCA* entered into force. Since he could not "actually exercise" an appeal right until the Officer refused the spousal sponsorship application on July 30, 2013 – after the *FRFCA* entered into force – he did not have a right of appeal on the day before the *FRFCA* entered into force, and is therefore not covered by the transitional provision pursuant to section 32 of the *FRFCA*.

[37] The Respondent further relies on Operational Bulletin 525, endorsed by this Court in *(Granados v Canada (Citizenship and Immigration)*, 2018 FC 302 at paras 50-53). Operational Bulletin 525 was in the record before the IAD and an excerpt provides as follows:

> Sponsors of foreign nationals whose family class applications were refused before June 19, 2013 on the basis of serious criminality and were punished in Canada by a term of imprisonment of at least six months or were found described in paragraph 36(1)(*b*) or (*c*) **have the right to appeal** to the IAD until the time period for submitting the appeal expires.
>
> (Emphasis in original)

[38] Finally, the Respondent cites jurisprudence to support its position that no person has a right of appeal until an appealable decision has been rendered (namely, *R. v Puskas*, [1998] 1 SCR 1207 at para 14 [*Puskas*]; *Gill v Canada (Citizenship and Immigration)*, 2012 FC 1522 at para 40). Essentially, Parliament would not have used the term "right of appeal" in the transitional provision if it did not intend to rely on the interpretation of this phrase according to the jurisprudence.

[39] The determination as to whether the IAD erred in concluding that the Applicant did not have a right of appeal boils down to a single question: does a right of appeal under subsection 63(1) of the *IRPA* (as contemplated under section 32 of the *FRFCA*) arise (or vest) at the moment a person files a sponsorship application in the prescribed manner, or when an officer renders a decision not to issue a permanent resident visa?

[40] For the following reasons, I believe that the IAD correctly and reasonably concluded that this right of appeal arises after an officer refuses a permanent resident visa application. In my view, the terms of subsection 63(1) of the *IRPA* and section 32 of the *FRFCA* support the IAD's

conclusion that the Applicant did not enjoy a right of appeal the day before the *FRFCA* entered into force.

[41] First, there is no dispute that both transitional provisions set forth in the FRFCA and the applicable provisions of the *IRPA*, namely subsection 63(1) of the *IRPA*, ought to be interpreted following the modern approach to statutory construction. To do so, I must look to the words of the statutes, and interpret them with regard to their object, text, the context of the provisions considered together, in addition to potential issues of absurdity, redundancy, or unfairness *(Medovarski v Canada (Minister of Citizenship and Immigration); Esteban v Canada (Minister of Citizenship and Immigration)*, [2005] 2 SCR 539 at para 8). That being said, one cannot ignore the plain words used in a provision (*R. v D.A.I.*, [2012] 1 SCR 149 at para 26).

[42] The Applicant's argument with respect to the terms of subsection 63(1) of the *IRPA* and section 32 of the *FRFCA* is essentially threefold. First, the term "person who has filed in the prescribed manner" is the reference point for the creation of an appeal right, and not the refusal decision itself, which is the object of the appeal. Second, the transitional provision displaces the Common Law principle that appeal rights vest only once a decision subject to appeal has been rendered. Third, Parliament would have used explicit language in section 32 of the *FRFCA* if it had intended to provide that appeal rights only arise once an officer has refused to issue a permanent resident visa, as seen by the contrast in language between sections 32 and 33 of the *FRFCA*. Section 33 of the *FRFCA* uses more explicit language than section 32, as it sets forth that the referral of a report to the ID determines the reference point.

