Federal Court  Cour fédérale

Date: 20140731

Docket: IMM-1787-13

Citation: 2014 FC 765

Ottawa, Ontario, July 31, 2014

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

KYVAN KIANI MANESH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

INTRODUCTION

[1] This is an application under s. 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for judicial review of the decision of an immigration officer [Officer] at the Canadian Embassy in Ankara, Turkey, dated February 22, 2013 [Decision], which refused the Applicant's application for permanent residence in the family class on the basis that his sponsor

did not meet the residency criteria under the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations].

BACKGROUND

[2] The Applicant is a citizen of Iran who applied to immigrate to Canada as a member of the family class. His wife Asal, who is his sponsor [Sponsor] is an Iranian citizen who came to Canada as a permanent resident in 2004. They met in Iran in March 2009 and married there in 2011. Asal sponsored the Applicant to immigrate to Canada in December of that year. The sponsorship application was approved in February 2012, and the Applicant's permanent residence application was sent for processing. However, at that stage, the Officer determined that Asal did not meet the residency criteria to be a sponsor, and the application was denied.

[3] The Applicant says this was in error because a sponsor need only be a permanent resident who was living in Canada at the time of the sponsorship application. The Respondent says that the Act and the Regulations set a higher threshold of residency for sponsors than what is required to maintain permanent residence, and that in any case the application for judicial review is premature because the appeal mechanisms provided for in the Act have not been exhausted.

[4] To appreciate what is at issue, it is necessary to outline the events that preceded and followed the sponsorship application. As noted above, Asal immigrated to Canada in 2004. Before this, she taught English as a second language (ESL) in Iran. She says in an affidavit filed in support of this application that she wished to continue this profession in Canada, but found that she needed more experience in order to work with her preferred employer in Canada. She

therefore returned to Iran in June 2008 to work as an Oral Examiner with the same organization, in hopes of later working for that organization in Canada.

[5] Asal says she planned to return to Canada by December 2009 to ensure her permanent residence would not be affected, as she had also spent most of 2007 in Iran due to the illness and death of her grandfather. However, just before she was due to return, she had an equestrian accident that required surgery and a lengthy recovery in Iran. Because of this delay, and some issues with the date stamps in her expired Iranian passport, she encountered problems when she sought to return to Canada. There was some doubt as to whether she had complied with the residency requirement to maintain her permanent residence. Asal launched a successful appeal to the Immigration Appeal Division of the Immigration and Refugee Board [IAD] and had her permanent residence restored (decision dated May 30, 2011, IAD file TBO-01325), but she had to pursue this appeal from Iran. In the meantime, she married the Applicant, and they began co-habiting in October 2011. The Applicant's permanent residence questionnaire states that they met in March 2009, and that he took English courses with her (Certified Tribunal Record at p. 25).

[6] Asal returned to Canada on November 24, 2011, and filed the sponsorship application on December 9, 2011. She says she received a letter approving that application at the end of February 2012. That letter is not in the Court's record, but the notes from the Global Case Management System [GCMS notes] include an entry from March 27, 2012 that states:

> Fax received from counsel – Cecil Rotenberg 26 march 2012…Confirmed to his office that sponsorship was approved, however, they never received confirmation. Discrepancy in email address. Have resent approval letter via email.

[7] Having received this confirmation, Asal returned to Iran on April 29, 2011 to await the decision on her husband's permanent residence application. She says she received advice from her solicitor and from Citizenship and Immigration (over the phone) that she was not required to remain in Canada while awaiting that decision. Though initially assigned to the visa office in Damascus, the application was transferred to the Embassy in Ankara when that office closed. After reviewing the file and requesting further information and documentation, the Officer was not satisfied that Asal met the residency criteria for a sponsor set out in s. 130(1)(b) of the Regulations, and denied the Applicant's application for permanent residence.

DECISION UNDER REVIEW

[8] The Officer notified the Applicant of the Decision in a letter dated February 22, 2013. It stated that, under s. 120(b) of the Regulations, a foreign national applying in the family class shall not become a permanent resident unless a sponsorship undertaking is in effect and the sponsor who gave that undertaking still meets the requirements of ss. 130 & 133 of the Regulations. The Officer outlined that s. 130(1)(b) states that a sponsor must be a Canadian citizen or permanent resident who resides in Canada, and s. 133(1)(a) states that a sponsorship application shall only be approved if, on the day on which it was filed and from that day until the day a decision is made with respect to the application, there is evidence that the sponsor is a sponsor as described in s. 130. The Officer then set out the following justification for denying the application:

> A visa officer had requested evidence to support the fact that your sponsor has been residing in Canada from the day on which the application was filed, and that she is still residing in Canada. In response, a letter was received from your representative stating that your sponsor returned to Iran to live with you shortly after she

> received notice from the Case Processing Centre in Mississauga that she was eligible to sponsor you; no evidence of residence in Canada has been provided.
>
> Conversely, a copy of a lease for an apartment in Iran was provided, valid from November 9, 2011 – March 10, 2013, listing your sponsor as a tenant and confirming her employment in Iran. Additionally, a copy of your sponsor's passport demonstrates only two entries to Canada – December 25, 2007, and November 24, 2011. No other stamps denoting entry into Canada are on file. Furthermore, in the sponsorship questionnaire, your sponsor listed employment in Canada for four months in 2008, and previous to that, several months in 2006 – all other employment in 2007 and from 2008-present is in Iran.
>
> As your sponsor has not been physically residing in Canada since your application was submitted on November 12, 2011, and has not provided any evidence to demonstrate ties to Canada that would support residence, I am not satisfied that she meets the requirements of R130(1)(b), and as a result, the requirements of 133(1)(a).

[9] As the sponsor, Asal was also notified of the Decision and advised that she had a right to appeal to the IAD under s. 63(1) of the Act. The letter advising her of this, dated February 22, 2013, included the following statement with respect to the IAD's jurisdiction:

> If the Appeal Division finds that an applicant is not a member of the family class, and/or that the sponsor is not a sponsor within the meaning of the Regulations, the Appeal Division will only have jurisdiction to consider the appeal under subsections 67(1)(a) and (b), that read:
>
> > 67. (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,
> >
> > > (a) the decision appealed is wrong in law or fact or mixed law and fact;
> > >
> > > (b) a principle of natural justice has not been observed (…)

[10] The Respondent filed an affidavit erroneously dated March 20, 2013 (clearly intended to read March 20, 2014), stating that Asal filed an appeal of the Decision with the IAD on March 22, 2013, which remains ongoing. The affidavit indicates that in March 2014 the parties filed written submissions on a motion filed by the appellant seeking a ruling on the meaning of the word "application" in the second and fourth lines of s. 133(1) of the Regulations, and that no date for the hearing of the appeal itself has been set.

ISSUES

[11] The issues in this application are:

a. Is the application premature because the appeal mechanisms provided in the Act have not been exhausted, or is it otherwise outside of the jurisdiction of the Court?

b. If the Court has jurisdiction to determine the matter, did the Officer err in interpreting and applying the residency requirement in s. 130(1)(b) of the Regulations?

STANDARD OF REVIEW

[12] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review

analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[13] The Respondent argues that while the case raises a question of statutory interpretation – namely, interpreting the residency requirement for a sponsor of a family class applicant for permanent residence – it is an interpretation of the Officer's home statute that is at issue, and this should be reviewed on a standard of reasonableness. The Officer's findings of fact when applying the test for residency are also reviewable on a standard of reasonableness, the Respondent argues: see *Dunsmuir*, above, at paras 47, 53, 5, 62; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 62; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 at para 15; *Iao v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1253 at paras 15-16 [*Iao*].

[14] It is now firmly established that there is a presumption that a standard of reasonableness will apply when reviewing an interpretation by an administrative decision-maker of their home statute: *McLean v British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 SCR 895 at paras 21-22 [*McLean*]; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 34 [*Alberta Teachers*]; *Dunsmuir*, above, at para 54; *Kandola v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 85 at paras 30-42 (per Noel JA, Webb JA concurring) and para 86 (per Mainville JA).

[15] The Applicant argues that the present matter raises a true question of jurisdiction or *vires*, and thus falls under an exception to the presumption of reasonableness review recognized in *McLean*, above. I do not agree. The Decision under review is that of the Officer rejecting the Applicant's permanent residence application. The Officer's jurisdiction to make that decision is not in doubt; it is a decision the Officer was empowered and required to make. The central legal issue is whether the Officer applied the proper residency test with respect to the Applicant's sponsor under s. 130(1)(b). The Applicant says the Officer's interpretation of the word "resides" in that provision was "*ultra vires*" the Regulations, but this is really just another way of saying the Officer misinterpreted the section or applied the wrong test. The Supreme Court has made it exceedingly clear that this does not amount to a question of *vires* or jurisdiction. Otherwise, the category of such questions would be very broad, since "anything a tribunal does that involves the interpretation of its home statute involves the determination of whether it has the authority or jurisdiction to do what is being challenged on judicial review" (*Alberta Teachers*, above, at para 34). The Supreme Court has rejected such an approach, directing that the category of "true questions of jurisdiction" is to be interpreted narrowly and that courts "should not be alert to brand as jurisdictional… that which may be doubtfully so" (*Canadian Union of Public Employees, Local 963 v New Brunswick Liquor Corp*, [1979] 2 SCR 227 at p. 233; *Dunsmuir*, above, at para 35; *Alberta Teachers*, above, at paras 33, 95). Thus, the Applicant has not shown any reason why the presumption of reasonableness review should not apply with respect to the Court's review of the Officer's Decision, or any reason to find that the presumption has been rebutted. As such, a standard of reasonableness applies with respect to the whole of issue b. above.

