Federal Court of Appeal  Cour d'appel fédérale

Date: 20180111

Docket: A-393-16

Citation: 2018 FCA 4

CORAM: **WEBB J.A.**
NEAR J.A.
GLEASON J.A.

BETWEEN:

JUVENAL DA SILVA CABRAL, PEDRO MANUEL GOMES SILVA, ROBERT ZLOTSZ, ROBERTO CARLOS OLIVEIRA SILVA, ROGERIO DE JESUS MARQUES FIGO, JOAO GOMES CARVALHO, ANDRESZ TOMASZ MYRDA, ANTONIO JOAQUIM OLIVEIRA MARTINS, CARLOS ALBERTO LIMA ARAUJO, FERNANDO MEDEIROS CORDEIRO, FILIPE JOSE LARANJEIRO HENRIQUES, ISAAC MANUEL LEITUGA PEREIRA, JOSE FILIPE CUNHA CASANOVA

Appellants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION, MINISTER OF EMPLOYMENT AND SOCIAL DEVELOPMENT, HER MAJESTY THE QUEEN

Respondents

Heard at Toronto, Ontario, on October 16, 2017.

Judgment delivered at Ottawa, Ontario, on January 11, 2018.

REASONS FOR JUDGMENT BY: GLEASON J.A.

CONCURRED IN BY: WEBB J.A.
NEAR J.A.

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REASONS FOR JUDGMENT

GLEASON J.A.

[1] The appellants appeal from the September 14, 2016 judgment of the Federal Court in *Cabral et al. v. Minister of Citizenship and Immigration et al.*, 2016 FC 1040 (per Zinn, J.), granting the respondents' motion for summary judgment under Rule 215 of the *Federal Courts Rules*, SOR/98-106 (the Rules). For the reasons that follow, I would dismiss this appeal, with costs.

I. Background

[2] Each of the appellants applied for permanent resident status as part of the Federal Skilled Trades Class (the FSTC), a class of economic immigrants established under subsection 12(2) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the IRPA) and section 87.2 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the IRPA Regulations). The respondent Minister of Citizenship and Immigration (the Minister) denied each of the appellants' applications. In response, the appellants commenced a proposed class proceeding.

[3] In their Amended Statement of Claim, the appellants alleged that their applications for permanent residence were denied solely because they failed the International English Language Testing System test (the IELTS), one of two tests adopted by the Minister to test English language competency. The appellants also alleged that the IELTS is culturally biased toward "British English", unfairly requires a high proficiency in English and was administered in a

manner that favours those from English-speaking countries and discriminates against those, like them, who are from non-English speaking countries.

[4] The appellants further pleaded in their Amended Statement of Claim that they had requested that an immigration officer conduct a substitute evaluation under subsection 87.2(4) of the IRPA Regulations. This provision allows for assessment of an applicant's ability to become economically established as an alternate basis for granting permanent resident status as part of the FSTC. The appellants pleaded that the requested substitute evaluations were not conducted because Ministerial Instructions had been issued which provided that applications would not be processed if an applicant did not meet applicable language requirements. The appellants alleged that these Ministerial Instructions violate the IRPA Regulations and are therefore *ultra vires*. They also claimed that the conduct of the respondents amounted to breach of statute, public misfeasance, excess of jurisdiction and authority, abuse of process, bad faith and breach of sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the Charter). The appellants finally alleged that they suffered damages as a result of the impugned conduct of the respondents.

[5] The respondents brought a motion to strike the appellants' Statement of Claim, which the Federal Court dismissed on April 27, 2015 (unreported decision of the Federal Court in *Cabral et al. v. Minister of Citizenship and Immigration et al.*, T-2425-14, per Zinn, J.). In so holding, the Federal Court struck several paragraphs in the appellants' original Statement of Claim, but

granted them leave to amend the claim. They did so, and it was the amended pleading that was before the Federal Court when it heard the respondents' summary judgment motion.

[6] The Federal Court also had before it the respondents' Statement of Defence, several affidavits and the transcripts from the cross-examinations of the affiants who were cross-examined.