[43] As a starting point, I would refer to the language of subsections 63(1) to 63(5) of the *IRPA*, as it is not enough to interpret the meaning of subsection 63(1) of the *IRPA* in isolation of the other subsections setting forth appeal rights (*Burchill v Canada*, 2010 FCA 145 at paras 10-12). As the IAD remarked, each of subsections 63(2) to 63(5) of the *IRPA* sets forth who may file an appeal and the decision that must be rendered for a right of appeal to arise. I agree with the Respondent that being among the classes of persons set forth in subsection 63(1) to 63(5) of the *IRPA* does not in itself appear to give rise to a right of appeal. Subsections (2) to (5) respectively refer to foreign nationals holding permanent resident visas (2), permanent residents or protected persons (3), permanent residents (4), and the Minister (5). Evidently, each of these classes of persons can file an appeal only once a decision subject to the IAD's jurisdiction has been rendered. At face value, the intent in enacting subsection 63(1) of the *IRPA* was to ensure that it follows a parallel process: once the person who has applied to sponsor a foreign national in the prescribed manner receives a negative decision, that person enjoys the right to appeal the officer's decision to the IAD.

[44] Since section 32 of the *FRFCA* refers back to a "person who had a right of appeal under subsection 63(1) of the [IRPA]", that right of appeal is most logically interpreted in the context of the other appeal rights set forth in the same section. This conclusion of the IAD was indeed reasonable, though I also believe it was correct. Nevertheless, I will provide further explanations, to elaborate on this conclusion.

[45] Considering the language of subsection 63(1) of the *IRPA*, filing a sponsorship application in the prescribed manner is evidently a condition precedent to enjoying a right of appeal to the IAD in the literal sense: if no such application is filed, evidently there can be no

decision, and thus no appeal. It appears that the filing of an application in the prescribed manner is more than a condition precedent to an appeal before the IAD, but a requirement for the validity of the application itself. To understand the notion of filing in a "prescribed manner" however, one must turn to sections 10 to 12 of the *IRPR*, which set forth those prescriptions for sponsorship applications. It is not necessary to reproduce these provisions in full, though I would note the following particular passages, with my emphasis:

10. […] (6) A sponsorship application that is not made in accordance with subsection (1) is considered not to be an application filed in the prescribed manner for the purposes of subsection 63(1) of the Act.	**10. […] (6)** Pour l'application du paragraphe 63(1) de la Loi, la demande de parrainage qui n'est pas faite en conformité avec le paragraphe (1) est réputée non déposée.
[…]	[…]
12. Subject to section 140.4, if the requirements of sections 10 and 11 are not met, the application and all documents submitted in support of it, except the information referred to in subparagraphs 12.3(b)(i) and (ii), shall be returned to the applicant.	**12.** Sous réserve de l'article 140.4, si les exigences prévues aux articles 10 et 11 ne sont pas remplies, la demande et tous les documents fournis à l'appui de celle-ci, sauf les renseignements visés aux sous-alinéas 12.3b)(i) et (ii), sont retournés au demandeur.

[46] It is now well-established by cases interpreting these provisions of the *IRPR* that when an application is not filed in the prescribed manner, it does not exist; i.e. it is not an application at all, or following the French provision: "[elle] est réputée non déposée" *(Stanabady v Canada (Citizenship and Immigration)*, 2015 FC 1380 at paras 24-32; *Ma v Canada (Citizenship and Immigration)*, 2015 FC 159 at paras 13-16; *Verma v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 488 at paras 12-14; *Su v Canada (Citizenship and Immigration)*, 2016 FC

51 at para 40; *Gennai v Canada (Citizenship and Immigration)*, 2017 FCA 29 at para 6). In these cases, this Court found it particularly persuasive that a defective application, and all documents submitted in its support "shall be returned to the applicant" under section 12 of the *IRPR*.

[47] The resulting implication is that a sponsor cannot appeal an officer's determination that an application is incomplete to the IAD: since no valid application had been made, the sponsor would not fall under the class set forth under subsection 63(1) of the *IRPA*. In other words, the "prescribed manner" requirement more clearly set forth in subsection 10(6) of the *IRPR* is a condition to be considered an applicant under subsection 63(1) of the *IRPA*, rather than an individual requirement to enjoy a right of appeal under the *IRPA*, just as being a member of the classes of persons set forth in subsection 63(2) to 63(5) of the *IRPA* is also insufficient to enjoy a right of appeal.