[16] Issue a. involves the Court interpreting and applying its own jurisdiction, so the issue of standard of review is not relevant.

[17] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at para 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

STATUTORY PROVISIONS

[18] The following provisions of the Act are applicable in these proceedings:

Family reunification	**Regroupement familial**
12. (1) A foreign national may be selected as a member of the family class on the basis of their relationship as the spouse, common-law partner, child, parent or other prescribed family member of a Canadian citizen or permanent resident.	12. (1) La sélection des étrangers de la catégorie « regroupement familial » se fait en fonction de la relation qu'ils ont avec un citoyen canadien ou un résident permanent, à titre d'époux, de conjoint de fait, d'enfant ou de père ou mère ou à titre d'autre membre de la famille prévu par règlement.
[…]	[…]

Sponsorship of foreign nationals

13. (1) A Canadian citizen or permanent resident, or a group of Canadian citizens or permanent residents, a corporation incorporated under a law of Canada or of a province or an unincorporated organization or association under federal or provincial law — or any combination of them — may sponsor a foreign national, subject to the regulations.

[…]

Right to appeal — visa refusal of family class

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.

[…]

Appeal allowed

67. (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,

(a) the decision appealed is wrong in law or fact or mixed law and fact;

(b) a principle of natural

Parrainage de l'étranger

13. (1) Tout citoyen canadien, résident permanent ou groupe de citoyens canadiens ou de résidents permanents ou toute personne morale ou association de régime fédéral ou provincial — ou tout groupe de telles de ces personnes ou associations — peut, sous réserve des règlements, parrainer un étranger.

[…]

Droit d'appel : 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.

[…]

Fondement de l'appel

67. (1) Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :

a) la décision attaquée est erronée en droit, en fait ou en droit et en fait;

b) il y a eu manquement à un

justice has not been observed; or

principe de justice naturelle;

(c) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.

c) sauf dans le cas de l'appel du ministre, il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.

Effect

Effet

(2) If the Immigration Appeal Division allows the appeal, it shall set aside the original decision and substitute a determination that, in its opinion, should have been made, including the making of a removal order, or refer the matter to the appropriate decision-maker for reconsideration.

(2) La décision attaquée est cassée; y est substituée celle, accompagnée, le cas échéant, d'une mesure de renvoi, qui aurait dû être rendue, ou l'affaire est renvoyée devant l'instance compétente.

[…]

[…]

Application for judicial review

Demande d'autorisation

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.

72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.

Application

Application

(2) The following provisions govern an application under

(2) Les dispositions suivantes s'appliquent à la demande

subsection (1):	d'autorisation :
(a) the application may not be made until any right of appeal that may be provided by this Act is exhausted;	a) elle ne peut être présentée tant que les voies d'appel ne sont pas épuisées;
[…]	[…]

[19] The following provisions of the Regulations are applicable in these proceedings:

Sponsor	**Qualité de répondant**
130. (1) Subject to subsections (2) and (3), a sponsor, for the purpose of sponsoring a foreign national who makes an application for a permanent resident visa as a member of the family class or an application to remain in Canada as a member of the spouse or common-law partner in Canada class under subsection 13(1) of the Act, must be a Canadian citizen or permanent resident who	130. (1) Sous réserve des paragraphes (2) et (3), a qualité de répondant pour le parrainage d'un étranger qui présente une demande de visa de résident permanent au titre de la catégorie du regroupement familial ou une demande de séjour au Canada au titre de la catégorie des époux ou conjoints de fait au Canada aux termes du paragraphe 13(1) de la Loi, le citoyen canadien ou résident permanent qui, à la fois :
(a) is at least 18 years of age;	a) est âgé d'au moins dix-huit ans;
(b) resides in Canada; and	b) réside au Canada;
(c) has filed a sponsorship application in respect of a member of the family class or the spouse or common-law partner in Canada class in accordance with section 10.	c) a déposé une demande de parrainage pour le compte d'une personne appartenant à la catégorie du regroupement familial ou à celle des époux ou conjoints de fait au Canada conformément à l'article 10.