[7] The respondents filed affidavits from Ms. Williams, a Program Support Officer at the Department of Immigration, Refugee and Citizenship Canada (the Department), Ms. Tyler, the Assistant Director of the Economic Policy and Programs Division at the Department and Ms. Homeward, a paralegal at the Department of Justice. The appellants filed affidavits from Mr. Boraks, the lawyer who prepared almost all of their applications for permanent residence, and from Mr. Volpe, a former Minister of Citizenship and Immigration and the publisher of an Italian Canadian newspaper.

[8] In her affidavit, Ms. Williams attested that she had reviewed applications for permanent resident status for a number of different classes of economic immigrants, including the FSTC. She also detailed the processes followed by the Department to assess and process FSTC applications and provided information about the appellants' applications which was drawn from her review of one of the Department's data bases, the Global Case Management System (GCMS). She noted that, in many cases, the appellants failed to meet other mandatory selection criteria in addition to having failed the IELTS and that another appellant had been granted permanent resident status.

[9] In her affidavit, Ms. Homeward provided details about the former Minister's trips to England and Ireland between 2012 and 2014 and attached governmental news releases, the Minister's speaking notes for presentations and several news articles.

[10] In her affidavit, Ms. Tyler deposed that she supervised employees responsible for the development of program policy for economic immigration programs, including the FSTC. She also attested to the creation of the FSTC, the legislative requirements for the FSTC, the language requirements for the FSTC and the content of the Ministerial Instructions applicable to the FSTC. In addition, she provided details regarding the IELTS and of scores achieved by applicants from several non-English speaking countries on the IELTS in 2013 and 2014 from the IELTS and IELTS Canada websites.

[11] In his affidavit, Mr. Boraks provided details about his clients' applications, but did not attach complete copies of their applications. He also deposed to several issues that the Federal Court found were irrelevant to the proceeding. Mr. Volpe's affidavit attached several newspaper articles, opinions and editorials.

II. The Decision of the Federal Court

[12] Before the Federal Court, the appellants objected to the admissibility of the affidavits filed by the respondents, claiming that they were hearsay and improperly spoke to the law as opposed to setting out facts. The Federal Court dismissed these objections, but in two instances determined that the evidence of the respondents' affiants was to be given minimal or lesser weight.

[13] More specifically, the Federal Court held that Ms. Williams had personal knowledge of Federal Skilled Trades Program (the program that established the FSTC), of the processing of applications under it and of the way in which the GCMS notes were generally created. The Federal Court further held that the GCMS notes that provided the basis for Ms. Williams' evidence about the appellants' applications were business records of the Minister and his officials and therefore admissible as an exception to the hearsay rule. However, where there was a contradiction between the GCMS notes and the direct evidence of Mr. Boraks, the Federal Court preferred the latter as it was direct testimony.

[14] The Federal Court determined that the evidence of Ms. Tyler was admissible and did not improperly speak to the law. As concerns Ms. Homeward's affidavit, the Federal Court accepted that Ms. Homeward could attest to the fact that the documents she appended were created, but held that she could not speak to the truth of their contents. The Federal Court therefore determined that it would afford only minimal weight to her evidence.

[15] After ruling on these evidentiary issues, the Federal Court reviewed the evidence and found that nine of the appellants' applications were deficient in respects other than the failure to pass the IELTS. It determined that summary judgment should be granted, dismissing these nine claims, as an essential element of the appellants' claim was that they had been denied permanent resident status solely due to the failure to pass the IELTS.

[16] The Federal Court then moved to consider whether it should grant summary judgment in respect of the remaining four appellants' claims and in so considering addressed the three different aspects of their claim.

[17] First, the Federal Court reviewed the evidence and held that the appellants had failed to establish that the IELTS was culturally biased or in any way unfair to them. It thus determined that this portion of their claim did not raise a genuine issue for trial as the respondents' evidence established that significant numbers of claimants from non-English speaking countries had passed the IELTS.