[48] With this in mind, an appeal to the IAD is subject to a condition precedent, that is, a negative decision rendered by the relevant decision-maker (a visa officer), as is the case for each of subsections 63(1) through 63(5) of the *IRPA*.

[49] In principle, a right of appeal cannot be said to accrue, arise, vest, or "crystallize" before the decision subject to an appeal has been made. In *Puskas*, the Supreme Court of Canada addressed legislative amendments to the right of appellants under the *Criminal Code* to appeal to the Supreme Court as of right, rather than with leave of the Court. In that case, appellants in two separate proceedings had been charged with criminal offences, though trial judges had respectively stayed proceedings and acquitted the accused. Thereafter, amendments to the

Criminal Code entered into force, limiting appeals as of right to the Supreme Court from decisions ordering a new trial. Subsequent to these amendments, new trials were ordered on appeal in both cases. Thereafter, the appellants attempted to appeal to the Supreme Court as of right (as permitted in the previous legislation, but not under the amendments).

[50] The Supreme Court first acknowledged that a right of appeal is a substantive right rather than a question of procedure. Moreover, the Court noted that its conclusion is based largely on sections 43 and 44 of the *Interpretation Act*, RSC 1985, c I-21, the relevant passages of which read as follows (*Puskas* at paras 5-6):

43. Where an enactment is repealed in whole or in part, the repeal does not	**43.** L'abrogation, en tout ou en partie, n'a pas pour conséquence :
[…]	**[…]**
(c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed,	**c)** de porter atteinte aux droits ou avantages acquis, aux obligations contractées ou aux responsabilités encourues sous le régime du texte abrogé;
44. Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,	**44.** En cas d'abrogation et de remplacement, les règles suivantes s'appliquent :
[…]	[…]
(c) every proceeding taken under the former enactment shall be taken up and continued under and in conformity with the new enactment in so far as it may be done consistently with the new enactment;	**c)** les procédures engagées sous le régime du texte antérieur se poursuivent conformément au nouveau texte, dans la mesure de leur compatibilité avec celui-ci; **d)** la procédure établie par le nouveau texte doit être suivie, dans la mesure où l'adaptation en est possible :
(d) the procedure established by the new enactment shall be followed as far as it can be adapted thereto	[…]
	(ii) pour l'exercice des droits acquis

[…]	sous le régime du texte antérieur,
(ii) in the enforcement of rights, existing or accruing under the former enactment, and	**(iii)** dans toute affaire se rapportant à des faits survenus avant l'abrogation;
(iii) in a proceeding in relation to matters that have happened before the repeal;	

[51] In light of these provisions, the Supreme Court determined that the question it must answer is if the ability to appeal without leave was a right that the appellants had accrued under the former legislation. Ultimately, the Supreme Court held as follows, with my emphasis at para 14 (citations omitted):

> In our view, there are numerous reasons for deciding that the ability to appeal as of right to this Court is only "acquired," "accrued" or "accruing" when the court of appeal renders its judgment. The first is a common-sense understanding of what it means to "acquire" a right or have it "accrue" to you. A right can only be said to have been "acquired" when the right-holder can actually exercise it. The term "accrue" is simply a passive way of stating the same concept (a person "acquires" a right; a right "accrues" to a person). Similarly, something can only be said to be "accruing" if its eventual accrual is certain, and not conditional on future events. In other words, a right cannot accrue, be acquired, or be accruing until all conditions precedent to the exercise of the right have been fulfilled.

[52] In other words, in *Puskas*, the appellants did not have the vested right of appeal to the Supreme Court without obtaining leave. Since the amendments entered into force before the Courts of Appeal ordered new trials, the amended legislation applied and the appellants could only appeal to the Supreme Court with leave.