Sponsor not residing in Canada

(2) A sponsor who is a Canadian citizen and does not reside in Canada may sponsor a foreign national who makes an application referred to in subsection (1) and is the sponsor's spouse, common-law partner, conjugal partner or dependent child who has no dependent children, if the sponsor will reside in Canada when the foreign national becomes a permanent resident.

[…]

Requirements for sponsor

133. (1) A sponsorship application shall only be approved by an officer if, on the day on which the application was filed and from that day until the day a decision is made with respect to the application, there is evidence that the sponsor

(a) is a sponsor as described in section 130;

[…]

Répondant ne résidant pas au Canada

(2) Le citoyen canadien qui ne réside pas au Canada peut parrainer un étranger qui présente une demande visée au paragraphe (1) et qui est son époux, son conjoint de fait, son partenaire conjugal ou son enfant à charge qui n'a pas d'enfant à charge à condition de résider au Canada au moment où l'étranger devient résident permanent.

[…]

Exigences : répondant

133. (1) L'agent n'accorde la demande de parrainage que sur preuve que, de la date du dépôt de la demande jusqu'à celle de la décision, le répondant, à la fois :

a) avait la qualité de répondant aux termes de l'article 130;

[…]

ARGUMENT

Preliminary Issue: Should the Court Entertain the Application

Respondent

[20] The Respondent argues that the Court should not entertain this application because the Decision has been appealed to the IAD by the Applicant's sponsor, and that appeal remains outstanding. The Respondent says both proceedings raise the same issues, and the present application is therefore precluded by s. 63(1) and s. 72(2) of the Act.

[21] The Respondent notes that the Applicant has not asked for consideration of humanitarian and compassionate (H&C) grounds. This is an apparent reference to the fact that, as indicated in the letter notifying Asal of the Decision, if the IAD finds that she was not a sponsor within the meaning of the Regulations, it would not have jurisdiction to consider H&C grounds (see Act, s. 65). This could affect the Court's determination of whether an adequate alternative remedy is available to an applicant who seeks judicial review and who has raised H&C considerations (*Huot v Canada (Minister of Citizenship and Immigration)*, 2011 FC 180 [*Huot*]; *Phung v Canada (Minister of Citizenship and Immigration)*, 2012 FC 585; *Kobita v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1479; cf. *Habtenkiel v Canada (Minister of Citizenship and Immigration)*, 2013 FC 397 (appeal to FCA pending) [*Habtenkiel*]). The Respondent takes the position that since the Applicant has not raised such grounds here, the IAD has jurisdiction to consider all of the issues the Applicant has raised for the Court's consideration.

[22] The Respondent notes that under s. 67 of the Act, the IAD may allow an appeal if the decision is based on a factual or legal error, there was a violation of natural justice, or (in circumstances not covered by s. 65) H&C grounds warrant special relief. In *Somodi v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 288 [*Somodi*], the Court of Appeal considered whether an application for judicial review of a decision denying a spousal application was barred while the (failed) sponsor exercised a right of appeal pursuant to section 63 of the Act. It found that the statutory bar in s. 72 of the Act prevailed over s. 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7, which grants the right to apply for judicial review. In the circumstances of that case, the Court found that the appeal remedy was superior, as it gave the appellant a *de novo* hearing on the merits far broader in scope than that which could have been provided through judicial review (see para 19). The Respondent quotes Justice Létourneau's analysis for the Court as follows:

> [21] In the IRPA, Parliament has established a comprehensive, self-contained process with specific rules to deal with the admission of foreign nationals as members of the family class. The right of appeal given to the sponsor to challenge the visa officer's decision on his or her behalf to the benefit of the foreign national, as well as the statute bar against judicial review until any right of appeal has been exhausted, are distinguishing features of this new process. […]
>
> [22] Parliament has prescribed a route through which the family sponsorship applications must be processed, culminating, after an appeal, with a possibility for the sponsor to seek relief in the Federal Court. Parliament's intent to enact a comprehensive set of rules in the IRPA governing family class sponsorship applications is evidenced both by paragraph 72(2)(a) and subsection 75(2) [as am. By S.C. 2002, c. 8, s. 194].