[18] The Federal Court next considered whether the Ministerial Instructions which provided that substitute evaluations could not be conducted if an applicant failed the language test were contrary to the IRPA Regulations. It found no conflict between the Ministerial Instructions and the provisions of the Regulations for several reasons. The Federal Court first held that it should adopt an interpretation that favours coherence over one that generates conflict. Second, the Federal Court underscored that the appellants had no right to be granted permanent resident status – even if they could become economically established in Canada – as subsection 12(2) of the IRPA provides the Minister discretion to select immigrants as part of an economic class. The Federal Court then noted that one of the objectives of the Minister under the IRPA, set out in paragraph 3(1)(*j*) of the IRPA, is "to work in cooperation with the provinces to secure better recognition of the foreign credentials of permanent residents and their more rapid integration into society". The Federal Court found that the appellants had failed to plead any material fact that would support their claim that the impugned Instructions breached this objective of the IRPA and

noted that, if anything, the Instructions furthered this objective. Third, the Federal Court held that there was no conflict between the Instructions and subsection 87.2(4) of the IRPA Regulations because subsection 87.3(2) of the IRPA allowed for the issuance of Instructions to "best support the attainment of the immigration goals established by the Government of Canada", which is a much broader concept than becoming "economically established", the basis for substitute evaluation in in subsection 87.2(4) of the IRPA Regulations. It therefore concluded that there was no genuine issue for trial with respect to the allegations that centred on the alleged conflict between the Ministerial Instructions and the legislation and regulations.

[19] Finally, the Federal Court considered the nature of the losses claimed by the appellants and noted that they had pleaded that their losses were a direct result of the respondents' actions and that they could not have mitigated their losses. The Federal Court held that the appellants had not established a genuine issue for trial in respect of this issue as, even if they had established that the IELTS was a higher standard than the other test the Minister had adopted to test English language proficiency, the appellants had not taken the other test and had thus failed to mitigate whatever damages they might have suffered.

[20] In result, the Federal Court held there was no genuine issue for trial in respect of any of the appellants' claims and therefore granted the respondents' motion for summary judgment, with costs.

III. The Issues

[21] Before us, the appellants make the following arguments:

- the Federal Court erred in law by improperly shifting the onus of proof and requiring the appellants establish that they possessed a genuine issue for trial as opposed to requiring that the moving party show there was no such issue;

- the Federal Court erred in law in ruling that the GCMS notes were business records and in determining that the portions of Ms. Williams' affidavit that relied on them were admissible in light of Rule 81(1) of the Rules, which prohibits affidavits on information and belief in summary judgment motions;

- the Federal Court erred in law – and violated several constitutional and Charter guarantees – in assessing issues of credibility based on a paper record;

- the Federal Court erred in its interpretation of the relevant provisions in the IRPA and the IRPA Regulations, which provide a right to claimants like the appellants to the conduct of a substitute evaluation upon request;

- the Federal Court's interpretation of the relevant provisions in the IRPA and the IRPA Regulations is at odds with its ruling on the motion to quash and, for this reason as well, is erroneous; and

- the Federal Court erred in law, violated the appellants' constitutional rights and demonstrated that it was biased in failing to address the various constitutional and Charter arguments made by the appellants.

IV. Analysis

[22] In my view, none of the appellants' arguments has merit.

A. *Burden of Proof*

[23] Contrary to what the appellants assert, the Federal Court did not erroneously assign them the burden of proof, but, rather, determined the motion in light of the entirety of the evidence and concluded that the respondents had shown there was no genuine issue for trial. In this regard, the Federal Court correctly applied the case law of this Court, which establishes that, while the ultimate burden on a motion for summary judgment rests with the moving party, there is an evidentiary burden on a responding party to put forward evidence to show that there is a genuine issue for trial: see e.g. *Collins v. Canada*, 2015 FCA 281 at paras. 68-72, 480 N.R. 274; *Buffalo v. Canada*, 2016 FCA 223 at para. 47, 487 N.R. 306; *MacNeil Estate v. Canada (Department of Indian and Northern Affairs)*, 2004 FCA 50 at para. 25, 316 N.R. 349. It was within this context that the Federal Court made statements to the effect that the appellants had not shown there to be a genuine issue for trial.