[53] This Court has followed this principle in the context of determining the regulations to be applied by the IAD in addressing sponsorship applications, albeit not the right of appeal set forth

in subsection 63(1) of the *IRPA*. Relying on *Puskas*, these cases have held that sponsorship applicants do not have accrued or accruing rights until all of the conditions precedent to the exercise of the right they hope to obtain under the application have been fulfilled *(Gill v Canada (Citizenship and Immigration)*, 2012 FC 1522 at paras 35-47; *Burton v Canada (Citizenship and Immigration)*, 2016 FC 345 at paras 16-25; *Patel v Canada (Citizenship and Immigration)*, 2016 FC 1221 at paras 20-38). These cases have held that matters proceed to the IAD as *de novo* appeals and that the IAD shall therefore apply the law in force at the time it is seized with the case, notwithstanding the law in force at the time the immigration officer rendered its decision (interpreting section 67 of the *IRPA*).

[54] I would further note that in *Puskas*, as the Supreme Court acknowledged, the matter concerned the "mechanism" by which appeals reached the Court (with leave or as of right), rather than the Court's jurisdiction to hear the appeal. That being said, appellate Courts appear to have applied the same principle in the context of their jurisdiction to hear an appeal subsequent to legislative amendments (see for example: *R v Whiting*, 2013 SKCA 127 at paras 34-44).

[55] The Applicant does not dispute that *Puskas* stands for the principle that under the Common Law, a right of appeal only accrues if a negative decision has been rendered by the decision-maker below. However, he attempts to distinguish *Puskas*, and the decisions above, by submitting that this principle *only* applies in the absence of transitional provisions. At the hearing, the Applicant's counsel acknowledged that if the transitional provision at issue (section 32 of the *FRFCA*) had not been enacted, he would not be before this Court, because the above Common Law principle would apply and the Applicant would not have had a right of appeal to

the IAD. However, he submits that the very purpose of the transitional provision was to ensure that this Common Law principle would not operate; otherwise, the transitional provision would have no useful effect and would be superfluous.

[56] I disagree with the Applicant's submission that the transitional provision would be of no effect unless it is interpreted as a means of vesting appeal rights the moment a sponsorship application is filed. In my view, the purpose of section 32 of the *FRFCA* is to ensure that any decision by which an officer refuses a sponsorship application rendered before the amendment entered into force (i.e. any day before June 19, 2013) is subject to the broader appeal rights set forth in the previous version of subsection 64(2) of the *IRPA*, even if the IAD is seized with the appeal after June 19, 2013. I do not believe that the Common Law necessarily would have had this effect absent a transitional provision, given this Court's consistent finding that the IAD must hear matters *de novo* notwithstanding the law in force at the time the officer rendered its decision.

[57] If nothing else, the application of *Puskas* and the Federal Court decisions following it in other contexts did not provide enough clarity as to render the transitional provision—setting the date of the officer's decision as the critical period for the accrual of appeal rights—superfluous. Without the transitional provision, it is possible that the IAD would have applied the law in effect at the time the matter was brought before it, notwithstanding an officer's decision rendered prior to June 19, 2013. I believe Parliament's intent in enacting the transitional provisions was to instruct the IAD not to refuse to hear appeals on this basis (rightfully or wrongfully). Moreover, the transitional provision would evidently ensure that appeals of decisions rendered before the *FRFCA* entered into force would be subject to the former laws, even if the notice of appeal was

filed by the sponsor after the law entered into force (since the appellant would have a right of appeal as soon as the decision is rendered even if they exercise that right after the amendment entered into force). In this regard, under subsection 3(2) of the *Immigration Appeal Division Rules*, SOR/2002-230, a notice of appeal must be received by the IAD no later than 30 days after the appellant receives the written reason for a refusal of a sponsorship application.

[58] In any case, the Applicant's argument that the transitional provision would be superfluous, following the IAD's interpretation is not persuasive. The Supreme Court of Canada has held that "when used in legislation, common law terms and concepts are presumed to retain their common law meaning, subject to any definition supplied by the legislature" (*Amos v Insurance Corp. of British Columbia*, [1995] 3 SCR 405 at para 15; *R. v Holmes*, [1988] 1 SCR 914 at 929-930). In section 32 of the *FRFCA*, Parliament did not provide a definition of "right of appeal"/"appeal right" or the accrual thereof that draws a distinction from the principle of Puskas. Rather, the transitional provision refers to "a person who had a right of appeal under subsection 63(1) of the [IRPA]". The Applicant admits that without this transitional provision, following *Puskas*, no right of appeal to the IAD would arise until an officer issues a negative decision.