[23] Section 75(2) of the Act, referred to in the preceding quotation, states:

Inconsistencies	**Incompatibilité**
(2) In the event of an inconsistency between this Division and any provision of the *Federal Courts Act*, this Division prevails to the extent of the inconsistency.	(2) Les dispositions de la présente section l'emportent sur les dispositions incompatibles de la Loi sur les Cours fédérales.

[24] The Respondent also cites Justice Scott's (as he then was) analysis in *Sadia v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1011 at para 11 [*Sadia*], where he stated that "Section 72(2) (a) of the Act is clear, no parallel proceedings can be brought before the IAD and this Court, challenging the same decision at the same time" (see also *Landaeta v Canada (Minister of Citizenship and Immigration)*, 2012 FC 219 at paras 25-27; *Habtenkiel*, above, at paras 20, 22-25).

[25] Thus, the Respondent argues, s. 72(2)(a) of the Act precludes an application for judicial review in the family class context until the foreign national's sponsor has exhausted his or her right of appeal to the IAD under s. 63 of the Act. This is particularly so in this case, the Respondent says, where the issues raised are the same and the Applicant has not sought H&C relief. The fact that the appeal may be taking longer than the sponsor would have hoped is not a sufficient ground to find otherwise.

Applicant

[26] Initially, the Applicant argued that the right to appeal to the IAD was solely a right of the sponsor, and that the Applicant "has no Appeal Board rights whatsoever" and his only recourse is to the Federal Court. However, in his later submissions, the Applicant acknowledged that "although we are dealing with the application of the applicant and the Immigration Appeal right belongs to the sponsor… the two must be treated as the same." In this regard, he cites Justice Dawson's (as she then was) analysis in *Sidhu v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 260, [2002] FCJ No 335 at paras 31-32, 34 [*Sidhu*]:

> [31] It is a settled principle of law that remedies such as those sought on this application for judicial review ought not to be granted if the Court is satisfied that an adequate, alternative remedy is available to the applicant. See, for example, *Anderson v. Canada (Armed Forces)*, [1997] 1 F.C. 273 (F.C.A.). The point is often expressed in terms that applicants ought to exhaust all statutory remedies before seeking judicial review, and reflects the discretionary and extraordinary nature of judicial review.
>
> [32] In my view, in the present case the legislative provisions governing landing provide an adequate, alternative remedy to judicial review of the decision of the senior immigration officer.
>
> […]
>
> [34] Declining, in the face of an adequate alternative remedy, to exercise the court's discretion at this juncture preserves the integrity of the process established by Parliament, reflects a proper and measured concern for the economic use of judicial resources, and ensures that if questions of law are ultimately to be decided by this Court on an application for judicial review the Court will have the benefit of reasons from the Appeal Division.
>
> [Applicant's emphasis]

[27] The Applicant underscores the words "the integrity of the process established by Parliament" and "concern for the economic use of judicial resources," and argues that unlike in *Sidhu* itself, a decision by the Court here not to consider the application on its merits would not serve these ends. He says the matter is certain to end up in this Court in any case, and that declining to decide it now would not make "economic use" of the resources of the Court and would impose extra costs on the Applicant. This is because, in the Applicant's view, the reason the Officer gave for the Decision (that the purported sponsor does not meet the definition of a sponsor) means that this is not a family class matter, and thus there is no right of appeal. The Applicant notes that the IAD has previously ruled that s. 130(1)(b) and s. 133(1)(a) require a sponsor to remain in Canada until the permanent resident application is decided (see *Sahranavard v Canada (Minister of Citizenship and Immigration)*, [2010] IADD No 19 [*Sahranavard*]). The result of this finding, the Applicant says, is that Asal is not a "sponsor," the matter is not a family class matter, and there is no right of appeal. In essence, the Applicant's argument seems to be that the IAD will decline jurisdiction, or that in any case its prior rulings show that any appeal to that body would be of no use.

[28] The Applicant notes that Justice Mandamin in *Somodi v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1356 (the decision under appeal in *Somodi*, above) at para 38 quoted from the Supreme Court's analysis in *Canadian Pacific Ltd v Matsqui Indian Band*, [1995] 1 SCR 3 at para 37 in analyzing the issue of jurisdiction:

> On the basis of the above, I conclude that a variety of factors should be considered by courts in determining whether they should enter into judicial review, or alternatively should require an applicant to proceed through a statutory appeal procedure. These factors include: the convenience of the alternative remedy, the nature of the error, and the nature of the appellate body (i.e., its

> investigatory, decision-making and remedial capacities). I do not believe that the category of factors should be closed, as it is for courts in particular circumstances to isolate and balance the factors which are relevant. [underlining added by Justice Mandamin]