B. *Evidentiary Issues*

[24] As for the admissibility of the GCMS notes and the portions of Ms. Williams' affidavit based on them, the Federal Court correctly concluded that the notes were business records. Both the common law and the *Canada Evidence Act*, R.S.C. 1985, c. C-5 provide for an exception to the hearsay rule for business records.

[25] At common law, statements made by a person under a duty to perform an act and to record it in the ordinary course of the declarant's business are admissible so long as the statements were made contemporaneously with the facts they record and were made without motive or interest to misrepresent the facts: *Ares v. Venner*, [1970] S.C.R. 608 at p. 626, 14 D.L.R. (3d) 4; Sidney N. Lederman, Alan W. Bryant and Michelle K. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 4th edition (Markham, Ontario: LexisNexis, 2014) at p. 295.

[26] Under the *Canada Evidence Act*, where oral evidence on a point would be admissible, subsection 30(1) provides that "a record made in the usual and ordinary course of business that contains information in respect of that matter is admissible". However, the *Canada Evidence Act* provides for a wider range of exceptions than those applicable at common law. Notably, records made in the course of an investigation (subparagraph 30(10)(*a*)(*i*)) and those which are a recording of evidence taken in the course of another legal proceeding (paragraph 30(10)(*c*)) are not admissible under the statutory business records exemption to the hearsay rule. Subsection 30(12) defines a "legal proceeding" broadly to mean "any inquiry where evidence is or may be given".

[27] Here, the entries into the GCMS notes meet both the common law and the statutory tests for business records. The employees of the Department who made these notes were under a duty to assess permanent residence applications and to record the bases for their rejections or positive decisions. Moreover, these recordings were largely clerical in nature and merely assessed the

presence or absence of compliance with enumerated statutory criteria, which could readily be assessed on the face of the materials submitted.

[28] This stands in contrast to situations where this Court and the Federal Court have determined that detailed notes made by Immigration Officers in systems similar to the GCMS notes to record what transpired during interviews of candidates are not admissible to prove the truth of their contents: see e.g. *Wang v. Canada (Minister of Employment and Immigration)*, 121 N.R. 243 at paras. 9-10, [1991] 2 F.C. 165 (F.C.A.); *Abedin v. Canada (Minister of Citizenship and Immigration)*, 199 F.T.R. 23 at paras. 13-16, [2000] F.C.J. No. 2103 and *Qiu v. Canada (Minister of Citizenship and Immigration)*, 183 F.T.R. 149 at paras. 3-8, [2000] F.C.J. No. 141. In these latter types of cases, an investigation is being conducted, evidence is being taken and there is no collateral guarantee of authenticity as the declarant may well be motivated to record the interview in a manner that buttresses his or her decision. This potential incentive to colour the recording is absent in the case of the GCMS notes in the present case.

[29] I therefore conclude that the Federal Court was correct in admitting the GCMS notes as business records.

[30] The more recently-recognized principled exception to the hearsay rule provides an alternate basis for upholding the Federal Court's admissibility ruling. This exception was elucidated by the Supreme Court of Canada in *R. v. Khan*, [1990] 2 S.C.R. 531, 113 N.R. 53 (*Khan*); *R. v. Smith*, [1992] 2 S.C.R. 915, 139 N.R. 323 (*Smith*) and *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787 (*Khelawon*) and allows for the admission of hearsay evidence

if it is reliable and necessary to the case. Reliability concerns the existence of circumstantial guarantees of trustworthiness that can overcome the fact the evidence cannot be tested by contemporaneous cross-examination: *Smith* at pp. 930, 933; *Khelawon* at paras. 61-63. In terms of necessity, the party seeking to adduce hearsay evidence must demonstrate it is "reasonably necessary" to do so: *Khan* at p. 546; *Smith* at pp. 933-934.