[59] I would also address the Applicant's argument that a negative decision by an officer cannot be a precondition under section 32 of the *FRFCA* by necessary implication because the language of section 33 of the *FRFCA* is "predicated on an action having been completed by the Minister". While this Court has not interpreted section 32, it has constructed section 33. In *Granados v Canada (Citizenship and Immigration)*, 2018 FC 302 at paras 45-60 and *Singh v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 455 at para 54, this Court

addressed judicial reviews of IAD decisions concluding that the applicant did not have a right of appeal under subsection 63(3) of the *IRPA* (and section 33 of the *FRFCA*) because a section 44 report was drafted and referred to the ID after the amendments entered into force, notwithstanding the fact that the underlying convictions occurred before the amendments. In those cases, this Court found the language of section 33 of the *FRFCA* to be clear, and dismissed the applications for judicial review.

[60] While I agree with the Applicant that section 33 of the *FRFCA* uses explicit language, this is insufficient to create a presumption that Parliament's intent was for the phrase "person who had a right of appeal under subsection 63(1) of the [IRPA]" to refer to every person who filed a sponsorship application in the prescribed manner. The language of subsection 63(1) of the *IRPA* is itself clear: a right of appeal arises after a decision not to issue a visa has been rendered. Again, the operative phrase in subsection 63(1) of the *IRPA* is "may appeal to the [IAD] against a decision not to issue". Without the officer's decision not to issue, the person who has filed an application in the prescribed manner has nothing to appeal and no right of appeal has arisen.

[61] With this in mind, I believe it is helpful to compare the transitional provision at issue in this matter to one final provision: section 29 of the *FRFCA* which reads as follows with my emphasis:

29. Subsection 25(1) of the Act, as it read immediately before the day on which section 9 comes into force, continues to apply in respect of a **request made** under that subsection 25(1)	**29.** Le paragraphe 25(1) de la Loi, dans sa version antérieure à l'entrée en vigueur de l'article 9, continue de s'appliquer à toute **demande présentée** au titre de ce paragraphe

if, before the day on which section 9 comes into force, no decision has been made in respect of the request.	25(1) si aucune décision n'a été rendue relativement à cette demande avant l'entrée en vigueur de cet article 9.

[62] This transitional provision deals with amendments (under section 9 of the *FRFCA*) to subsection 25(1) of the *IRPA*, regarding requests for an exemption on humanitarian and compassionate grounds. It is apparent that this provision explicitly protects applications filed under subsection 25(1) of the *IRPA* from the amendments before a decision has been rendered by an officer. In other words, this provision explicitly provides that all applications filed before the amendments of June 19, 2013, shall be treated under the former law (as interpreted by this Court: *Fathi v Canada (Citizenship and Immigration)*, 2015 FC 805 at paras 21-25; *Amiri v Canada (Citizenship and Immigration)*, 2019 FC 205 at paras 46-60). Thus, if Parliament had intended to ensure that an applicant's appeal right would vest when the sponsorship application was filed, it could have used language in line with that of section 29 of the *FRFCA*, instead of referring to the moment at which a "right of appeal" arises under subsection 63(1) of the *IRPA*.

[63] I would further acknowledge that the amendments in this case appear to have been applied by the legislature retrospectively. Before proceeding on this point, I believe it is helpful to note that Professor Ruth Sullivan distinguishes between legislation of retroactive, retrospective, and immediate application (*Van Buskirk v Canada (Attorney General*), 2012 FC 1463 at para 59, citing Professor Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham: LexisNexis, 2008) at p 669). According to Professor Sullivan, retroactive legislation operates to "change the past legal effect of a past situation, and there is a strong presumption against retroactive effect". Retrospective legislation "change[s] the future legal effect of a past

situation", and a presumption of variable weight may apply against retrospective effects. Legislation of immediate application "change[s] the future legal effect of an on-going situation" and there is no presumption against such legislation.