[29] The Applicant says this introduces a discretionary factor which includes the convenience of an alternative remedy, and contrasts this with a more rigid "*sed lex dura lex*" approach – a reference to the notion that "the law is harsh, but it is the law." He also cites *Huot*, above, where Justice Martineau observed at para 17 that the applicant "theoretically had the right to appeal to the IAD, but in practice it was a meaningless right" because the IAD did not, in the circumstances of the case, have jurisdiction to grant the relief requested – an exemption based on H&C grounds. He says Justice Martineau's approach was one of practicality, based on the question of how to secure the just, most expeditious and least expensive determination of every proceeding on its merits. He argues that a similar approach should be employed here, and that it is apparent that no effective alternative remedy exists since more than a year has passed and the Board has yet to deal with a motion seeking a ruling on a question of law that relates to the IAD's jurisdiction to consider the matter. The Applicant says the central issue raised – the proper test of residency in the family class sponsorship context – is a question of law that this Court could more effectively deal with.

Merits of the Application

Applicant

[30] The Applicant argues that the Officer wrongly imported an intention-based test of residency into s. 130(1)(b) of the Regulations, and that this amounts to an error of law and of jurisdiction that must be corrected by this Court. He says the only residency requirement for a sponsor of a family class applicant is to comply with the residency obligation in s. 28 of the Act, which requires a minimum of 730 days of physical presence in Canada during each five-year period. Asal was found to have met this requirement as of May 30, 2011, and she remained a permanent resident unless a determination was made that she had not complied with this obligation at the time of her husband's refusal. Since no such determination was made, and there was no basis for such a finding, it was an error to conclude that Asal did not "reside in Canada" for the purposes of s. 130(1)(b) of the Regulations.

[31] Furthermore, the Applicant argues, as Asal has argued in her interlocutory motion before the IAD, that the word "application" in s. 133(1) clearly refers to the sponsorship application itself, and not the sponsored spouse's permanent residence application. The section says that:

> 133. (1) A sponsorship application shall only be approved by an officer if, on the day on which the application was filed and from that day until the day a decision is made with respect to the application, there is evidence that the sponsor
>
> (a) is a sponsor as described in section 130;

The Applicant says the use of the definite article ("the application") following the reference to the "sponsorship application" shows that the obligation that the sponsor "reside in" Canada extends only until the approval of the sponsorship application, and that there is no requirement that the sponsor remain in Canada once the sponsorship application is approved. In other words, there is nothing that says the sponsor has to continually reside in Canada while the permanent residence application of the sponsored person is pending. The Applicant notes that there can be long delays in the processing of permanent residence applications, and argues that it was not intended that sponsors be separated from their spouses in order to remain in Canada throughout this waiting period. The Applicant says that it is common that spousal family class applicants are being accused of *mala fides* under s. 4.1 of the Regulations because Canadian spouses do not visit their overseas spouses enough while a permanent residence application is pending. He argues that the Respondent cannot, at the same time, require that the sponsor remain continually in Canada during that period; that is, the Respondent cannot have it both ways.

[32] The Applicant says that an intention-based test was applied with respect to permanent resident status under the 1976 Immigration Act. A permanent resident had to show that they maintained continually an intention to reside in Canada – most often referred to as the "*Koo* test" (see *Koo (Re)*, [1993] 1 FC 286 [*Koo*]). However, the Applicant says this approach was abandoned with the introduction of the Act in 2002. While the *Koo* test still has relevance in the citizenship context, it is no longer relevant with respect to permanent residence. Instead, the quantitative physical presence approach set out in s. 28 of the Act is to be applied with respect to maintaining permanent resident status. The Applicant says there is no indication in the Act or the Regulations that anything more is required to meet the criterion that a sponsor "resides in

Canada" under s. 130(1)(b) of the Regulations, noting that the Act makes no reference whatsoever to a residency intention. Similarly, the question of whether one has "ties to" Canada is irrelevant under the s. 28 analysis. As such, he argues, the Officer has added requirements that do not exist under the statutory scheme and are therefore *ultra vires* (*Hui v Canada (Minister of Employment and Immigration)*, [1986] 2 FC 96 (FCA); *Muliadi v Canada (Minister of Employment and Immigration)*, [1986] FCJ No 1056 at paras 21, 23).