[31] Here, the twin requirements of reliability and necessity are met as the circumstances of the GCMS notes' creation supports their reliability and necessity favours allowing their admission without filing affidavits from a multitude of Departmental employees merely to validate their computer entries. In the circumstances of the present case, it would be a senseless waste of the resources of the appellants – and of the judiciary – to require that the GCMS notes be proved by filing an affidavit from each employee who made the relevant entries. As noted in *Sopinka, Lederman & Bryant: The Law of Evidence in Canada* at s. 6.102, the requirement of necessity may be met "where a declarant's attendance in court would needlessly add to the length of a trial merely to establish a point which could be readily accepted through hearsay evidence". Thus, under the principled exception to the hearsay rule, the notes were admissible.

[32] As concerns the appellants' arguments regarding Rule 81(1) of the Rules, the appellants are correct in asserting that this subsection provides that affidavits containing statements made on information and belief are not to be filed on motions for summary judgment or summary trial. However, the case law of this Court and of the Federal Court has interpreted information and belief as used in this context as being synonymous with hearsay such that evidence which is admissible under an exception to the hearsay rule does not offend the prohibition in Rule 81(1):

Éthier v. Canada (RCMP Commissioner), [1993] 2 F.C. 659, 151 N.R. 374 (C.A.); *Twentieth Century Fox Home Entertainment Canada Ltd. v. Canada (Attorney General)*, 2012 FC 823 at para. 22, [2012] F.C.J. No. 844; *Ottawa Athletic Club Inc. v. Athletic Club Group Inc.*, 2014 FC 672 at paras. 117-119, 459 F.T.R. 39. Accordingly, the Federal Court's ruling on the GCMS notes does not violate Rule 81(1) of the Rules since they were properly admitted under an exception to the hearsay rule.

[33] On the appellants' final evidentiary argument, I disagree that the Federal Court made any credibility findings in this case. It was therefore open to it to rule on the motion based on the evidence the parties had filed.

[34] Thus, the Federal Court did not err on any of the evidentiary issues raised by the appellants.

C. *Interpretation of the Requirements of the IRPA and of the IRPA Regulations*

[35] Turning to the interpretative issue, for much the same reasons as those given by the Federal Court, I do not believe the Ministerial Instructions at issue in this case violated any provision in the IRPA or the IRPA Regulations and thus am of the view that the Federal Court did not err in finding that the appellants' assertions otherwise did not raise a genuine issue for trial.

[36] The starting point for assessing this portion of appellants' claim is the recognition that non-citizens do not have the right to immigrate to Canada or to be granted status as a permanent

resident as part of any of the economic classes: *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711 at para. 23, 135 N.R. 161; *Medovarski v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51 at para. 46, [2005] 2 S.C.R. 539 and *Cha v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126 at para. 23, 349 N.R. 233. This principle is enshrined in subsection 12(2) of the IRPA, which, as the Federal Court noted, is cast in permissive terms:

12(2) A foreign national may be selected as a member of the economic class on the basis of their ability to become economically established in Canada.	12(2) La sélection des étrangers de la catégorie « immigration économique » se fait en fonction de leur capacité à réussir leur établissement économique au Canada.

[37] The criteria for eligibility as a member of the FSTC are contained in section 87.2(3) of the IRPA Regulations. The Federal Court aptly summarized them at paragraph 19 of its reasons as follows:

> […] An applicant must:
>
> (*a*) meet the minimum language proficiency set by the Minister under subsection 74(3) of the IRPA Regulations in reading, writing, listening, and speaking;
>
> (b) have acquired at least two years of full-time experience (or the part-time equivalent) in the skilled trade during the five years preceding the application, after becoming qualified to independently practice in the occupation;
>
> (c) have met the relevant employment requirements of their skilled trade as specified in the NOC, except for the requirement to obtain a provincial certificate of qualification; and

> (d) have a certificate of qualification issued by a competent provincial authority in the applicant's skilled trade, or a work permit or offer of employment as described in paragraphs 87.2(3)(*d)*(ii) - (v) of the Regulations.

[38] Under subsection 74(3) of the IRPA Regulations, the Minister is afforded the authority to establish minimum language proficiency criteria for all classes of immigrants and to delegate administration of language proficiency tests to outside authorities, such as the authorities that administer the IELTS.