[64] In the case at bar, the Applicant's appeal right had not yet vested; however, the legislative amendments retrospectively altered the appeal right to which he would have been entitled, resulting from the sponsorship application he had previously filed (i.e. the amendments changed the future legal effects of a past situation). That said, there is no general requirement of legislative prospectivity, so long as the legislature has clearly indicated its desired retroactive or retrospective effects (*British Columbia v Imperial Tobacco Canada Ltd.*, [2005] 2 SCR 473 at para 71; *R. v Dineley*, [2012] 3 SCR 272 at para 10). As explained, in this case, the desired retrospective effects were clearly set forth in the transitional provisions at issue by allowing only those with accrued rights of appeal to the IAD to rely on the previous legislation.

[65] Finally, I do not believe the "lock-in principle" discussed in *Hamid v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 217 is of assistance to the Applicant in this case. I would remark that the lock-in principle discussed in *Hamid* addressed the facts and selection criteria relating to permanent resident visa applicants at the time the application is received, rather than the legislation in effect at the time of the visa officer renders its decision.

[66] Specifically, the applicant in *Hamid* argued that a visa officer erred by removing his two children as dependents from his permanent resident application because they had completed their studies at the time the officer assessed the application and were no longer financially dependent

on the applicant, although they had been when the application was filed. In the applicant's view, his children were "locked in" as dependents at the moment the officer received the application.

[67] Ultimately, the Federal Court of Appeal dismissed the applicant's argument that the "lock-in principle" applies in their favour in that case and granted the Minister's appeal. In this regard, the Court noted, "[t]he truth is that, at whatever point in the application process eligibility is determined, a certain level of arbitrariness is inevitable". While the Court acknowledged that the jurisprudence considers the age of an applicant's dependent children to be locked in at the time of the application and the Minister has treated it as such, the Court did not conclude that this is the case for other matters and held, "I am not satisfied that the Minister's refusal to treat factors other than age as locked in could be characterized as unreasonable" (*Hamid* at para 54). Thus, the "lock-in" principle appears to preserve certain limited selection criteria, such as age, as they were at the time an officer receives a visa application, and ensures that the officer assesses the application in accordance with the criteria in effect at that time.

[68] However, there does not appear to be any basis for concluding that appeal rights to the IAD are "locked in" once a sponsorship application is filed. Recall that the IAD hears matters *de novo* and in principle applies the law and regulations in effect at the time it hears the appeal. For these reasons, this argument must fail.

[69] On a final note, and although it is evidently not determinative of this matter, I would remark that two other IAD members have reached the same conclusion with respect to the proper interpretation of subsection 63(1) of the *IRPA* and section 32 of the *FRFCA* in similar cases *(Anua v Canada (Citizenship and Immigration),* 2016 CanLII 97340 (CA IRB) at paras 10-13;

Singh v Canada (Citizenship and Immigration), 2017 CanLII 22850 (CA IRB) at paras 5-11). If nothing else, this provides further support for the conclusion that the IAD's decision falls within a range of reasonable outcomes in respect of the facts and law (*Dunsmuir* at para 47).

[70] In this case, for the reasons above, I find that a negative decision by a visa officer is a condition precedent to exercising a right of appeal before the IAD: without such a negative decision, no right of appeal arises. Contrary to the Applicant's arguments, the language of subsection 63(1) of the *IRPA* and section 32 of the *FRFCA* is clear: I do not see any suggestion that Parliament's intent was to establish a right of appeal beginning from the moment an application is filed.

[71] However, I believe it is of import to make one final remark in this matter. While the amendment to subsection 64(2) of the *IRPA* precluded the Applicant from appealing the Officer's refusal to the IAD, I do not believe that he is entirely without recourse. Once he had received the Officer's negative decision on July 30, 2013, the Applicant could have applied to this Court for leave and judicial review within the 60 delay set forth in subsection 72(2)(b) of the *IRPA*, since the decision was issued by an Officer outside of Canada. Evidently, if the Applicant applied to this Court for judicial review of that decision today, he would be out of time by nearly six years.