[33] The Applicant notes that the IAD has consistently held, without an analysis of the change from the 1976 Immigration Act to the present Act and Regulations, that the *Koo* approach applies when interpreting the word "resides" in s. 130(1)(b) of the Regulations (see *Zhang v Canada (Minister of Citizenship and Immigration)*, [2004] IADD No 608; *Sahranavard*, above). He also notes that Chief Justice Crampton of this Court upheld this approach as reasonable in *Iao*, above, though he says this was also "without any analysis." The Applicant argues that the Court should adopt a more purposive interpretation of the Act that emphasizes its objective of reuniting Canadians with their close relatives abroad (see *Hajariwala v Canada (Minister of Employment and Immigration)*, [1989] 2 FC 79, [1988] FCJ No 1021). The Respondent's interpretation of the Act, and that of the IAD, has a disuniting effect on spousal relationships by requiring spouses to be separated while their family class permanent residence applications are being processed, the Applicant says, and this interpretation is therefore not in keeping with the purposes of the Act.

Respondent

[34] The Respondent argues that the Decision is not unreasonable on the merits, as the Applicant has not shown that the sponsor complied with all of the requirements imposed in the legislation. The residency requirement that applies in this context is different from the residency requirement for maintaining one's permanent resident status, and the latter test has no relevance here.

[35] In order to maintain her permanent residency, Asal had to show that she was physically present in Canada for at least 730 days within the preceding 5 year period, or that she qualified for one of the exemptions set out in s. 28(2) of the Act. The Respondent acknowledges that, at least as of May 30, 2011, Asal was in compliance with this residency requirement.

[36] However, to sponsor a foreign national to immigrate in the family class, the Respondent argues, the sponsor must be residing in Canada from the date of the sponsorship application until the application (for permanent resident status of the sponsored person) is decided. This does not mean that the sponsor cannot travel to meet her spouse or take vacations; rather, she must show that Canada is where she lives (her home). This is in contrast to a Canadian *citizen's* ability to sponsor a spouse without meeting this requirement, as long as they will reside in Canada when the sponsored spouse becomes a permanent resident. The Respondent says that Parliament intended to treat Canadian citizens and permanent residents differently in this regard, and that ss.130(1) and 133(1)(a) would have no meaning unless permanent resident sponsors were

required to be physically resident in Canada throughout the process (see *Fatehi v Canada (Citizenship and Immigration)*, 2012 CanLII 61974 at paras 19-29 (CA IRB)).

[37] The Respondent says the proper test for whether a permanent resident meets the residency requirement to sponsor a foreign national in the family class is set out in *Gao v Canada (Citizenship and Immigration)*, 2011 CanLII 48092 (CA IRB) and was found to be reasonable in *Iao*, above. It represents a modified version of the test of residency in relation to eligibility for citizenship stated in *Koo*, above, at para 10 (see *Iao*, above, at para 23). Thus, the visa officer must consider whether a sponsor has centralized his or her mode of living in Canada from the time the sponsorship application was made until the sponsored spouse's permanent resident application is determined. This is a qualitative analysis, looking at the factors pointing toward and away from a conclusion that the sponsor was residing in Canada during that period. The Respondent says the fact that each part of the test may not have been clearly referred to her does not affect the validity of the Officer's analysis.

[38] In this case, the Respondent argues, it was reasonable to conclude that the sponsor was not residing in Canada. She returned to Iran to live with (not visit) the Applicant after receiving notice that she was eligible to sponsor him. There was a lease agreement for an apartment in Iran running from November 9, 2011 to March 10, 2013 that listed the sponsor as a tenant, even though she was required to be residing in Canada starting from December 2011. There was no other evidence provided to show that the sponsor physically resided in Canada or had sufficient ties to Canada to claim residence, and in fact the sponsor to this day lives in Iran.

[39] The Respondent says costs are warranted in this case because the Applicant has launched an application for judicial review concurrent with an appeal before the IAD raising the same issues, with full knowledge that the IAD is the appropriate forum. Unlike in *Johnson v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1262, the Applicant here did not merely make a mistake in the choice of forum, but has continued to prosecute concurrent proceedings dealing with the same subject matter at the same time. As a result, the Respondent's resources have been wasted, and the Court's resources have been wasted in an area where the law is settled.

ANALYSIS

[40] The Court has great sympathy for the situation in which the Applicant and his wife now find themselves but, unfortunately, I think the law is very clear that I cannot entertain this application.

[41] The Applicant's Sponsor clearly has an adequate alternative remedy before the IAD and, if she is dissatisfied with the IAD's decision, she can come to the Court for judicial review. She has already made her presentation to the IAD and simply awaits a decision that, when it comes, will allow her to move forward.