[39] In addition, the IRPA provides the Minister with wide authority to issue Instructions regarding the way in which visa applications (including those for permanent residence status as part of the FSTC) are to be processed so they will best support attainment of the immigration goals of the Government of Canada. Subsections 87.3(2) and (3) of the IRPA provide in this regard:

87.3(2) The processing of applications and requests is to be conducted in a manner that, in the opinion of the Minister, will best support the attainment of the immigration goals established by the Government of Canada.	87.3(2) Le traitement des demandes se fait de la manière qui, selon le ministre, est la plus susceptible d'aider l'atteinte des objectifs fixés pour l'immigration par le gouvernement fédéral.
(3) For the purposes of subsection (2), the Minister may give instructions with respect to the processing of applications and requests, including instructions	(3) Pour l'application du paragraphe (2), le ministre peut donner des instructions sur le traitement des demandes, notamment des instructions :
(*a*) establishing categories of applications or requests to which the instructions apply;	*a*) prévoyant les groupes de demandes à l'égard desquels s'appliquent les instructions;

(*a.1*) establishing conditions, by category or otherwise, that must be met before or during the processing of an application or request;	*a.1*) prévoyant des conditions, notamment par groupe, à remplir en vue du traitement des demandes ou lors de celui-ci;
(*b*) establishing an order, by category or otherwise, for the processing of applications or requests;	*b*) prévoyant l'ordre de traitement des demandes, notamment par groupe;
(*c*) setting the number of applications or requests, by category or otherwise, to be processed in any year; and	*c*) précisant le nombre de demandes à traiter par an, notamment par groupe;
(*d*) providing for the disposition of applications and requests, including those made subsequent to the first application or request.	*d*) régissant la disposition des demandes dont celles faites de nouveau.
[Emphasis added]	[Non souligné dans l'original.]

[40] Both this Court and the Federal Court have recognized the broad authority of the Minister to issue Instructions under this or similar provisions in the IRPA to limit the number of applications to be processed and to provide direction as to how processing is to be undertaken: *Tabingo v. Canada (Citizenship and Immigration)*, 2013 FC 377 at para. 8, 362 D.L.R. (4th) 166; aff'd *Austria v. Canada (Citizenship and Immigration)*, 2014 FCA 191 at paras. 46, 66-67, [2015] 3 F.C.R. 346; *Jia v. Canada (Citizenship and Immigration)*, 2014 FC 596 at para. 29, [2015] 3 F.C.R. 143; appeal dismissed 2015 FCA 146; *Liang v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 758 at para. 42, [2012] F.C.J. No. 683.

[41] One of the immigration goals of the Government of Canada, reflected in paragraph 3(1)(*e*) of the IRPA, is the promotion of the "successful integration of permanent residents into Canada". As noted by the Federal Court, paragraph 3(1)(*j*) of the IRPA similarly

provides that the more rapid integration of immigrants like those in the FSTC is an immigration goal.

[42] Capacity in one of Canada's official languages is undoubtedly a relevant factor in promoting such successful integration. Indeed, the Regulatory Impact Analysis Statement in respect of the amendments to the IRPA Regulations setting the current parameters of the FSTC notes that the language "criteria [have] been developed recognizing the […] importance of meeting minimum language requirements, given that language proficiency is a determinant factor of immigration success". (Regulatory Impact Analysis Statement, Canada Gazette Part II, Vol. 146, No. 26, p. 2936 (SOR/2012-274).

[43] By virtue of the broadly-worded authority provided to the Minister under section 87.3 of the IRPA, the Minister possessed the authority to issue the impugned Instructions in the present case. More specifically, under paragraph 87.3(3)(*a.1*) of the IRPA, the Minister is empowered to issue Instructions establishing conditions that must be met before processing an application where the Minister is of the opinion that the Instruction best supports attainment of the immigration goals of the Government of Canada. This is a very broad grant of authority and would encompass the impugned Instructions in the present case as they are consistent with the Government's immigration goals of fostering rapid integration of immigrants. Moreover, the Instructions recognize that Canada has more FSTC applicants than it is prepared to allow to immigrate as the Instructions set caps on the numbers of FSTC applications that will be processed each year. It is entirely consistent with attainment of the Government's immigration goals that priority be given to and applications processed only from those who meet the

minimum prescribed language requirements as they are the applicants who are most likely to become successfully integrated as part of the FSTC. The IRPA therefore authorized the Minister to issue the impugned Ministerial Instructions.