[72] That said, I believe that the Applicant's case is rather exceptional and that he would have a strong argument that the interests of justice weigh in favour of this Court granting him an extension of time to apply for leave and judicial review of the Officer's decision under paragraph 72(2)(c) of the IRPA, should he apply, following the test established by the Federal Court of

Appeal *(Canada (Attorney General) v Hennelly*, 1999 CanLII 8190 (FCA), [1999] FCJ No 846 (QL); *Canada (Attorney General) v Larkman*, 2012 FCA 204 at paras 61-62).

[73] Namely, the Applicant appears to have had a continuing intention to pursue this application, which has been "in the system" since the Officer refused to issue the visa on July 30, 2013, after finding Ms. Pooranakumar to be inadmissible *(Lesly v Canada (Citizenship and Immigration)*, 2018 FC 272 at para 26). I would also note that at face value, a judicial review of the Officer's decision appears to have merit, as even the IAD made *obiter* remarks to that effect in its decision, noting that section 133 of the *IRPA* would appear to protect refugee claimants from inadmissibility findings relating to offences committed under subsection 57(1) of the *Criminal Code* and that "there are a number of substantive issues at play that warrant a closer look".

VII. **Certified Question**

[74] At the hearing, the Respondent proposed the following question for certification:

> Pursuant to section 32 of the *Faster Removal of Foreign Criminals Act*, SC 2013, c 16, is "a person who had a right of appeal under subsection 63(1) of the Act before the day on which section 24 [came] into force" defined by the date of the "decision not to issue the foreign national a permanent resident visa" or by the date on which that person filed "in the prescribed manner an application to sponsor a foreign national as a member of the family class"?

[75] The Applicant opposes certification. He submits that *Granados* (in which no question was certified) is more similar to the present case than other cases in which questions were certified *(Begum v Canada (Citizenship and Immigration)*, 2017 FC 409). He submits that there

is no divergent jurisprudence. This is simply a question of statutory interpretation within this Court's purview to decide, as in *Granados*.

[76] The Federal Court of Appeal recently set forth the requirements to certify a serious question of general importance permitting an appeal under paragraph 74(d) of the *IRPA* in *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 and *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22. In addition to being dispositive of the appeal, the question "must transcend the interests of the parties and must raise an issue of broad significance or general importance" (*Lewis* at para 36; *Lunyamilla* at para 46).

[77] While this question would be dispositive of the appeal and it has yet to be resolved in other cases, I am not convinced that it raises an issue of broad significance or general importance.

[78] The legislative amendments at issue entered into force on June 19, 2013: six years ago. There will likely be few future cases in which these transitional provisions will impact the appeal rights of those who filed sponsorship applications before June 19, 2013, but received negative decisions from officers after that date. Recall that this particular matter proceeded first to the IAD on genuineness of the marriage alone (2016), then proceeded to the Federal Court on a judicial review (2017), and subsequently appeal rights were raised at a second hearing before the IAD on redetermination (2018).

[79] It appears unlikely that future cases raising this question will be appealed to the IAD given the number of years that have elapsed since the amendment. Other decisions of this Court have refused to certify questions regarding transitional provisions that will apply to a relatively

limited number of cases *(Alleg v Canada (Minister of Citizenship and Immigration)*, 2005 FC 348 at para 17; *Kang v Canada (Minister of Citizenship and Immigration)*, 2005 FC 297 at para 47).

VIII. **Conclusion**

[80] For these reasons, no reviewable error arises. The IAD both correctly and reasonably determined that the Applicant had no right of appeal in this matter. Accordingly, I would dismiss this application for judicial review.

[81] I would further dismiss the Respondent's request to certify a question as I do not believe that this matter raises a serious question of general importance within the meaning of paragraph 74(d) of the IRPA.

JUDGMENT in IMM-5201-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No question is certified.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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