[42] The combined effect of ss. 62, 63(1), 72(1) and 72(2)(a) of the Act makes it clear that the Applicant's Sponsor must exhaust her rights of appeal under the Act before either of them can come to this Court. This has been confirmed by the Federal Court of Appeal in *Somodi*, above, and more recently by Justice Scott in *Sadia*, above.

[43] As the Respondent points out, the Sponsor, pursuant to her right of appeal to the IAD, has filed an appeal; the appeal is pending. The Federal Court of Appeal has determined that having concurrent applications before the IAD and the Federal Court is contrary to the intention of the IRPA. Paragraph 72(2)(a) precludes an application for judicial review in the family class context until the foreign national's proposed sponsor has exhausted his or her right of appeal to the IAD under s. 63 of the IRPA. It is the IAD's mandate to determine the validity of the sponsorship, not that of the Federal Court. In this case, given that this application raises the same issues as does the appeal to the IAD, and given that the Applicant has not sought H&C relief, as admitted by the Applicant, s. 72(2)(a) precludes an application to this Court until the right of appeal has been exhausted. The fact that the appeal to the IAD may be taking longer than the Sponsor would have hoped is not sufficient ground to find otherwise.

[44] Counsel for the Applicant, who also represents the Sponsor before the IAD, has sent correspondence to the Court since the hearing in this matter providing an update on the proceedings before the IAD. The IAD has found against the Sponsor's position regarding the meaning of the word "application" in s. 133(1) – a question which the Sponsor raised through a motion seeking an interpretation of that provision (see paras 29 and 31 of these Reasons above). Counsel for the Applicant takes the view that this dispenses with the appeal before the IAD. The Sponsor concedes that she did not reside in Canada between April 2012 and May 12, 2014, including when the Decision under review here was made in February 2013, and maintained no connections with Canada (no *pied-à-terre* as counsel puts it) that could show she centralized her mode of living here during that time. Thus, counsel submits, there is nothing left for the IAD to decide. The appeal is bound to fail and counsel has requested that the IAD dismiss it without

further delay so that the matter can be brought before this Court on judicial review. He proposes to "ask that the leave application be referred to your Lordship in these circumstances" and to "ask that the matter be expedited on whatever terms your Lordship may grant."

[45] I am not aware of whether a final decision dismissing the appeal has in fact been issued by the Board, but for the purposes of the present application, it does not matter. The IAD's decision is separate from the Decision under review here, which is the Decision of the Officer dated February 22, 2013. I am not empowered to consider a challenge to the IAD's decision within the context of this application. While the Court has discretion to allow more than one decision to be challenged within a single application in appropriate circumstances (see Rule 302, *Federal Courts Rules*, SOR/98-106), I am not aware of any instance where the Court has allowed an amendment to the Notice of Application after the hearing to permit a second decision to be challenged. No motion for such an amendment is before me, nor do I think it would be appropriate to grant it in the circumstances.

[46] If the Applicant wishes to challenge the IAD's decision, he must follow the normal process and seek leave to commence an application for judicial review of that decision under s.72(1) of the Act. Such an application would be brought before the Court in the usual manner contemplated by the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22. It is possible to bring a motion to expedite the leave process, though the threshold of justification is high: see for example *Smith v Canada (Minister of Citizenship and Immigration)*, [2002] FCJ No 888, 2002 FCT 662.

[47] This effectively disposes of the present application. The Respondent has asked for costs but I don't think they are warranted in the circumstances. The Applicant was granted leave so this application cannot be considered frivolous or vexatious, and it is clear that a real personal hardship has caused the Applicant to throw himself on the mercy of the Court in the hope of securing some kind of resolution to the difficult personal situation this couple faces. I cannot fault him for this.

[48] The Applicant has placed 4 questions before the Court for consideration for certification:

1. Does s. 130 constitute anything more than a mere definition of the eligibility of a permanent resident or citizen to become a sponsor of a spouse or common-law partner and as one of the qualifications of eligibility that he "resides in Canada"?

2. Furthermore, does the use of the word "reside" constitute anything more than its common-law meaning of actual living?

3. Does section 133(1)(a) of the Regulations require anything more than that the sponsor resides in Canada in the sense of living in Canada during the sponsorship and until the sponsorship application is approved?

4. Does the Court retain jurisdiction under section 18.1 of the Federal Courts Act to hear and determine the right of an applicant even though the alternative remedy of his sponsor has not been completed exhausted?

[49] Questions 1 to 3 have no relevance for the decision I have made based upon jurisdiction, and the jurisprudence on question 4 – at least as regards the circumstances in this case - is clear. Consequently, no question needs to be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed;
2. There is no question for certification; and
3. No order is made as to costs.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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