[44] Nor do I see any conflict between these Instructions and subsection 87.2(4) of the IRPA Regulations, which should be interpreted in a harmonious manner, if possible. As noted, subsection 87.2(4) of the IRPA Regulations provides for the possibility of a substitute evaluation for those who might meet – or might fail to meet – the prescribed criteria for eligibility as a member of the FSTC:

87.2(4) If the requirements referred to in subsection (3), whether or not they are met, are not sufficient indicators of whether the foreign national will become economically established in Canada, an officer may substitute their evaluation for the requirements. This decision requires the concurrence of another officer.	87.2(4) Si le fait de satisfaire ou non aux exigences prévues au paragraphe (3) n'est pas, de l'avis de l'agent, un indicateur suffisant de l'aptitude de l'étranger à réussir son établissement économique au Canada, il peut y substituer son appréciation et cette décision doit être confirmée par un autre agent.

[45] There are several reasons why the impugned Ministerial Instructions do not conflict with subsection 87.2(4) of the IRPA Regulations.

[46] First, the IRPA gives the Minister the authority to issue Instructions regarding conditions that must be met before processing applications. As noted, it is consistent with this broad grant of authority to issue an Instruction to not process applications from those who fail to meet the prescribed minimum language criteria, thereby removing their applications from the processing stream and rendering them ineligible to request a substitute evaluation.

[47] Second, there is nothing in subsection 87.2(4) of the IRPA Regulations that creates a right to the conduct of a substitute evaluation. Rather, the provision is a permissive one and grants the right to Immigration Officers (and not to applicants) to conduct a substitute evaluation in the prescribed circumstances.

[48] Third, it is not inconsistent with the flexibility granted to Immigration Officers under subsection 87.2(4) of the IRPA Regulations to require that the Department weed out applications from those who fail to meet minimum language proficiency criteria before they are processed, thereby rendering their applications ineligible for substitute evaluation. As the Federal Court rightly noted, the ability to become economically established is a narrower notion than the goal of fostering rapid integration: an individual may be economically established but not integrated into Canadian society, especially if he or she cannot communicate in one of Canada's official languages.

[49] I therefore believe that the Federal Court did not err in its interpretation of the relevant statutory and regulatory provisions.

[50] Nor was its prior ruling on the motion to strike an impediment to granting the summary judgment motion in the instant case. The two types of relief are fundamentally different; in a motion to strike, the facts as pleaded are taken as true whereas a summary judgment motion is determined based on the evidence tendered. More importantly, in its reasons on the motion to strike, the Federal Court did not address the interpretative issue but rather focussed on the adequacy of the pleadings and whether the appropriate parties had been joined as defendants. Its

interim decision on the motion to strike was therefore not inconsistent with its ruling on the summary judgment motion.

[51] Thus, the Federal Court did not err in finding that the interpretative issues raised by the appellants failed to disclose a genuine issue for trial.

D. *Failure to Address the Constitutional and Charter Arguments*

[52] The vague constitutional and Charter arguments advanced by the appellants were all dependent on one or the other of the foregoing arguments and were offered as additional reasons for dismissing the motion for summary judgment. As none of these arguments was an independent one, I see no need for the Federal Court to have addressed them.

V. Proposed Disposition

[53] I would therefore dismiss this appeal, with costs.

"Mary J.L. Gleason"
J.A.

"I agree.
Wyman W. Webb J.A."

"I agree.
D. G. Near J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-393-16
STYLE OF CAUSE:	JUVENAL DA SILVA CABRAL, ET AL. v. MINISTER OF CITIZENSHIP AND IMMIGRATION, MINISTER OF EMPLOYMENT AND SOCIAL DEVELOPMENT, HER MAJESTY THE QUEEN
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